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Te Kāhui Ture o Aotearoa

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23 January 2026

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Notice of declarations of inconsistency: Public Protection Orders under the Public Safety (Public Protection Orders) Act 2014 and Extended Supervision Orders under the Parole Act 2002

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Notice of declarations of inconsistency: Public Protection Orders under the Public Safety (Public Protection Orders) Act 2014 and Extended Supervision Orders under the Parole Act 2002 (**Notice**). The Notice follows the Supreme Court's decisions in *Attorney-General v Chisnall*, where the Court found certain aspects of Public Protection Orders under the Public Safety (Public Protection Orders) Act (**PPO Act**) and the Parole Act to be inconsistent with section 26(2) of the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**),[1] and subsequently made declarations of inconsistency reflecting its findings.[2]

1.2 This submission has been prepared with input from the Law Society's Human Rights and Privacy and Criminal Law Committees.[3] It addresses the following matters:

(a) The Supreme Court's declarations, and the Court's principal reasons for finding that limitations on the right to be free from second penalty are unjustified.

(b) A background summary of the Law Society's prior submissions regarding preventive measures. These are consistent with the Court's view.

(c) Ways forward. Drawing on both our own prior submissions, and the recent work of Te Aka Matua o te Ture | New Zealand Law Commission (**Law Commission**),

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1 *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768.
2 *Attorney-General v Chisnall (Declarations of inconsistency)* [2025] NZSC 126, [2025] 1 NZLR 619.
3 More information about our law reform committees is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

we urge the Select Committee to recommend progressing comprehensive legislative reform, discussing two possible paths.

(d) In addition, further work is needed to determine interim measures. As a starting point, we propose several minor amendments to both the PPO and Parole Acts, with a particular emphasis on removing the retrospective application of ESOs and PPOs amounting to detention. Discrete aspects of the PPO and ESO regimes could be rebalanced such that they can serve their public safety purpose without continuing to impose unjustified limitations on the right to be free from second penalty. We emphasise, however, that while our suggestions here may assist in the short-term as mitigations, they are not put forward as a substitute for the necessary comprehensive reform.

2 The Supreme Court's declarations of inconsistency and reasons for finding that limitations on the right to be free from second penalty are unjustified

2.1 In *Attorney-General v Chisnall*, the Supreme Court made declarations of inconsistency in respect of PPOs and ESOs that involve detention. The Court's declarations stated:[4]

> Public protection orders made under the Public Safety (Public Protection Orders) Act 2014 are a second penalty for offences for which offenders have already been punished. They therefore limit the right to be free from second penalty protected by s 26(2) of the New Zealand Bill of Rights Act 1990. This limitation is not justified under s 5 of the New Zealand Bill of Rights Act. To the extent that s 3 of the Public Safety (Public Protection Orders) Act authorises the retrospective application of public protection orders, that limitation cannot be justified. Therefore, provisions in the Public Safety (Public Protection Orders) Act that authorise the making of public protection orders are inconsistent with s 26(2) of the New Zealand Bill of Rights Act.
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> To the extent that ss 75, 107FA, 107IA, 107IAC and 107K of the Parole Act 2002 authorise the imposition of special conditions requiring detention as an aspect of an extended supervision order, they are a second penalty for offences for which offenders have already been punished. They therefore limit the right to be free from second penalty protected by s 26(2) of the New Zealand Bill of Rights Act 1990. This limitation is not justified under s 5 of the New Zealand Bill of Rights Act. To the extent that s 107C(2) of the Parole Act authorises the retrospective application of detention-authorising special conditions as an aspect of an extended supervision order, that limitation cannot be justified. Therefore, to the extent that ss 75, 107FA, 107IA,107IAC and 107K of the Parole Act authorise the imposition of special conditions requiring detention as an aspect of an extended supervision order, they are inconsistent with s 26(2) of the New Zealand Bill of Rights Act.

