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EXTENDED SUPERVISION ORDERS AND YOUTH OFFENDERS

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Contents

Abstract

This paper relates to whether Extended Supervision Orders do, or ought to apply to youth offenders.

Word length

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Subjects and Topics

Parole – Extended Supervision Order – Sentencing - Youth - Interpretation

I Introduction

The commonly used phrase "butterfly effect" is understood to represent a property of chaotic systems by which small changes in initial conditions can lead to large-scale and unpredictable variation in the future of state of the system. A butterfly in one part of the world flaps its wings, and in doing so sets in motion a sequence of changes that ultimately manifest in a typhoon on the other side of the world. This might be an appropriate analogy for the development of New Zealand's current Extended Supervision Order regime, from a targeted response to public risk from a select number of individuals, to a widely applicable post-sentence detention mechanism ordered by the Courts and implemented by the Department of Corrections. The legislative purpose behind New Zealand's Extended Supervision Order regime was to protect children and young persons against the risk of prolific sexual offenders in the community. The topic of this paper side-steps the more general issues relating effective double punishment and shortcomings in the mechanisms of risk-assessment and rehabilitative realities, and focuses instead on whether the ESO regime applies to youth offenders, and whether it should apply to youth offenders. Youth offenders in this regard is loosely used to denote offenders under the age of 18 at the time of the commission of the relevant offending.

II ESO regime

A General framework

Part 1A of the Parole Act 2002 provides for New Zealand's ESO regime. An Extended Supervision Order, or "ESO", is a Court order that a person be subject to standard and any special conditions of an extended supervision order, for a defined period of up to 10 years. Standard conditions of an ESO include broad reporting obligations, employment controls, rehabilitative and reintegrative assessment obligations, and contact prohibitions relating to the victims of their offending, and persons under the age of 16. Special conditions are set by the Parole Board on a case by case basis,[1] including residential restrictions, rehabilitative programme requirements, restrictions on the consumption of alcohol and drugs, medication compulsion conditions, association restrictions, geographic restrictions, electronic monitoring, and intensive monitoring.

The persons who may be made subject to an ESO are those who fall within the statutory definition of "eligible offender", as set out in s 107C. The term "eligible offender" is defined as a person who is not subject to an indeterminate sentence of imprisonment imposed in respect of a relevant offence, and who has not yet reached the sentence end

[1] With the exception of an intensive monitoring condition, which has to be imposed by the Courts.

date or the expiration of any period of subsequent release conditions. "Qualifying offences" are comprised of two categories, being "relevant sexual offences", and "relevant violent offences". The listed qualifying relevant sexual range from indecent assault, to sexual violation. Qualifying violent offences are similarly listed, and range from aggravated wounding or injuring, to commission of a crime with a firearm, to murder. Included also are offences against the Films, Videos, and Publications Classification Act 1993, to the extent that the offence is objectionable on the basis it relates to child sexual exploitation material.[2]

Prior to the imposition of any ESO, the Court must satisfy itself that the offender poses a "high risk" of committing a relevant sexual offence in the future, or a "very high risk" of committing a relevant sexual offence in the future. In making this assessment, the Court must have regard to a health assessor's report addressing the following:

(With respect to relevant sexual offending):

Whether the court is satisfied the offender:

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

(With respect to relevant violent offending):

Whether the court is satisfied the offender:

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

[2] Namely, that it *promotes, supports, or tends to promote or support the exploitation of children or young persons for sexual purposes, or deals with sexual conduct with or by children or young persons, or exploits the nudity of children or young persons.*

The standard to which the Court is required to be "satisfied: is the balance of probabilities, rather than the traditional criminal standard of "beyond reasonable doubt".

It is an offence to breach any condition of an ESO, punishable by a maximum period of imprisonment of up to two years. Should an offender subject to an ESO be remanded in custody or receive a supervening sentence of imprisonment, for breach of that ESO or for any other offending, the conditions are suspended and the duration of the ESO ceases to run until the offender is again back in the community. Accordingly, the practical duration of an ESO can extend well beyond the ten-year mark from its date of imposition.

In New Zealand as at 2019-2020, 227 offenders were subject to an ESO. This reflects a marked increase from around 19 offenders in 2005, with numbers steadily increasing until 2014 at which point they have plateaued somewhat. The average age of offenders subject to an ESO is around 50 years of age, up slightly from an average age of 40 in 2005. The highest number of offenders subject to an ESO falls within the 50+ age group (116), followed respectively by 40-49 years (54), 30-39 years (31), 25-29 years (18), 20-24 years (8), and finally under 20 years of age. One offender under the age of 20 was subject to an ESO in 2017, two offenders in 2011, one in 2010, and one in 2009. Department of Corrections data does not further breakdown the age of offenders under 20 years of age, nor do their published records indicate the age of offenders at the time their relevant offending was committed as opposed to their subsequent age when subject to an ESO.[3]

B Youth and child offenders

Under the present legislation, there are no express provisions or limitations relating to youth offenders under the ESO regime. The definition of "eligible offender" in this regard simply requires that a determinate sentence of imprisonment have been imposed, without regard for the age of the offender either at the time of application for an ESO, nor at the time the relevant offending was committed.

The jurisdictional interplay between adult offenders and youth and child offenders is contained in Part 4 of the Oranga Tamariki Act 1989, the Criminal Procedure Act 2011, and section 22 of the Crimes Act 1961. There are two channels through which a child or young person charged with offending can find themselves subject to the Criminal Procedure Act 2011 and sentencing under the Sentencing Act 2002, firstly, where they are charged with murder or manslaughter, or with a category three or four offence and elect trial by jury, and secondly, where the Youth Court orders that the matter be brought before the District Court or High Court for sentence if the young person is 15 years or

[3] Corrections Volumes, 2019-2020, pp 40-42.

over, or if the young person is 14 years or over and the proven charge against them is a category 3 or 4 offence for which the maximum penalty is at least 14 years' imprisonment. In essence, therefore, children and young persons facing serious charges of murder or manslaughter, or who either elect trial by jury and are convicted, or are convicted of such offending and transferred before the District Court may become subject to the sentencing regime as set out in the Sentencing Act 2002.

The confined issue as to the application of the ESO regime to youth offenders has not been expressly raised before or addressed by the Courts, notwithstanding a number of ESO applications or appeals refencing offending histories that commence in youth. The case of *Chief Executive of Department of Corrections v Moeke*[4] involved what appears to be the only published instance of an ESO being sought in relation to an offender who was under the age of 18 at the time of all relevant offending. Mr Moeke was sentenced to a period of five years and six months imprisonment, in respect of sexual offending against family members aged 10, 11, and 14 . Mr Moeke was 15 years old at the time of offending, and 16 at the time he was sentenced to prison. Mr Moeke served the full term of his sentence, due apparently to a denial of the offending and the consequent limitation that placed on his ability to complete rehabilitative treatment programmes in custody.[5] He had no other convictions for relevant offending. In 2008 the Chief Executive of the Department of Corrections filed an application for an ESO, which was in due course granted in 2009 following contested evidence from the Department's health assessor, and evidence from a health assessor instructed on behalf of Mr Moeke. The evidence of the Department's health assessor was that he was medium-high risk of further child sexual offending, whereas the respondent's health assessor opined that he was moderate to low risk of sexual recidivism. The ESO was granted for the maximum term of ten years. On appeal, Mr Moeke sought to challenge the length of the order, but was unsuccessful.[6] Mr Moeke's ESO continued in place until 2019 notwithstanding the revised risk threshold enacted in 2014 and no further relevant offending following his release from custody in 2009, at which point the ESO was cancelled by the Court without opposition from the Department.[7]

