REDACTED VERSION

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: THIS JUDGMENT HAS BEEN REDACTED TO COMPLY WITH A SUPPRESSION ORDER MADE IN THE DISTRICT COURT

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA213/2023
[2024] NZCA 8

BETWEEN	MATTHEW MADDEN Appellant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing:	4 October 2023
Court:	Katz, Palmer and Jagose JJ
Counsel:	M J McKillop for Appellant J M O'Sullivan for Respondent
Judgment:	15 February 2024 at 2.00 pm

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The application for permanent name suppression is declined.

C The appeal is dismissed.

REASONS OF THE COURT

(Given by Palmer J)

Summary

[1] [Redacted] [I]n 2019, [Mr Matthew Madden committed] a representative offence against [a] child. In 2023, the District Court imposed an extended supervision order (ESO) on him for five years under the Parole Act 2002 (the Act).[1] Mr Madden appeals and seeks to adduce further evidence on appeal. We decline the application to adduce further evidence because it is either not fresh or it is not relevant to whether the District Court erred. We dismiss all of the grounds of appeal and decline the application for permanent name suppression.

What happened?

Mr Madden's offending

[2] [Redacted]:

(a) [Redacted].[2]

(b) [Redacted].[3]

(c) [Redacted].[4]

(d) [Redacted].

(e) [Redacted].

(f) [Redacted].[5]

[3] [Redacted].[6] [Redacted].[7] [Redacted].[8]

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1 *Chief Executive Department of Corrections v Madden* [2023] NZDC 7412 [judgment under appeal].
2 [Redacted].
3 [Redacted].
4 [Redacted].
5 [Redacted].
6 [Redacted].
7 [Redacted].
8 At [27].

[4] In March 2020, Mr Madden pleaded guilty and was convicted of a [redacted] representative offence of doing an indecent act on a [redacted] victim, his nine-year-old neighbour, by playing with the victim's penis in bed in June 2019. Mr Madden was 28 years old by then. On 29 May 2020, on the basis of a psychological report from the Department of Corrections and two reports by Dr Justin Barry-Walsh, in the District Court at Palmerston North, Judge Krebs sentenced Mr Madden to imprisonment for two years and two months.[9] The Judge declined Mr Madden's application for permanent name suppression.[10]

[5] While in prison, Mr Madden was admitted to the Kia Marama Special Treatment Unit for child sex offenders. He withdrew from the programme due to personal circumstances not making group therapy appropriate.

Extended Supervision Order

[6] On 8 June 2021, three months before Mr Madden was released from prison, the Department of Corrections applied for an ESO against him. The application was supported by a report dated 3 May 2021 from a health assessor, Mr Haydn McKendry (the first report). Mr Madden withdrew his consent to any psychological treatment information being used by Mr McKendry. Accordingly, the full reasons for Mr Madden's withdrawal from Kia Marama were not made known to the Judge considering the application for an ESO. However, Mr Madden did tell Mr McKendry he felt traumatised by others' presentations in the Kia Marama group therapy sessions. This was noted in the first report. And, as a result of the withdrawal of consent, and Mr Madden's incomplete engagement in psychological treatment more generally, the first report stated that the information regarding treatment was limited and should be interpreted with caution.

[7] On 7 December 2021, Judge Kellar, in the District Court at Christchurch, transferred the case to Wellington and made an interim supervision order (ISO).[11] On 1 July 2022, Judge J M Kelly, in the District Court at Wellington, vacated the hearing in order for an updated health assessor report to be prepared. Mr McKendry provided

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9 *R v Madden* [2020] NZDC 9807.
10 At [87].
11 *Department of Corrections v Madden* [2021] NZDC 24160.

his addendum report on Mr Madden's progress since the previous report, dated 16 August 2022 (the addendum report). Again, Mr Madden did not consent to Mr McKendry accessing any information pertaining to his treatment at Kia Marama.

[8] On 14 October 2022, the ESO application was heard by Judge Sainsbury in the District Court at Wellington. Mr McKendry gave evidence and was cross-examined. On 23 December 2022, the Judge explained that his decision would be delayed so it could take into account this Court's judgment in *Mosen v Chief Executive of the Department of Corrections*.[12] On 19 April 2023, the Judge granted the application.[13] As explained in more detail below, as is relevant, he held that the statutory criteria for imposing an ESO were met.[14] He imposed an ESO for five years.[15]

Law of extended supervision orders

[9] The Act provides, relevantly:

> **107I Sentencing court may make extended supervision order**
>
> (1) The purpose of an extended supervision order is to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences.
>
> (2) A sentencing court may make an extended supervision order if, following the hearing of an application made under section 107F, the court is satisfied, having considered the matters addressed in the health assessor's report as set out in section 107F(2A), that—
>
> (a) the offender has, or has had, a pervasive pattern of serious sexual or violent offending; and
>
> (b) either or both of the following apply:
>
> (i) there is a high risk that the offender will in future commit a relevant sexual offence:
>
> …
>
> (4) Every extended supervision order must state the term of the order, which may not exceed 10 years.