2.2 The Court's principal reasons for finding such limitations were, in summary, that:

(a) The ESO and PPO regimes impose penalties on offenders.[5] The regimes are civil proceedings, and the purpose of each regime is the protection of the public from the risk of harm inflicted by the commission of serious sexual or violent offending by recidivist offenders.[6] However, the effect of orders under those regimes are similar to sentencing responses, and involve the curtailment (sometimes

4 *Chisnall (Declarations of inconsistency)*, above n **Error! Bookmark not defined.**, at [18].
5 *Chisnall*, above n 1, at [133].
6 At [134].

substantially) of freedoms under the Bill of Rights Act.[7] They therefore impose a penalty for criminal conviction, and so limit the right recorded in section 26(2) of the Bill of Rights Act not to be subject to second penalties.[8]

(b) Where ESOs and PPOs amounting to detention are applied retrospectively (that is, to offenders who were sentenced prior to the enactment of the relevant regime), limitation of the right in section 26(2) is not capable of justification.[9]

(c) Where ESOs and PPOs amounting to detention are applied prospectively (that is, where an offender was sentenced after the enactment of the relevant regime), such limitation may be justified, but currently it is not. This is because, although the regimes have a very important purpose which could justify some limitation on section 26(2) and the limiting measures are rationally connected to that purpose,[10] there are less rights-intrusive alternative models available that would be effective at managing the risk of reoffending (and thereby, more effective at protecting the community from harm).[11]

2.3 The core characteristics of a rights-consistent model comprise three pillars:[12]

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

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

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

2.4 Key concerns are that the current ESO and PPO regimes:

(a) do not recognise that the "circumstances and conditions of the detention are distinct from the circumstances and conditions of imprisonment, so as to minimise the punitive impact on the individual";[13] and

(b) impose insufficient obligations to provide rehabilitative and therapeutic support to individuals subject to an ESO or PPO.[14]

2.5 The Supreme Court completed its analysis by taking an overall proportionality assessment of the purpose and rights at issue. The Court acknowledged that the purpose the regimes serve is of very high importance. However, the right under section 26(2) is also of high importance in a free and democratic society. In that context, the ESO and PPO regimes are "extraordinary and truly exceptional measures for a society to implement".[15] The Supreme Court observed that "exceptional care is needed in constructing a protective regime in such circumstances to minimise to the extent possible the curtailment of rights, lest we become accepting in our society that it is appropriate to

7 At [136]–[137].
8 At [138].
9 At [146]–[148].
10 At [198], [208] and [253].
11 At [232].
12 At [235].
13 At [241].
14 At [242]–[243].
15 At [254].

simply warehouse people for broader societal ends, without due regard to their rights".[16] The Court ultimately concluded that "[w]hile the objectives of the detention-authorising aspects of the regimes were important, the limits imposed were not proportionate to those objectives".[17]

3 The Law Society's prior submissions on preventive measures generally

3.1 The Law Society has repeatedly made submissions on the issue of ESOs and PPOs, including to Select Committees in response to relevant Bills,[18] and to the Law Commission in response to Issues Papers.[19] The present submission draws from these previous submissions, and we have **appended** several which are relevant for the Select Committee's convenience. This submission also draws on the Law Commission's recent report *Here ora: Preventive measures in a reformed law*,[20] which undertook a comprehensive review of existing preventive regimes and made recommendations for law reform.