While Mr Moeke's young age was recognised in imposing the ESO in the District and High Courts, no express jurisdictional questions or challenges were raised, and no express engagement in any such issues was forthcoming. Furthermore, despite somewhat superficial challenges to the risk assessment mechanisms and conclusions employed by the Department's health assessor, no comprehensive discussion or analysis was advanced

[4] *Chief Executive of Department of Corrections v Moeke* District Court, Wellington, 24/8/2009, CRI-2008-085-8190
[5] *Moeke v Chief Executive of Department of Corrections* [2010] NZCA 60
[6] *Moeke v Chief Executive of Department of Corrections* [2010] NZCA 60
[7] *Moeke v Department of Corrections* DC Hutt Valley, CRI-2008-085-008190, 18 June 2019

as to the applicability or validity of these measures with respect to persons in Mr Moeke's position who had been incarcerated from a young age, for a significant proportion of their life, over formative developmental years, and within a system geared towards adult rather than youth offenders.

Accordingly, while it does not appear that there is any pervasive trend of ESOs being ordered in respect of offenders who were youths at the time of the commission of the relevant offending, it is an issue that can, and has arisen.

III Legislative context

The legislative context within which the ESO regime falls is germane to the assessment of whether age can be inferred as a factor in the ESO regime, and whether it ought to be. The definition of an "eligible offender" as someone who has is not subject to an indeterminate sentence of imprisonment for a relevant offence necessarily draws consideration of the legislative provisions applying to such indeterminate sentences.

Furthermore, the surrounding provisions are relevant in understanding the legislative purpose behind the enactment of the ESO regime in 2004.

There are under New Zealand law two paths to an indeterminate sentence of imprisonment, the first being offences which carry a permissible maximum term of life imprisonment, and the second being a sentence of preventative detention. The meaning of "indeterminate sentence of imprisonment" is defined as such in the interpretation section of the Parole Act 2002.

A Imprisonment for life

A number of offences in New Zealand carry a maximum penalty of life imprisonment, including murder,[8] manslaughter,[9] dealing in Class A drugs,[10] treason,[11] aircraft high jacking,[12] and terrorism.[13] The effect of a maximum term of imprisonment of life is that the Court at its discretion may impose a sentence of life imprisonment, unless a minimum period of imprisonment is expressly provided for.[14] In relation to sentencing for dealing

[8] Crimes Act 1961, s 172(1).

[9] Crimes Act 1961, s 177(1).

[10] Misuse of Drugs Act 1975, s 6(2)(a).

[11] Crimes Act 1961, s 74(1).

[12] Aviation Crimes Act 1972, s 3.

[13] Terrorism Suppression Act 2002, s 6A(2).

[14] Sentencing Act 2002, s 81.

in Class A drugs, the Misuse of Drugs Act 1975 expressly states that the Court shall impose a sentence of imprisonment unless, having regard to the particular circumstances of the offence and the offender, including the age of the offender if under 20 years of age, the Judge or Court is of the opinion that the offender should not be sentenced to imprisonment.[15]

1 Murder

Under the Sentencing Act 2002, there is a presumption of imprisonment for life in respect of a conviction for murder, unless in the circumstances it would be manifestly unjust. In assessing youth in this context, the Court of Appeal has commented:[16]

> [122] While youth is a factor properly to be taken into account in sentencing, it is part only of a wider public interest (*R v Fatu* [1989] 3 NZLR 419, 431; *R v Mahoni* (1998) 15 CRNZ 428, 436). Where the offending is grave, the scope to take account of youth may be greatly circumscribed. Article 37 of the *United Nations Convention on the Rights of the Child*, referred to by counsel for the accused and Crown, prohibits capital punishment and life imprisonment without possibility of parole for those under 18. In New Zealand, eligibility for parole for those sentenced to imprisonment for life arises after 10 years.
>
> [123] The Sentencing Act contains no restriction on a sentence of life imprisonment on a young person who is criminally responsible. The presumption expressed by s 102 is legislative identification of the public interest in maintaining life imprisonment as the standard response for murder unless such response is manifestly unjust. Youth of itself could not be a sufficient reason to make life imprisonment manifestly unjust if the offender had the necessary intent (under s 167) or knowledge of consequences (under s 168) to be guilty of murder, in the absence of a statutory direction to that effect.
>
> [124] In the case of a finite term of imprisonment, the reduction in the period until eligibility for parole which was part of the reforms introduced in 2002 relieves the sentencing Judge of some of the former anxiety in predicting the prospects of rehabilitation for a young offender. The response of a young offender to a sentence of imprisonment and the changes brought about by his or her developing maturity can be considered at an earlier stage by the Parole Board. In the case of a young offender sentenced to life imprisonment, use of the power under s 25 for early consideration of parole may be appropriate where, through developing maturity and positive response to correction, the 10 year non-parole period ought to be reconsidered in the interests of justice.

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[15] Misuse of Drugs Act 1975, s 6(4).

[16] *R v Rawiri* [2003] 3 NZLR 794(2003) 20 CRNZ 396

Where imprisonment for life is imposed, the Court is required to impose a minimum non-parole period of 10 years, unless the offending is aggravated in terms of the express circumstances set out in s 104 of the Sentencing Act 2002. The Court may order that a defendant serve their sentence without parole, if satisfied that no minimum period of imprisonment would satisfy the principles of accountability, denunciation, deterrence, or protection of the community. Section 103(2B) prohibits the imposition of a sentence of life without parole in respect of offenders who under 18 years of age at the time the murder was committed.

B "Three strikes" provisions

Following amendments in 2010 to the Sentencing Act 2002, additional consequences were introduced for repeated serious violent offending, commonly referred to as the "three strikes" laws. In effect, these amendments hold that in respect of specified serious violent offences (including both physical and sexual violence), an offender is liable to increased, mandatory penalties following preceding strike warnings for such serious violent offending. In order for the accumulating procedure to commence, an offender is required to have been 18 years or over at the time of the commission of their stage 1, or first qualifying serious violence offence. In most instances, the three strikes legislation will result in a determinate sentence of imprisonment albeit of a mandated length, except where the stage 3 offence in respect of which the offender is sentenced is an offence carrying life imprisonment. There is an limitation on the mandatory imposition of the prescribed sentences if it would be "manifestly unjust" to do so.