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12 *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507.
13 Judgment under appeal, above n 1, at [67].
14 Parole Act 2002, s 107IAA; and judgment under appeal at [32], [40], [43], [48], [56], [60] and [61].
15 Judgment under appeal, above n 1, at [67].

(5) The term of the order must be the minimum period required for the purposes of the safety of the community in light of—

(a) the level of risk posed by the offender; and

(b) the seriousness of the harm that might be caused to victims; and

(c) the likely duration of the risk.

…

107IAA Matters court must be satisfied of when assessing risk

(1) A court may determine that there is a high risk that an eligible offender will commit a relevant sexual offence only if it is satisfied that 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) a lack of acceptance of responsibility or remorse for past offending:

(ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.

…

[10] In *Chief Executive, Department of Corrections v Alinizi*, this Court set out the three-step process for determining whether an ESO should be made:[16]

(a) the Court must determine whether the offender has, or has had, a pervasive pattern of serious sexual or violent offending;

(b) the Court must make specific findings as to whether the offender meets the qualifying criteria set out in s 107IAA; and

(c) if those criteria are met the Court must make a determination about the risk of the offender committing a relevant sexual or violent offence.

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16 *Chief Executive, Department of Corrections v Alinizi* [2016] NZCA 468 at [13].

The appeal

[11] Mr Madden appeals the imposition of the ESO and also seeks permanent name suppression. He also applies to adduce fresh evidence on appeal. Corrections opposes the appeal and applications.

[12] Under s 107R of the Act, a decision or order made by the sentencing court may be appealed. Appeals must be to this Court and are treated as appeals against sentence under the Criminal Procedure Act 2011 (CPA), with the necessary modifications. We are therefore required to allow the appeal if we are satisfied that there is an error in the decision and a different order should be made.[17] Under s 251 of the CPA, if we allow the appeal we must set aside or vary the ESO or remit it to the District Court with directions.

[13] Alternatively, an offender may apply to cancel an ESO under s 107M of the Act. Under s 107M(4), the sentencing court may cancel an ESO:

> … only if the applicant satisfies the court, on the basis of the matters set out in section 107IAA, that the offender [does not pose] a high risk of committing a relevant sexual offence … within the remaining term of the order.

Additional evidence

Law of additional evidence on appeal

[14] Section 107H(2) of the Act provides that the court may "receive and take into account any evidence or information that it thinks fit for the purpose of determining the appeal … whether or not it would be admissible in a court of law". Despite the broad powers to admit evidence under that section, this Court undertakes the usual assessment for applications to adduce further evidence and assesses whether the evidence on appeal is fresh, credible, and cogent.[18] If the evidence is credible, but not fresh, then the court must assess the strength of the evidence and its potential impact

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17 *McGuiness v Chief Executive of the Department of Corrections* [2023] NZCA 387 at [17]–[18].

18 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120]. See application of these criteria in the following ESO appeals: *Mosen v Chief Executive of the Department of Corrections*, above n 12, at [4]; *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [7] per Winkelmann CJ, William Young, Glazebrook, O'Regan and Ellen France JJ and at [40] per Winkelmann CJ and O'Regan J; and *Lewis v Chief Executive of the Department of Corrections* [2018] NZCA 99 at [21]–[24].

on the order.[19] The limits on an individual's liberty imposed by an ESO informs the analysis of whether it is in the interests of justice to admit the evidence.[20] We also note that admitting fresh, cogent, credible information in relation to an ESO decision differs from adducing fresh evidence in a sentence appeal in one respect. There is no equivalent in sentencing to s 107M for an ESO, where an offender can apply to have their ESO varied or extinguished if their risk changes over time.[21]

The additional evidence

[15] The additional information Mr Madden wants considered is an affidavit by him which comments on his treatment in prison, his experience of the ISO and ESO, and Mr McKendry's reports, and attaches:

(a) reports by psychologists with the Department of Corrections on his treatment progress in prison, dated 1 April 2021 and 17 November 2022; and

(b) two psychological reports by Mr Craig Prince, a clinical psychologist, dated 28 October 2021 and 10 July 2023.

[16] Mr Prince's first report was not provided to the District Court. Mr Madden says, in his affidavit, that was "because it largely confirmed Haydn McKendry's report". The updated report assesses Mr Madden based on an interview with him on 23 June 2023, on the basis that the primary ground of appeal would be that a shorter ESO term, related more closely to the time required to see treatment gains, would be more appropriate.

Submissions

[17] Mr McKillop, for Mr Madden, submits the evidence is credible and fresh and should be admitted. To the extent the supporting evidence was available before the

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19 *Mark v R* [2019] NZCA 121 at [16].

20 *Mosen v Chief Executive of the Department of Corrections*, above n 12, at [4].

21 See *Te Pania v Chief Executive of the Department of Corrections* [2023] NZCA 161 at [26]; *McLennan v Chief Executive of the Department of Corrections* [2021] NZCA 629 at [29]; and *Taakimoeaka v Chief Executive of the Department of Corrections* [2021] NZCA 467 at [42].