3.2 As a preliminary comment, the Law Society acknowledges the important purpose of preventive regimes, as well as the gravity of the rights at issue. In particular, the Law Society endorses the view of the Law Commission that preventive measures have an important role in protecting the community from harm and, as such, the law of Aotearoa New Zealand should continue to provide for preventive measures for serious sexual and violent offending.[21]

3.3 However, the Law Society also endorses the Law Commission's view that significant and—reflecting the Supreme Court's concluding caution—careful overhaul of the current law relating to preventive measures is ultimately required to meet the important protection objective while also being human rights compliant, by providing careful matching of a person's risk to the preventive measures applied and by ensuring stronger entitlements to rehabilitation and reintegration support.[22]

3.4 The Law Society noted in its 2023 submission in response to the Law Commission's issues paper IP51 that preventive regimes are required to balance a number of competing considerations of significant importance, the most predominant being the safety of the community and an individual's rights under the New Zealand Bill of Rights Act 1990. We also observed that such regimes are often required to address some of the most difficult cases in the criminal justice system (for which there is often not a clear "right" answer), and that the availability of rehabilitation and the availability of ongoing

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16 At [254].
17 At [262].
18 For example, NZLS Submission to Select Committee regarding Public Safety (Public Protection Orders) Bill (1 November 2013) [**NZLS PPO Submission (2013)**]; NZLS Submission to Select Committee regarding Parole (Extended Supervision Orders) Amendment Bill (28 October 2014) [**NZLS ESO Submission (2014)**].
19 NZLS Submission to Law Commission regarding issues paper IP51 (28 July 2023) [**NZLS Submission to NZLC (2023)**]; NZLS Submission to Law Commission regarding preferred approach paper IP54 (25 September 2024) [**NZLS Submission to NZLC (2024)**].
20 Te Aka Matua o te Ture | Law Commission *Here ora: Preventive measures in a reformed law* (NZLC R149, 2025).
21 Law Commission, above n 20, at [3.1] and [3.3].
22 Law Commission, above n 20, at [3.44]–[3.47].

reviews was central to whether a preventive regime is capable of justification.[23] These matters remain relevant to consideration of the ESO and PPO regimes in light of the Supreme Court's declarations.

3.5 Further, in our submission to the Law Commission in 2024, we noted:[24]

> It is important to consider how far our current preventive regimes [preventive detention, ESOs and PPOs] go for the purposes of meeting the safety of the community, and whether such limitations on the rights to liberty of the individual are justified. Parliament may properly legislate to curtail individual rights, provided that doing so is justified by the harm sought to be avoided and goes no further than is demonstrably justified in a free and democratic society.

3.6 We highlighted the difficulties inherent in the decision-making for preventive measures:[25]

> The types of crimes in question (such as, for instance, sexual offending against children) naturally invoke emotional reactions. Judges are not immune to this, and it must be acknowledged that they carry the burden of the risks and consequences of getting these decisions wrong. This makes the task of weighing convicted offenders' rights to liberty against the future risks that they pose and public safety considerations particularly fraught. It can involve difficult considerations, such as risk evaluations and the likely effectiveness of rehabilitation. Within the current regime there is a risk that decision-makers may weigh considerations in a manner that does not centre rights but rather safety, leading to outcomes that are problematic from a human rights perspective.

3.7 The Law Society considers that those risks indicate the legislature ought not to rely on judicial intervention (or similar intervention by the Parole Board) to prevent the imposition of rights-infringing ESOs or PPOs as an adequate response to the Supreme Court's declarations. Comprehensive reform should be pursued in respect of preventive measures, which will require a direct legislative response.

3.8 In arriving at this view, we have also considered and draw the Committee's attention to another recent Supreme Court decision, which addresses parole considerations when setting and continuing conditions of a preventive sentence.[26] In our view, the Supreme Court's further decision in *Grinder v Attorney-General* reinforces the conclusion that what is needed is a more rights-compliant variant on the current rules, rather than something radically different.

3.9 Accordingly, we next set out what effective and Bill of Rights Act-compliant alternatives there may be to the current law, commenting on at least two approaches which

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23 NZLS Submission to NZLC (2023) at [2.1] and [2.5].