C Preventative detention

Preventative detention is a sentence option for offenders who are assessed as posing significant and ongoing risk to the safety of the community. It applies only to persons convicted of qualifying sexual or violent offending, and if the court satisfies itself that the offender is likely to commit another qualifying offence if released at the otherwise applicable sentence expiry date. Unlike the provisions relating to ESOs, however, eligibility for preventative detention is expressly confined to offenders who were 18 years or over at the time of offending. Prior to the enactment of the Sentencing Act 2002, the preceding provisions under the Criminal Justice Act 1985 confined the application to offenders 21 years of age or older.[17]

Of significance in the present context is the fact that prior to the enactment of the revised provisions under the Sentencing Act 2002, the preceding provisions under the Criminal Justice Act 1985 further limited the application of preventative detention to offenders

[17] Criminal Justice Act 1985, s 75(1).

convicted of sexual violation by rape or unlawful sexual connection contrary to s 128(1) of the Crimes Act 1961, or repeat offending or attempted offending against children under the age of 16 contrary to sections 130 to 134, or sections 140 to 142 of the Crimes Act 1961, or any offence against sections 128, 129, 142A, 173, 188, 189(1), and 199 of the Crimes Act 1961.

D Other sentencing provisions

While less directly relevant to the ESO regime provisions, minimum age restrictions are mandated in relation to a number of different provisions under the Sentencing Act 2002.

1 Sections 18 and 15B Sentencing Act 2002

Section 18 provides a prohibition on the imposition of a sentence of imprisonment on an offender who was under the age of 18 years at the time of the commission of the offence, unless for category 4, or 3 offending carrying a maximum penalty of imprisonment of 14 years or more.

Similarly, section 15B of the Sentencing Act 2002 provides a comparable prohibition on the imposition of a sentence of home detention on an offender who was under the age of 18 at the time of the commission of the offence, unless for category 4, or category 3 offending carrying a maximum penalty of imprisonment of 14 years or more.

These provisions under the Sentencing Act 2002 provide further context to the assessment of the position of the ESO regime.

IV Legislative background

The precipitating event for the enactment of New Zealand's current ESO regime dates back to the passing of the Mental Health Act 1969. From 1 April 1970, the definition of "mentally disordered" person was amended to read:

> **mentally disordered**, in relation to any person, means suffering from a psychiatric or other disorder, whether continuous or episodic, that substantially impairs mental health, so that the person belongs to one or more of the following classes, namely:
>
> (a) Mentally ill—that is, requiring care and treatment for a mental illness:
>
> (b) Mentally infirm—that is, requiring care and treatment by reason of mental infirmity arising from age or deterioration of or injury to the brain:
>
> (c) Mentally subnormal—that is, suffering from subnormality of intelligence as a result of arrested or incomplete development of mind:

Prior to the enactment of this revised definition, the extant provision under Mental Health Act 1911 in relation to any "mentally detective person" held:

> **Mentally defective person** means a person who, owing to his mental condition, requires oversight, care, or control for his own good or in the public interest, and who according to the nature of his mental defect and to the degree of oversight, care, or control deemed to be necessary is included in one of the following classes:—
>
> Class 1—**Persons of unsound mind**—that is, persons who, owing to disorder of the mind, are incapable of managing themselves or their affairs:
>
> Class 2—**Persons mentally infirm**—that is, persons who, through mental infirmity arising from age or the decay of their faculties, are incapable of managing themselves or their affairs:
>
> Class 3—**Idiots**—that is, persons so deficient in mind from birth or from an early age that they are unable to guard themselves against common physical dangers and therefore require the oversight, care, or control required to be exercised in the case of young children:
>
> Class 4—**Imbeciles**—that is, persons who though Capable of guarding themselves against common physical dangers are incapable, or if of school age will presumably when older be incapable, of earning their own living by reason of mental deficiency existing from birth or from an early age:
>
> Class 5—**Feeble-minded**—that is, persons who may be capable of earning a living under favourable circumstances, but are incapable from mental deficiency existing from birth or from an early age of competing on equal terms with their normal fellows, or of managing themselves and their affairs with ordinary prudence:
>
> Class 6—**Epileptics**—that is, persons suffering from epilepsy;
>
> Class 7—**Persons socially defective**—that is, persons who suffer from mental deficiency associated with anti-social conduct, and who by reason of such mental deficiency and conduct require supervision for their own protection or in the public interest.

The practical effect of the revised definition to "mentally disordered persons" from one which included "socially defective" persons was a narrowing of the range of people who were captured under, or satisfied the criteria of the definition, and accordingly, who could be detained in a penal or certified psychiatric institution. Those who no longer met the qualifying definition for mental disorder were liable to be released. One such individual was Lloyd Alexander McIntosh, who was released from Lake Ellis psychiatric hospital and who went on to rape a 23-month-old child in 2003, and then sexually assault a mentally impaired woman. The public outcry at his actions was exacerbated by the subsequent revelation that a nurse at Lake Ellis, Neil Pugmire, had sought to forewarn his superiors, and subsequently the Minister of Health directly, of his concerns at prospect of releasing Lloyd McIntosh back into the community.

The ensuing public spotlight highlighted a lacuna in the law, caused by the incomplete overlap of the more recently enacted Sentencing Act 2002, and the revised application of the mental health legislation. In effect, individuals such as Lloyd McIntosh could no longer be detained in secure facilities as they no longer met the revised legislative threshold, yet the assessed inevitability of further sexual offending against children was without address unless and until such time as they offended again and were able to become subject to the revised legislative regime under the Sentencing Act 2002. It was this lacuna that saw the introduction of the Parole (Extended Supervision) Amendment Act 2004.

A Parole (Extended Supervision) Amendment Act 2004

The Parole (Extended Supervision) Amendment Bill 2004 was introduced by Labour's Minister of Justice, Phil Goff on 19 November 2003. The purpose and content of the bill was characterised by the Minister as follows:

> The active management regime for child sex offenders will allow extended supervision orders to be imposed on child sex offenders who are likely to continue to sexually victimise children once their sentence is finished. There is currently no provision for that to occur. This bill allows monitoring, for up to 10 years, of child sex offenders who have received a finite sentence of imprisonment for a relevant offence, and who the court determines are likely to reoffend following the expiry of their sentence. Offenders covered by that provision are those who have committed child sex offences under the Crimes Act, or sexual violence, or attempted sexual violation where a child victim is involved.
>
> The Department of Corrections will assess all offenders serving a finite sentence of imprisonment for a relevant offence to determine whether an application should be made, before the end of the sentence, for an extended supervision order. Where an assessment indicates that the offender has a high or medium-high risk of offending, again the Department will apply to the sentencing court for an order. The Court can impose an order of up to 10 years, if satisfied that the offender is likely to commit further child sex offences once the offender's sentence has ended. The offender will be given notice of the application, and will have the opportunity to appear personally or be represented by counsel to defend the matter.
>
> The bill provides also for a right of appeal of both the department and the offender against any decision to grant or decline an application. If an offender is made subject to an order, standard conditions would apply automatically throughout the term of the order. In addition, the Parole Board can impose special conditions that can include home detention-type conditions and conditions prohibiting the offender from going to specified places or areas. Home-detention conditions can apply for up to the first 12 months. Other special conditions can apply for the full term of the order.

> The board can also require the offender to be subject to electronic monitoring to check compliance with these conditions. The more rigorous conditions will apply to the highest risk offenders, who justify a more intensive management regime. Transitional provisions will ensure that orders can be sought for hose currently serving a sentence, or under parole or release supervision conditions, as at the date of introduction of this bill. This ensures that those worst offenders, sentenced before the Sentencing Act of 2002 made preventative detention more widely available, do not simply "fall between the cracks".