24 NZLS Submission to NZLC (2024) at [2.3].

25 At [2.4].

26 *Grinder v Attorney-General* [2025] NZSC 165. In *Grinder*, the appellant had been sentenced to preventive detention in 2003 for a long history of sexual offending against children and young people. In addition to questions about the interpretation of provisions of the Parole Act, the Court also considered the effect of the Bill of Rights, the majority holding (citing Chisnall) that a proportionality assessment needed to be completed by the Parole Board. The Board must use ss 5 and 6 of the Bill of Rights to ensure orders made, and conditions imposed, are as rights-consistent as possible. However, in this case, the Parole Act already had built into it a proportionality analysis. It was consistent with the requirements of the Act and the requirements of s 5 of the Bill of Rights to direct that particular attention be paid to the reasonableness of the condition and its necessity, measured against the consideration of "undue risk": *Grinder* at [57]–[59].

Parliament could take. Because a robust reform will take time to develop and implement, we also consider the value of a more modest and immediate interim response, recommending two types of more minor changes that could be expedited. These include addressing, with immediacy, concerns regarding the retrospective application of PPOs and ESOs imposing detention-like conditions. In the Law Society's view, this is a critical amendment to be actioned.

4 Responding comprehensively to the declaration of inconsistency: two pathways

4.1 We think that there are, potentially, two broad alternatives to the current law that could be tailored to be both effective and Bill of Rights Act-compliant. They require considering, respectively:

(a) Whether there is a viable process for imposing preventive orders at the point of sentencing, thus avoiding concerns with retrospectivity and/or double punishment (**Pathway A**); or

(b) Whether the design of a post-completion of sentence supervision regime could be modified to be Bill of Rights-consistent (**Pathway B**).

4.2 Each has advantages and drawbacks. While we do not go so far as expressing a preferred approach, we do note the broad consistency of Pathway B with the thorough and recent consideration given to these issues by the Law Commission. In its *Here ora* report, the Commission has considered the range of options and carried out extensive consultation, producing a Final Report which sets out a number of detailed proposals.[27]

4.3 We commend the Law Commission's report to the attention of the Committee and suggest that, if it has not already done so, the Committee may wish to invite the Law Commission to be heard on the matters in front of the Committee, and/or to make a written submission.

Pathway A: a different approach at sentencing

4.4 The first pathway, as above, would consider whether there is a viable process for making preventive orders at the time of sentencing. This would require a different sentencing approach, whereby the potential for future supervision and restrictions after release from prison are a conditional part of the sentence imposed following a conviction (and thus part of the original penalty imposed).

4.5 This could be for the first qualifying offence or—in a reworked model—following a conviction for a second or subsequent offence which demonstrates a likely future risk of serious reoffending. The approach could involve, for example, allowing the sentencing judge to make an order for post-incarceration supervision or detention akin to a PPO, but also allowing Corrections to seek leave of the court at a later date *not* to bring that supervision/detention element into force (with the offender being able to challenge a decision not to seek such leave). Opportunity could also be provided for the individual, shortly prior to release from prison, to seek a judicial decision as to whether the conditional supervision part of the sentence should be remitted or varied (as to time

27 Above n 20.

and/or as to conditions). Some form of regular review would be needed, so the suitability of the detention and conditions can be reassessed as required and specifically tailored to the risks posed by the individual to the safety of others. Doing so would assist in addressing the Supreme Court's concerns set out at [2.3] above.

4.6 Pathway A compares favourably to the current regime because, by conditionally imposing such orders as part of the original penalty, it would minimise or eliminate the question of double punishment. The comparison (in terms of how a court would actually undertake the process, practically speaking, and in terms of the long-range thinking required to try and assess risk(s) at the likely time of release) is probably preventive detention.

4.7 While it may open the door to a certain number of appeals on the grounds of a sentence imposed being disproportionate, this would affect a small number of individual cases each year, rather than reflecting rights-inconsistency across an entire regime.

4.8 While offering a theoretically principled path, the approach does, however, have practical drawbacks, more so in respect of ESOs than PPOs.