The initial response from the National Party to the proposed legislative changes was one of derision, asserting that the regime was a political ploy to obfuscate shortcomings by the Government in responding to the circumstances raised by two particular, high-profile individuals. The Honourable Tony Ryall responded to the introduction of the bill to the House by stating:

> This bill is nothing but a political gimmick by a Minister of Justice who is under pressure for his complete and utter failure in leadership of the justice system in New Zealand. The fact that this bill will do absolutely nothing to protect any child from a pedophile. Not one child will be protected from a paedophile because this bill is prompted by Mr Goff. All that this bill is about is trying to appear to be tough, whereas this Government's record on this sort of stuff is appallingly bad. If it were not for the National Party in Opposition raising the appalling case of Barry Allan Ryder and Lloyd Alexander McIntosh, this failed Minister of Justice of not have done anything.
> Let me tell the House about Mr Goff. Mr Goff made his reputation on the back of Barry Allan Ryder, saying he would never let Barry Allan Ryder be released from jail. Mr Goff railed against Mrs Shipley and railed against Sir Douglas Graham, and said if he was Minister of Justice, those people would bever be released from prison. Then we discovered that Barry Allan Ryder, a paedophile who repeatedly abused young children, had been released under Mr Goff's watch. What did Mr Goff say? He said he did not know that. Yet Mr Goff is the man who made his reputation on the back of that paedophile. He said that Barry Allan Ryder would never be released; he said he would not allow that to happen.
> But Mr Goff did allow Barry Allan Ryder to be released, and Mr Goff never ever asked what the parole conditions were. When the National Party revealed to the public that Barry Allan Ryder was being released, and had been released. Mr Goff said that he was not going to ask what the parole conditions were. He said he could not ask that. It was not until the National Party, New Zealand First, ACT, and the media put pressure on the New Zealand Parole Board and this week Minister for Justice that the parole conditions were released. Those conditions showed that this Government could not guarantee the safety of children in Christchurch with Barry Allan Ryder in the community. What happened is that Barry Allan Ryder, under the watch of this Government's bureaucracy, was allowed to sexually abuse two young boys in Christchurch, and this Minister said he could do nothing. But he made his reputation on the case of that paedophile.
> Then we discovered the case of Lloyd Alexander McIntosh – another offender whom Mr Goff said he would never allow out of jail. But we discovered that Lloyd Alexander

> McIntosh was being paroled – released into Palmerston North – and this Minister and Mr Maharey, only after pressure from the Opposition parties, decided they would say to the public of New Zealand that they would do everything possible to eliminate the risk his behavior posed to children in Palmerston North. Lloyd Alexander McIntosh is a vile individual who was sent to jail for raping a 6-year old child and who then, within months of being released from prison, raped a 23-month old child. That individual should never be allowed out of jail. Mr Goff said he would stop that sort of person from being released, but he did not do so, only when we raised the case did Mr Goff even look into the circumstances. What happened in that case was that those Ministers said they had 24-hour, 7-day-a-week supervision in place, and that would protect the people of Palmerston North. Well, what happened? Lloyd Alexander McIntosh assaulted a young woman in his home, while a security guard employed by this Government was outside the door. That man, Lloyd Alexander McIntosh, told somebody that he had almost raped that girl while a Government-employed person was outside the door. He was allowed to do that. Why did the security guard not go and stop him? It was because the security guard was worried about McIntosh's privacy.
> So the Government is rapidly, given the embarrassment of those two cases, bringing forward this bill. "Mr Get-tough Goff". ...
>
> …
>
> This legislation is a gimmick. It will not work. This Minister is only responding to the Opposition's pressure. This bill is hopeless. I tell Mr Goff that he misled this House. I will tell members what the Department of Corrections told the Law and Order Committee: no paedophile will be monitored for 10 years. This is what the Government's advisers told the select committee. Do members want to know what the extensive supervision of paedophiles will be? The head of the Community Probation Services told us that in the first few months, extended supervision will include two visits with a parole officer a week, and after 2 years it will go down to one visit with the parole officer every 3 months. Well, how will an electronic bracelet and a quarterly visit from a parole officer stop the like of Barry Allan Ryder abusing young children? I ask Mr Goff how an electronic bracelet and a quarterly visit from a parole officer will stop a paedophile from abusing a child. It will not do so.
> This bill is a sham. It will not save one child from the abuse of a paediphile. This Government is perpetrating a fraud on the people of New Zealand. There is no way that an electronic bracelet can stop a paedophile from reoffending. This Government should be passing a law that allows a judge to be convicted that some of those people should never be released from jail, and that extends preventative detention for those sorts of individuals. Mr Goff promised he would do something like that, and he has not. He talks tough, and votes soft.

The earlier context preceding the publicised offending of the likes of Barry Allan Ryder and Lloyd McIntosh was referenced in the response to the introduction by the Bill New Zealand First's the Honouorable Ron Mark:

> …
> There is a fundamental issue with regard to child sex offenders that I believe this Government will not face up to, because the rot started during the time when Helen Clarke was the Minister of Health. It relates to the deinstitutionalisation, and to whether child sex offenders and paedophiles are mad or bad. Hello! There is no answer from Labour on that. Are child sex offenders and paedophiles mad or bad? Are the people who prey on our children doing so because they are bad, nasty, horrible people of sane mind, or because they are mentally impaired and intellectually disabled – mad, as opposed as to bad? If they are mad, they should not be in jail, and we should not be passing laws like this to catch them. We should have institutions and asylums where we can put those people and care for them, and where they are protected from society and society is protected from them. But this Government, fundamentally and ideologically, will not stand for, tolerate, or allow institutions to exist, because it has carefully constructed its arguments to stigmatise institutions.
>
> Not only does the Government stigmatise institutions but it also stigmatises every person who supported them and worked in them. I remember Ruth Richardson being one person, and the Labour Party members being other people, who went about and condemned anyone who worked at the Templeton Centre as being institutionalised himself or herself. They said those workers did not know what they were talking about and had nothing constructive to offer. The warnings of such workers that this sort of thing would happen fell on the deaf ears of Helen Clark, who wears medals for closing 29 hospitals and getting rid of institutions.

The Green Party, in supporting the bill at the first reading, noted the legislative context of the bill, shortly following the amendments brought about by the Sentencing Act 2002, and the Parole Act 2002. The Honourable Nandor Tanczoz commented in part:

> … So the Sentencing Act and the Parole Act allow for earlier release when it is warranted, but also allow a person to be kept in prison until the end of his or her sentence if that is necessary. That legislation also amended the provisions around preventative detention and made that provision more available. It made it more likely that people convicted of particularly heinous offences will get preventative detention.
> …
> Tony Ryall and Ron Mark both criticised the electronic monitoring provisions. I am not sure exactly what they suggest, but it seems to me that the alternative is to suggest that we keep locked up indefinitely after their sentence has expired, regardless of that fact. The point is that this is a problem that arose under the old legislation. Under the current legislation such people would get preventative detention. The fact is that they were sentenced under the previous regime, and this bill is an attempt to clear up that anomaly and deal with that issue, which was so ignored by the parties of the right when they were in power.