(a) Imposing a PPO at sentencing (and allowing for Corrections to later seek withdrawal of the order) would be straightforward. The duration of the PPO would depend on how long the Resident Manager feels it is needed once it starts and there are several points of review. However, PPOs are a very small minority of the preventive orders presently imposed.[28]

(b) Matters with ESOs are more complex. With an ESO, the maximum period is 10 years, which may be renewed. However, judicial authority is quite clear that it is not just a matter of applying for the maximum period, but being clear about exactly how long is needed in the offender's situation given the risk factors. It may be doubtful whether that kind of analysis can be done at the sentencing stage.

(c) We are also wary of the risks that, under systemic pressures (for example, resourcing available to the Department of Corrections), injustice could arise in the form of original, outdated orders remaining in place largely by default, or through risk aversion.

4.9 We note that while the Law Commission did consider this type of approach, the difficulties of imposing preventive measures based on assessment of a person's future risk at the time of sentencing ultimately led the Commission to conclude that it should not be recommended.[29] The Commission considered, instead, that new preventive measures should involve post-sentence orders (people should, however, be notified at sentencing of the possibility that they will be made subject to a preventive measure, thereby responding to the issue of 'double punishment'). It concluded that the benefits of imposing measures towards the end of a sentence far outweigh concerns about

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28 In 2023–2024, 27 ESOs were granted: Figure NZ Extended supervision orders issued in New Zealand (retrieved 12 January 2026). There have been only four PPOs in total.

29 Law Commission, above n 20, at [1.22].

subjecting the person to a second punishment. On this basis, subject to the re-design of the regime, a post-sentence regime on balance could be justifiable.[30]

Pathway B: a redesigned post-sentence regime

4.10 Pathway B would involve redesigning a post-sentence regime to provide adequate safeguards against further serious offending, without unjustifiably impinging on protected rights. Pathway B appears to align with the Law Commission's recommendations for a continued preventive measures regime, albeit reformed, and the legislative framework set out in detail by the Law Commission provides a template for one such option. We also leave open the possibility that variations and/or other approaches may be possible. The Law Commission, for example, proposes:

(a) A new Act.[31]

(b) A coherent, tiered approach to the types of orders, with three new types of preventive measures.[32]

(c) A redesigned test for imposing preventive measures, with rights safeguards effectively built into the test for application.[33]

(d) Overarching guiding principles for the administration of preventive measures.[34]

4.11 Such an approach also, in our view, aligns well with the decision in *Chisnall*, in that the Court did not view the regime as needing to be entirely abandoned. On the contrary, it considered such measures, if appropriately designed, to be serving an important societal purpose, while cautioning that the regime does require reworking to be rights compliant, and noting particularly that the prospective detention and rehabilitative duty aspects of the PPO and ESO regimes are inconsistent and have more plausible rights-consistent alternatives that could be applied.

4.12 The Law Society has not engaged with the close details of any particular design. Whether the safeguards that could be built in under a Pathway B approach would suffice to meet a rights compliance test will hinge entirely on the design of any new framework.

4.13 Given this, we recommend, above all, that the Justice Committee take further advice on the issue from suitably qualified persons on the two possible pathways we have set out, and the design of any fresh approach. The extensive analysis by the Law Commission of relevant matters, and the consultation with a wide range of stakeholders and government agencies that the Commission has undertaken, would seem to offer a useful starting point.

4.14 We do not rule out that there may also be middle ground: a regime that continues to apply in a similar way to presently—however, with bespoke amendments to the rehabilitation, detention, supervision and conditions components of the regime to address the Supreme Court's 'three pillars' of a rights-consistent framework and key concerns, without requiring complete repeal and reform.[35] At first glance, the Law

30 At [1.24] and R6.
31 At [1.18] and R3.
32 At [1.15] and R2.
33 At [1.58]–[1.60] and ch 10.
34 At [1.110] and R69.
35 See further paras [2.3]–[2.4] above.

Commission's stance in favour of a new Act does appear persuasive, given the real complexity of this legislation across multiple statutes (and we have the same concern, as we note below, in regard to attempting interim amendments). However, we would not object to a middle-ground solution if one can be devised. Others will be better placed to brief the Committee on the range of options.

5 Interim legislative response to improve the preventive measures framework

5.1 We are aware that the Government is managing a heavy legislative work programme. Undertaking the redesign or reworking of a robust and rights-consistent preventive measures regime will require resources and time. We have therefore considered what interim adjustments could be made to assist in reducing the rights-inconsistency of the present legislation, until broader reform can be progressed.

5.2 The first and most important of these, as we indicated earlier, is the need for a change addressing the retrospective application and imposition of PPOs or ESOs amounting to detention.

5.3 We further suggest some interim amendments to the prospective aspects of PPOs and ESOs, in response to the 'three pillars' and key concerns identified by the Supreme Court. We wish here to emphasise, however, that we do not consider these modest proposals to be a substitute for the need for wider reform. We are also mindful of the *Chisnall* Court's observation regarding the "exceptional care [that] is needed" in constructing a protective regime.[36]

Addressing retrospective application

5.4 The Supreme Court has found that where ESOs and PPOs amounting to detention are applied retrospectively (that is, to offenders who were sentenced prior to the enactment of the relevant regime), limitation of the right in section 26(2) is not capable of justification under section 5 of the Bill of Rights Act.[37] The Law Society recommends the removal of the retrospective detention aspects of PPOs and ESOs as a matter of immediate priority.

5.5 It should go without saying, but we emphasise it nonetheless, that it would be inappropriate and inconsistent for any redesigned regime to have retrospective application. In the meantime, without amendment, the existing law will continue to be applied in breach of the fundamental rights of individual offenders—some of whom at least will be among New Zealand's most vulnerable members of society.

5.6 As a starting point, a catch-all provision could be added to both present Acts (the PPO Act 2014 and the Parole Act 2002), to the effect that "nothing in provisions [x, y, z] apply to offenders sentenced prior to [date]". We offer this with the substantial caveat that this is highly complex legislation, and further complexity arises from attempting fresh amendments because:

(a) there are many people already in the ESO / PPO regime that were made subject to orders prior to the relevant dates; and

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36 *Chisnall*, above n 1, at [254], quoted above more fully at [2.5].

37 *Chisnall*, above n 1, at [26], [146]–[148], and [169(a)].

(b) other specific provisions (such as section 107IAC(6) of the Parole Act) also enable retrospectivity, and may need a different response.

5.7 How any change to avoid retrospectivity therefore can be progressed is a matter for detailed analysis. Advice will be needed to assess what options are available and the best response without causing unintended inconsistencies in application (where some sentenced offenders are caught and others are not), lacunae in the legislation, or conflicts between provisions. We are not in a position to provide this level of detail ourselves to the Committee. We recommend it seeks advice on these issues.

5.8 In regard to offenders already made subject to orders, another option may assist. In our view, it would both necessary and proper for Parliament to respond to the Supreme Court by making changes which allow persons currently subject to an ESO or a PPO which has detention-like conditions to have their position reviewed so that a more rights-compliant outcome can be created. We do not suggest here that existing orders should be cancelled, but a more rights-compliant temporary solution could be to provide for all persons subject to such orders to have the right to have their order reviewed by the High Court to ensure that "there is no less restrictive alternative that would balance public safety with the respondent's right to liberty and right to freedom from second penalty under s 26(2) of the New Zealand Bill of Rights Act 1990" (or wording to similar effect).

Other interim amendments

5.9 The Law Society also has identified some options for amendments to the prospectively-applicable aspects of PPOs and ESOs, which may assist in ensuring that the limitation on rights can be justified. These are listed below separately for each preventive regime.