In supporting the bill as introduced, the Honourable Marc Alexander for United Future noted:

> … the bill before us that provides for a regime of extended supervision for dangerous sex offenders is – at least in intent – timely. It the very near future, a number of child sex offenders sentenced under the old sentencing regime will be coming up for parole and eventual release. Under the new Sentencing Act, the worst type of sex offenders to which the new regime applies will have received preventative dentation, and the justice system maintains control over them potentially for the rest of their naturel lives – if not in actuality, through the imposition of that penalty. But as the Minister has already mentioned, at present we face the situation where a number of offenders – there is not expected to be a huge number – will slip through the cracks and soon find themselves out in the community free to offend again, which almost certainly they will.

For ACT, the Honourable Muriel Newman echoed the theme relating to the stop-gap nature of the bill, stating:

> … If we look at the real issue – and it has been brought out in this debate – we see that there are some people who commit offences against children and who should not be out in the community ever. They should be on preventative detention. They should never be released.

The circumstances surrounding the release of Barry Ryder and Lloyd McIntosh had previously been openly discussed in the House on 18 March 2003:

> **Hon Tony Ryall (NZ National – Bay of Plenty) To the Minister of Justice:** In light of his comments in 1995 that "Those Ministers, through their failure to act when warned about Mr Ryder...must bear responsibility for the appalling sequence of events that led to Mr Barry Ryder's conviction..."; what action, if any, did he take to ensure the public's protection when he became aware that Mr Ryder was soon to be paroled?
>
> **Hon Phil Goff (Minister of Justice):** Barry Ryder was released in the early 1990s as a direct result of a political decision – the passing of the Mental Health Act – without transitional provisions for dangerous offenders let out by the changes. Two National Ministers were directly warned of the consequences of this by Neil Pugmire and did nothing. In 2002 Ryder was released because he had a finite sentence and the Parole Board decided that a period of controlled supervision in the community was needed. That was not a political decision. Indeed, as a former Minister of Justice, the member knows better than most that he was, and now I am, prohibited from interfering in any way with the Parole Board decision. Indeed I was not even notified of the decision.
>
> **Hon Tony Ryall**: In light of the fact that in August 2000 the Minister knew that Barry Allan Ryder was up for parole and would be shortly released, why did he, despite all the years of hand-wringing and vein-popping speeches, take no action whatsoever to satisfy

himself that appropriate supervision arrangements were being put in place for Barry Allan Ruder – there was not one action?

Hon Phil Goff: The member apparently did not listen to my initial answer. In the 1990s, Barry Ryder was released directly as a result of a political decision. In 2002 the nature of his release by the Parole Board was such that I was statutorily prevented from intervening. Indeed, I was not even told about it. If the member wants an answer he should listen, instead of talking all the way through the answer.

Hon Georgina Beyer: What changes have been made to legislation that would have made a difference to those changes been in place when Ryder was sentenced in 1995?

Hon Phil Goff: The key change is in relation to preventative detention. In 1995 the judge said that Ryder should have got preventative detention under the then existing law, which Tony Ryall did nothing about. He was not able to do so. The law has now been changed so that if the same circumstances arose again, Mr Ryder would find himself indefinitely imprisoned, and under the Parole Act would never be released because of the risk he constitutes to the wider public. National failed to do that for 9 years; I have done it.

Hon Marc Alexander: Does the Minister agree, that in similar cases such as Lloyd McIntosh, who never stood trial after raping his 6-year-old sister, he ought never to be released after mysteriously regaining his mental capacity without going to court, so that he could not go on to rape a 23-month-old girl 3 months after his release?

Hon Phil Goff: Yes, there are, unfortunately, parallels between Lloyd McIntosh and Barry Ryder. The difficulty we confront is that both – after having been release by the National Government because it changed the Mental Health Act – subsequently reoffended and then given finite sentence. I should mention that under the new Sentencing Act, offenders would on a finite sentence, of course, serve up to the very last day of their sentence and then be given 6 months' parole beyond that date.

In the Justice and Electoral Select Committee report on the bill, it was recommended that the bill be passed with the indicated amendments. The report reaffirmed the background circumstances prompting the bill:

High-risk transitional offenders

A small number of people with a predisposition for child sex offending were released from psychiatric institutions in 1992 because their condition did not fit the then-new definition of ''mental disorder'' under the Mental Health (Compulsory Assessment and Treatment) Act 1992. Several of those released went on to commit serious sexual crimes against children, were sentenced prior to the passage of the Sentencing Act 2002 and received finite prison sentences, which posed the risk of future child sex offending when their sentences expired. If these offenders had been sentenced after the enactment of the Sentencing Act, they would have been eligible for preventive detention on their first

> offence, and therefore be liable to life imprisonment or lifetime monitoring if released. This small number of offenders represents a real risk to society.

The report included the first express reference to age-related considerations for eligible offenders, representing:

> **Young offenders**
> We considered whether young people who have not been convicted and sentenced to prison for a relevant offence should be able to submit voluntarily to supervision under the extended supervision regime. A submission from Barnardos New Zealand asked that provision be made for assessment and monitoring of young persistent sex offenders after their discharge of orders. We have no recommendations to make in this area, although we note that there is currently a gap in relation to the supervision of young offenders in the community. We consider the extended supervision regime is not appropriate for young non-convicted offenders because it allows for the imposition of stringent conditions, and also provides a serious sanction for breach of condition. The scheme is designed for serious offenders who have been convicted of a relevant offence and sentenced to imprisonment. It is envisaged that further policy work will be done to identify the most appropriate regime for these young non- convicted offenders.
>
> **Response to submitters' concerns**
> We have clarified that the extended supervision regime is not aimed at younger offenders, and that further work is needed in this area, in response to concerns about younger offenders expressed by Barnardos New Zealand.
> We have indicated support for a provision to do with inter-agency information sharing for the purposes of managing the risks posed by child sex offenders in the community (see ''Inter-agency information sharing'' section), partly in response to concerns about the need for inter-agency collaboration and information sharing expressed in submissions by Alison Thom, and by the SAFE programme.

In recognition of the legislative gap-filling nature of the proposed bill, the Honourable Nandor Tanczoz proposed a "sunset clause" for the legislation, so that the operation of the revised Sentencing Act 2002 and Parole Act 2002 took the place of the ESO regime in respect of serious child sex offenders over the coming years. He commented:

> Many of the people sentenced today under the Sentencing Act 2002 – the kind of people we are talking about – are likely to get preventative detention, which would allow restrictions and supervision to be put on them for ten rest of their lives. That did not happen under the old regime. One of the principal things about this bill is that it is an attempt to create a situation to catch these people who were sentenced to a finite sentence under the old regime.

The Parole (Extended Supervision) Amendment bill ultimately received Royal Assent on 6 July 2004, bringing about changes to the principle Parole Act 2002 to implement the first iteration of the ESO regime. In doing so, it provided the mechanism for offenders who had been convicted of specified sexual offending against children to be made subject to an ESO upon order of the Court, for a maximum period of up to 10 years. The legislative risk threshold was one of "likely" to commit further relevant offending against children. The definition of "eligible offender" was materially the same as the present definition, save for the lack of express inclusion of returning offenders. As with the present definition, there was no express reference to or limitations relating to a minimum qualifying age for eligible offenders.

The legislative change were enacted with clear retrospective intent and effect, and with a negative vet as to s 7 of the Bill of Rights Act 1990 both with respect to double jeopardy and retrospectivity.

B Parole (Extended Supervision Orders) Amendment Act 2014

The initial regime continued materially unchanged until the lead-up to its ten-year anniversary. As with the initial introduction and implementation of the regime, the political discussion relating to the proposed further legislative changes was intertwined with public and media concern relating to high profile individual offenders, including the earlier-cited Lloyd McIntosh, along with references to Stuart Murry Wilson and Phillip Smith. Stuart Wilson's prolific sexual offending against women and girls was widely-publicised, earning him the moniker "the Beast of Blenheim." Phillip Smith, for his part, occupied the media spotlight for murdering the father of a boy he had been sexually abusing, before fleeing the country on a false passport while on day leave from prison.

Introduced and considered alongside the Parole (Extended Supervision Order) Amendment bill was the cognate Public Safety (Public Protection Orders) bill, designed to empower the High Court to issue a public protection order to detain a person in a secure facility when, at the end of a finite prison sentence or period subject to the most intensive from of an extended supervision order, he or she poses a very high risk of imminent and serious sexual or violent offending. Upon the introduction of the Parole (Extended Supervision Orders) Amendment bill, the origins of the ESO regime in the earlier Parole (Extended Order) Amendment Act 2004 were cited by the majority of the political parties in their support of an apparent need to extend the 10 year terms provided for in 2004. The legislative lacuna that the original regime was expressed to fill, however, appears to have largely fallen to political oblivion or expedience.

In the Select Committee report published on 5 November 2014, no express reference was made to the continued definition of "eligible offender", save for the comments relating to the extension of its application to include overseas offenders. In his comments at the second reading of the 2014 bill, the Hon Phil Goff referred at length to the background to the Parole (Extended Supervision) Amendment Act 2004, stating:

> We also considered at the time a much wider use of preventive detention. Preventive detention means that you can lock a person up indefinitely. It is an indeterminate sentence. In some ways that would avoid entirely the New Zealand Bill of Rights Act issue, because if you give them that at the time of the sentencing by the judge, you would not be in breach of that Act. A sentence is imposed, and the person can be locked up for life, literally, and if they are let out they can be recalled at any time, and that happens. But in some ways it would be a more severe regime to have a much wider use of preventive detention than what we are doing with these two pieces of legislation.

This suggestion that the 2004 Amendment Act was implemented as an alternative to a broader use of preventative detention does not appear to accord with any of the published commentary or discussions on the purpose or role of the 2004 Amendment Act at the time.

Along with amendments providing for extensions of the term of an ESO beyond 10 years, the 2014 Amendment Act also significantly expanded the class and nature of relevant offences. Following the 2014 amendments, sexual offences against adults as well as children were specified as qualifying offences, and the regime was expanded to apply to serious violent offences. With the expanded class of relevant offences, the 2014 amendment introduced a revised risk threshold test for the imposition of an ESO. Before a Court could impose an ESO for relevant sexual offending, it needed to be satisfied that there was a "high risk" of further relevant sexual offending, and in relation to relevant violent offending, that there was a "very high risk" of further relevant violent offending. The amendment also revised and further specified the matters required to be addressed in the required health assessor's report.

Once again, prior to the enactment of the 2014 bill, the Attorney-General assessed that the bill as proposed unjustifiably contravened the Bill of Rights Act 1990 with respect to double jeopardy, and retrospectivity.

V The case against youth application

The legislative regime with respect to ESOs therefore is, and has always been, silent in terms of whether there is any express minimum age of an eligible offender. In the absence of express wording, it is necessary to assess the text as a whole and in lights of

its purpose, the apparent parliamentary intention in enacting the regime, and any constraints imported to the assessment by way of extraneous legislative provisions or instruments relating to the rights of children and young persons.

A Text and purpose

The definition of "eligible offender" is expressed with reference to an offender who has not subject to an indeterminate sentence of imprisonment. An offender could only be sentenced to an indeterminate sentence of preventative detention if over the age of 18 at the time of the commission of their offending. Alternatively, a sentence of life imprisonment can be imposed for limited offences, and is the presumed sentence in respect of murder unless in the circumstances such a sentence will be manifestly unjust. Age is one factor the courts will take into account in this assessment, alongside such other mattes as the circumstances of the offending and any presence of the factors listed in s 104 of the Sentencing Act 2002. In respect of drug offending which carries the possibility of imprisonment for life, there is an express presumption against a sentence of imprisonment in respect of offenders under the age of 20. Necessarily, if an offender is not sentenced to imprisonment, he or she will not be sentenced to imprisonment for life.

The listed qualifying offences as set out in s 107B of the Parole Act 2002 include sexual connection with and indecent act on a dependent family member.[18] The definition of "dependent family member" has a clear theme of power or authority over, or responsibility or role in the care or upbringing of the dependent person.[19] Similarly, the qualifying offences include meeting a young person following sexual grooming, and sexual conduct with a child or young person.[20] In order for a grooming offence to be established, the intended action of an offender must be one that constitutes an offence against part 7 of the Crimes Act 1961, such that they would have to be independently liable for some (likely sexual) offence. There is no express requirement in relation to offences of sexual conduct with a young person or child that the offender be of a certain age, however the apparent legislative intention of those provisions is with respect to adult offending against children and young persons, as opposed to young persons or children as between themselves.

Section 107GAA of the Parole Act 2002 sets out the procedure when a eligible offender is also subject to an active PPO application. In order to qualify for the application for a PPO, an offender must be 18 years or older. This does not directly import any limitation

[18] Contrary to Crimes Act 1961, s 131.

[19] Crimes Act 1961, s 131A.

[20] Contrary to Crimes Act 1961, ss 131B, 132, and 134.

with respect to minimum age at the time of the relevant offending, as invariably an offender will age while serving any sentence of imprisonment for that offending.

The standard conditions of an ESO which automatically apply include conditions relating to employment,[21] as well as a prohibition on contact with persons under the age of 16.[22] Recognising that an offender is likely to have aged in the course of serving any sentence of imprisonment such that their age at the point of any application for an ESO may no longer be that of a child or young person, these conditions are clearly geared towards adult rather than youth offenders.

Sections 107G and 107P relate to the procedure following the application for an ESO, and the suspension of the conditions of an ESO when an offender is no longer in the community due to supervening detention. These sections make reference to the Bail Act 2000 and Corrections Act 2004 with reference to custodial jurisdiction, but neither allow for custody pursuant to the Oranga Tamariki Act 1989 as may result from s 175 of the Criminal Procedure Act 2011. The issue as to the age of an offender at the point of application for an ESO as opposed to at the time of the relevant offending prior to sentence arises again here.

From an assessment of the express wording of Part 1A of the Parole Act 2002 setting out the ESO regime, some limited support can be gleaned for the argument that the provisions do not apply to youth offenders, as opposed to adult offenders. The inclusion of a number of offences which are geared towards adult rather than young offenders within the designation of relevant sexual offences is neutral, as the regime is by design inclusive of adult offenders. The inclusion of offences by adults does not, itself, add to any contention that youth are not also included with respect to the remaining listed offences. The limited support from a contextual reading of Part 1A in this regard is muted somewhat by the practical reality that some offenders could remain under the age of 18 at the point of consideration for eligibility for an ESO, whereas it is more likely that any sentence of imprisonment for relevant offending would see them over the age of 18 at the point any ESO was considered.