5.10 In broad terms, the amendments proposed would re-balance each regime to accommodate aspects of the three pillars identified by the Supreme Court, repeated here for convenience:[38]

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

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

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

5.11 We have adapted the suggestions which follow from our previous submissions, appended, to which we earlier referred.

Proposed amendments to achieve rights-compliance in the PPO Act

5.12 In the PPO Act we recommend:

(a) Amending section 5(b) to read that a PPO "should only be imposed if the magnitude of the risk posed by the respondent justifies the limits that the order

[38] At [27] and [235].

would place on the respondent's right to liberty and right to freedom from second penalty under section 26(2) of the New Zealand Bill of Rights Act 1990".[39]

(b) In section 13(1), including a new paragraph (c) imposing an additional prerequisite to making a PPO that "there is no less restrictive option that would balance public safety with the respondent's right to liberty and right to freedom from second penalty under section 26(2) of the New Zealand Bill of Rights Act 1990".[40]

(c) Amending section 36 to include that a resident is also entitled to receive rehabilitative treatment to address the extent of disturbance in residents' behavioural functioning as described in section 13(2).[41]

5.13 To reinforce the right of residents to have as much autonomy and quality of life as possible, the Law Society recommends the Select Committee consider including in section 27(1) express recognition of rights relating to:[42]

(a) healthy food and clean water;

(b) natural light, warmth and comfortable bedding;

(c) exercise facilities and the ability to go outdoors; and

(d) fresh air.

Proposed amendments to achieve rights compliance in the Parole Act 2002

5.14 In the Parole Act we recommend:

(a) Amending section 107I(2) to include new paragraph (c), imposing an additional prerequisite to making an ESO that "there is no less restrictive alternative that would balance public safety with the respondent's right to liberty and right to freedom from second penalty under section 26(2) of the New Zealand Bill of Rights Act 1990".[43]

(b) Amending section 107K to include the requirements that:

(i) any special conditions (in particular, home detention and intensive monitoring) may be imposed only if the magnitude of the risk posed by the respondent justifies the limits the conditions would place on the respondent's right to liberty and right to freedom from second penalty under section 26(2) of the New Zealand Bill of Rights Act 1990;

(ii) any home detention be limited to a specified time related to the nature of the identified risk posed by the respondent; and

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39 See NZLS PPO submission (2013) at [23]. In light of the Supreme Court's judgment in *Chisnall*, the Law Society considers the exact phrasing of the principle should expressly reference section 26(2) of the Bill of Rights Act, in addition to the general principle of liberty suggested in its 2013 submission.

40 See NZLS PPO Submission (2013) at [30].

41 See NZLS PPO Submission (2013) at [38].

42 See NZLS PPO Submission (2013) at [39].

43 For completeness, this proposed change is going further than the Supreme Court's reasoning would strictly require, as it would apply to all ESOs, not just those that impose detention-like conditions.

(iii) any home detention does not interfere with the respondent's right to rehabilitation.

(c) Amending section 107IAC(2) to refer to the requirement in section 107K that an intensive monitoring condition may be imposed only if the magnitude of the risk posed by the respondent justifies the limits such monitoring would place on the respondent's right to liberty and right to freedom from second penalty under section 26(2) of the New Zealand Bill of Rights Act 1990.

(d) Clarifying (possibly as new subsection (4) in section 107JA) that a person subject to an ESO is entitled to receive any rehabilitative or reintegrative treatment or support recommended under s 107JA(1)(h).

6 Next steps

6.1 We hope this feedback is useful. The guidance the Supreme Court has given, and the Law Commission's analysis, offer rich resources to the Committee and its advisers when deciding on the best way forward in making amendments to the legislation. The Law Society welcomes the opportunity to contribute to this process.

6.2 Please feel free to get in touch with me via the Law Society's Senior Law Reform and Advocacy Advisor, Claire Browning (claire.browning@lawsociety.org.nz), if the Committee has any questions regarding the Law Society's submission, or wishes to hear in person from our human rights and criminal law committee representatives on these matters.

Nāku noa, nā

David Campbell
Vice-President