B Legislative intent

Looking beyond the text of Part 1A of the Parole Act 2002, the broader legislative context of the legislation coupled with the expressed legislative intent for enacting the legislation provides greater insight to the issue of youth application.

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[21] Parole Act 2002, s 107JA(1)(b), (f), and (h).

[22] Parole Act 2002, s 107JA(1)(i).

In the legislative history of the passage of the Parole (Extended Supervision) Amendment Act 2004, and the Parole (Extended Supervision Orders) Amendment Act 2014, there was no express, nor any implied indication that the ESO provisions were intended to apply to youth. The only express consideration of the issue of youth offenders, as prompted by submissions from Barnados at Select Committee stage, generated the response "We have clarified that the extended supervision regime is not aimed at younger offenders". Despite this "clarification", nothing was changed with respect to the content of the bill to ensure that this intended limitation on the application of the regime was ultimately enacted. The intended purpose of the regime as originally proffered in 2004, as reflected in the varying speeches from all parties, was to respond to the risks posed by a small number of individuals who could not be further detained in prison pursuant to finite sentences, but who were assessed to pose a serious and pressing threat to the safety of children in the community. The ESO regime was espoused to provide an immediate parallel to preventative detention for those who had been sentenced prior to the expansion of the application of preventative detention in the Sentencing Act 2002.

The similarities as between the preventative detention provisions in s 87 of the Sentencing Act 2002, and the ESO regime in the Parole Act 2002 are apparent, as are the related provisions under the Public Safety (Public Protection Orders) Act 2014. With the exception of the inclusion of offending under the Films, Videos, and Publications Classification Act 1993 with respect to ESOs, the listed qualifying sexual and violent offending as between all three regimes is identical. None of the three regimes require the commission of previous offending, and the legislative matters for consideration and risk threshold that the Court is required to satisfy itself of with regard to the imposition of preventative detention is lesser than that for an ESO. Other than the demonstrated examples raised by the likes of Lloyd McIntosh and Barry Ryder as traversed extensively by the House in the passing of the initial and amending ESO legislation, there cannot realistically remain any scenario in which an ESO would be necessary but the imposition of preventative detention unavailable to the Court. While it might be asserted that a sentencing judge is less well placed to assess risk at the outset of a sentence than a judge at the end of what may have been a lengthy term of imprisonment, this is not a basis for declining to impose preventative detention where it would otherwise be appropriate having regard to the circumstances of the offender, the offending, and the content of the health assessors' reports. It is unpalatable to consider that an offender would materially increase in risk during the course of his or her sentence of imprisonment, particularly with respect to any latent risk in respect of child sex offending. As such, it difficult to conceive that there remains a justifiable basis to retain the ESO regime in light of its intended purpose, let alone to see it apply to a broader spectrum of offenders than are captured by the preventative detention provisions. The broad contextual interplay as between the ESO and preventative detention regimes, coupled with the legislative intent

as expressed with the enacting of the ESO legislation supports a view that the ESO regime ought to be interpreted as not applying to offenders who were youths at the time of the relevant offending.

Whether the ESO regime in its entirety remains justifiable in light of this position is questionable. This is so particularly in light of its inconsistency with the New Zealand Bill of Rights Act with respect to retrospectivity, but more saliently, with respect to the right against double jeopardy. The reaffirmation of the regime by Parliament in 2014 does little to allay these concerns, particularly in light of the detachment from the original basis and justification for implementing the regime in 2004 coupled with the introduction of the supplementary PPO regime to manage high risk sexual and violent offenders in the community.

C Rights-consistent interpretation

1 NZBORA 1990

Section 6 of the New Zealand Bill of Rights Act 1990 ("NZBORA") requires that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other meaning. Sections 4, 5, and 6 of NZBORA were considered by Justice McGrath in *Zaoui v A-G*:[23]

> [36] These provisions require the Court to prefer an interpretation consistent with protected rights where one is reasonably available: *Ministry of Transport v Noort* [1992] 3 NZLR 260, 272; *Quilter v Attorney-General* [1998] 1 NZLR 523. Section 4 precludes the Court from reading the legislative text in a way which nullifies it or is so inconsistent with the statutory purpose as to do violence to its scheme. But subject to those limits these provisions require the Court to apply the meaning of the text that is most in accordance with the freedoms protected by the Bill of Rights. In doing so in respect of the Part 4A detention provision of the [Immigration] Act the first step is to identify the meanings that are reasonably available and then to consider which of them least infringes on the protected rights. Depending on what those inquiries show it may be necessary to ascertain the extent to which the right is limited and whether effect can be given to it.

In *Ministry of Transport v Noort*, Justice Richardson commented:[24]

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[23] *Zaoui v A-G* [2005] 1 NZLR 577 (CA).

[24] *Ministry of Transport v Noort* [1992] 3 NZLR 260; (1992) 8 CRNZ 114; 1 NZBORR 132 (CA), at p 271; p 125; p 143 (at p 278; p 133, p 153).

> [T]he Bill of Rights Act is a legislative commitment to the protection and promise of those basic human rights and freedoms set out in the Act. Those rights are not absolute and that commitment does not preclude Parliament from abridging or even excluding their application. Sections 5 and 6 reflect a strong legislative intention to protect the rights and freedoms contained in the Bill of Rights Act. In determining under s 4 whether there is an inconsistency between the provisions of another enactment and a provision of the Bill of Rights, it is proper to have regard to the statutory objectives of protecting and promoting human rights in New Zealand, and New Zealand's commitment to international human rights standards, and also to the limiting provisions of s 5 and s 6. In the end, and in the absence of an express statutory exclusion of a Bill of Rights Act provision, it must be a question of determining under s 4 whether there is any room for reading along with the other enactment a Bill of Rights Act provision whether absolute or modified or limited pursuant to ss 5 and 6.

The interrelationship of sections 4, 5, and 6 were commented on further by Justice Hardie Boys, while considering the impact of the (precursor to the current) Interpretation Act 1999:[25]

> Section 4 declares the primacy of Parliament; in the event of inconsistency between a statute and the Bill of Rights, the former prevails. Section 5 states the obvious reality that no right or freedom is absolute: a free and democratic society requires limitations, in the public interest and in reconciliation with the rights and freedoms of others, provided those limitations are reasonable, demonstrably justified, and prescribed by law. Section 6 provides in effect that where a statute is fairly open to more than one interpretation, that which is consistent with the rights and freedoms in the Bill of Rights is to be preferred. And so it is only where consistency cannot fairly be found that s 4 will apply. Section 7 provides the mechanism for Parliament to be informed if proposed legislation appears inconsistent with any of the rights and freedoms contained in the Bill of Rights; an important safeguard in view of s 4."The Part I sections, particularly ss 4, 5 and 6, must be read as a whole. Only then, I think, is the true significance of s 5, otherwise a difficult provision, apparent. It is plainly Parliament's intention that the rights and freedoms affirmed by the Act should be upheld unless there is clear legislative intention to the contrary. The direction given by s 6 may not always be sufficient for this purpose. Section 6 is directed to the meaning of the other enactment, and does not permit any limitation or qualification of the Bill's rights and freedoms. It rather treats them as absolutes, and so, on its own, could allow quite wide scope for the application of s 4. Yet there must be many a statute which could be read consistently with the Bill's rights and freedoms if it is accepted that the statute has imposed some limit or qualification upon them; in other words, although the statute cannot be given a meaning consistent with the Bill's rights and freedoms in their entirety, it can be given a meaning consistent with them in a limited or abridged form. It is obviously consistent with the spirit and the

[25] *Ministry of Transport v Noort* [1992] 3 NZLR 260; (1992) 8 CRNZ 114; 1 NZBORR 132 (CA), at p 271; p 125; p 143 (at pp 286-287; p 142, p 164).

> purpose of the Bill of Rights Act that such a meaning should be adopted rather than that s 4 should apply so that the rights and freedoms are excluded altogether. Section 5 in my opinion is designed to enable such an approach to be taken. It is directed not only to acts done by the persons or agencies mentioned in s 3, and to the Attorney-General's responsibilities under s 7, but it also has a reconciling or bridging role between the two sections between which it is placed, s 4 and s 6. Thus in terms of s 4 there will be inconsistency between an enactment and a right or freedom only if after construing it in accordance with s 6 there is no room within it for the right or freedom even in modified or abridged form. To view the matter in this way is no arrogation by the Court of the responsibility of determining what is a reasonable limit, and what can be demonstrably justified in a free and democratic society. Rather it is to see s 5 as a mechanism to secure recognition of the Bill's rights and freedoms to the fullest extent that is reasonable and practicable in a specific statutory context.

With respect to the NZBORA rights raised by the present matter, section 25(i) provides for minimum standards of criminal procedure:

> **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:
> …
> (i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

Under NZBORA, there is no express definition of the upper age limit of a "child", however the courts have suggested it more likely accords with the definition in the 1989 Convention on the Rights of the Child which defines "child" as a human under the age of 18 years, as opposed to the subdivisions of youth as set out in the Oranga Tamariki Act 1989.[26] Furthermore, section 9 of NZBORA enshrines a right not to be subjected to disproportionately severe treatment or punishment.

Should an interpretation of "eligible offender" for the purposes of the ESO regime not import any minimum age requirement with respect to the point at which the offending occurred, it is arguable that any youth offender is not being dealt with in a manner that takes account of his or her age. Not only will a young offender necessarily have a lesser track record of conduct against which to balance the offending behaviour, he or she will likely have comparatively underdeveloped self-regulatory capacity due to immaturity associated with age, he or she may display a lack of acceptance of responsibility or remorse, or an absence of understanding for or concern about the impact on victims due to age-related cognitive or emotional limitations. As such, the legislative assessment

[26] *R v Kaukasi* High Court, Auckland, 4/7/2002, Fisher J, at [5].

criteria may operate more harshly on young offenders. Further, the static point at which the risk assessment for the purposes of an ESO is conducted is inherently less well suited to an offender who is in the process of development and maturation than it is for an adult offender. A related and considerable concern arises with regard to actuarial measures invariably utlised by health assessors, and whether the statistical data sets on which their analysis criteria and recidivism risks are generated transpose accurately to youth offenders. This suitability issue parlays also into the provision of appropriate rehabilitative intervention, as the Department of Corrections' Kia Marama[27] and Te Piriti[28] sex offender programmes are both expressly targeted at child sex offenders. Whether an offender aged 15 offending against a victim aged 14 can properly be characterised as "child sex offending" is debatable.

It is similarly arguable that to subject a youth offender to the comprehensive restrictions of the ESO regime for up to ten years is disproportionately severe punishment, as an order of that duration may reflect a period in the range of half their naturel life at the point of imposition.

In light of the rights of a child in NZBORA and the right not to be subject to disproportionately severe punishment, a rights-consistent interpretation of the s 107C of the Parole Act 2002 is not only warranted but consistent with the legislative purpose of the ESO regime including that "the extended supervision regime is not aimed at younger offenders".

2 UN Convention on the Rights of the Child

The Convention on the Rights of the Child ("CRC") was adopted by the United Nations in 1989, and ratified by New Zealand in 1993. The effect of this ratification is that New Zealand is bound by the conditions of the CRC under international law. There are contained in the CRC a number of articles that bear upon the present issue with respect to the application of ESOs to youth offenders, with article 1 establishing that for the purposes of the CRC, a child means every human being below the age of eighteen years unless the law applicable to the child, majority is attained earlier. Article 37 requires states to ensure that (emphasis added):

> …

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27 https://www.corrections.govt.nz/resources/research_and_statistics/the-effectiveness-of-correctional-treatment/2-kia-marama-sex-offender-treatment-programme

28 https://www.corrections.govt.nz/resources/research_and_statistics/the-effectiveness-of-correctional-treatment/5-the-te-piriti-sex-offender-treatment-programme

> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

Further, article 40 holds (emphasis added):

> 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
>
> 2. …
>
> 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
>
> > (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
> >
> > (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
>
> 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

While not legally binding, the UN Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules") recommend minimum standards for juvenile justice matters. In particular, rule 2.3(a) states that efforts shall be made to establish a set of laws, rules and provisions specifically applicable to juvenile offenders, designed to meet the varying needs of juvenile offenders while protecting their basic rights and meeting the needs of society. The articulated "aims if juvenile justice" in rule 5.1 are stated as:

> The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

When assessing New Zealand's international obligations and commitments with respect to the rights of the child and juvenile justice, further support can be gleaned for an interpretation of s 107C of the Parole Act 2002 that does not include application to youth offenders. An inclusive rather than exclusive interpretation does not accord with the need to implement laws specifically appliable to youth, to adequately account for the age of youth, to see detention for no longer than is necessary, nor to emphasise the wellbeing and rehabilitation of the youth offender.

VI Conclusions

The enactment and implementation of New Zealand's ESO regime has been the focus of much debate, analysis, and criticism. Absent to any meaningful extent, however, is the issue of whether the regime applies to youth offenders. It is troubling that no substantial consideration has been given to the position of youth offenders under this regime, and that the regime has been implemented without any express exclusion of youth despite the legislation not being aimed at this group. In addition to the concerns at the progressive encroachment on rights and expansion of this regime without compelling justification, the position of youth under this regime is particularly troubling due to their differing position vis-à-vis adult offenders, the disproportionate impact these provisions are likely to have on youth, and the apparent intention that they not fall under this regime. The irony that the precipitating focus of the bill was one of protecting the position of children and young people is not lost in recognising the impact it can, and has had on some offenders drawn from within that group.

In the absence of expressly litigating for a purposive and rights-consistent interpretation of section 107C of the Parole Act 2002 in any subsequent instances of offenders who were under the age of 18 at the time of their relevant qualifying offending, a more principled and cogent response to this issue would be for a legislative amendment to add to the definition of "eligible offender" the requirement that the offender be 18 years or over at the time of committing the qualifying offence. Whether any political appetite on principle for such an amendment would withstand public or media perceptions of enabling child-sex-offenders may prove limiting, notwithstanding those offenders themselves being, in effect, children.

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