ESO was made, Mr McKillop submits it ought to be admitted to properly contextualise the fresh evidence and because that is in the interests of justice. He offered to make Mr Prince available for cross-examination. Mr McKillop submits the Court ought not set down any general rule precluding determining an ESO appeal on the basis of fresh evidence. The appropriate disposition of a case will always require case by case consideration. Here, he submits there is no need to remit the matter to the District Court for further consideration. He mentioned it would take much longer to get a hearing in the District Court compared than in the Court of Appeal.

[18] Ms O'Sullivan, for Corrections, acknowledges that Mr Madden can point to evidence of a reduction of his risk since the proceeding commenced. But she submits the fresh evidence could not have been before the District Court, so it does not give rise to an error. A challenge to the ESO on the basis of Mr Madden's current risk profile or circumstances should be pursued in the District Court in accordance with s 107M of the Act. If this Court is minded to allow the appeal on the basis of fresh evidence, the matter should be remitted back to the District Court for reconsideration.

Should the additional evidence be admitted?

[19] Under s 250 of the Criminal Procedure Act, we must allow the appeal of the ESO if there was an error by the District Court and a different sentence should be imposed. The first report by Mr Prince was available to Mr Madden but largely confirmed the other evidence. It could have been made available before the ESO was made but it was not helpful to his case so it was not provided. Mr Madden's evidence about his experience in prison, and the reports of the Corrections psychologists, could also have been made available before the ESO was made. Although this evidence is credible, it is not fresh or cogent and we do not admit it.

[20] The updated report by Mr Prince concerns changes in Mr Madden's psychological condition and circumstances since the ESO decision. The appeal tests the ESO decision under appeal. It cannot be an error by the District Court to fail to have regard to information or evidence that was not, and could not be, before it. Accordingly, the fresh evidence about Mr Madden's current condition and

circumstances is not relevant to whether there was an error in the District Court's decision.

[21] If Mr Madden wishes to challenge the continued applicability of the ESO on the basis of fresh information, he can make an application under s 107M. The fresh evidence could be properly tested there, the Crown would have the opportunity to apply to adduce fresh evidence as well and appeal rights would be preserved. Otherwise, as Ms O'Sullivan submits, this Court effectively becomes a first instance court, which cannot have been the intention of Parliament in enacting the appeal provisions.

[22] There is one aspect of Mr Madden's affidavit and Mr Prince's updated report that Mr McKillop submits addresses a point that existed before the ESO was made. Mr Madden explains in more detail the reasons why he withdrew from Kia Marama. Mr McKillop submits that shows that the District Court was wrong to conclude that Mr Madden is disengaged from treatment, a conclusion which coloured its whole assessment. The evidence is not fresh, as it could have been made available to Mr McKendry or the Court by Mr Madden before the ESO was imposed. The only reason that this information was not before the District Court was because Mr Madden decided not to allow it.

[23] This evidence is credible and it explains an aspect of the evidence before the District Court. Similarly to the fresh evidence adduced in *Mosen*, the information provided is consistent with what was considered in the District Court but provides additional commentary. If this was cogent enough to make a difference to the level of risk posed by Mr Madden, we would have admitted the evidence.[22]

[24] But we do not consider the proposed information does make a difference. The first report in support of the ESO application outlined Mr Madden's relevant past trauma, explicitly stated that treatment information should be interpreted with caution due to the lack of information, and noted that Mr Madden withdrew from Kia Marama because of being traumatised in group sessions. Mr Madden's evidence and Mr Prince's updated report contextualises and ties together the information that was

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22 See *D (SC 31/2019) v Police, above n 18,* at [307] per William Young J.

in the first health assessor's report. It explains more about the reasons why Mr Madden withdrew from Kia Marama. But it does not alter the central point that Mr Madden did withdraw and did not engage with treatment. That was the key point relating to his risk at the time the ESO was made. Accordingly, the information is not cogent. And it does not affect our consideration of the question on appeal of whether the Judge erred in making the ESO.[23] We decline to admit the evidence for the purposes of appeal of the ESO. It may well be relevant to an application under s 107M.

Issue 1: Term

Law

[25] As quoted above, s 107I(5) of the Act requires the term of an ESO to be "the minimum period required for the purposes of the safety of the community" in light of the level of risk posed, the seriousness of the harm that might be caused and the likely duration of the risk. It involves an exercise of broad discretion, so the scope for appellate review requires a "light-handed" approach.[24] However, in *Moeke v Chief Executive of the Department of Corrections*, this Court noted that the statutory provisions for modification or variation of ESOs do not justify transgression of the requirement that the term be for the minimum period required for community safety purposes.[25] The court is to fix the period in light of the statutory criteria.[26] The Court also suggested that Corrections should ensure that psychological reports address the minimum term sought.[27]

Evidence

[26] In his addendum report, Mr McKendry stated:

> 19 … For now, Mr Madden's ability to understand, internalise, and effectively implement treatment-related material and skills, in the longer term and across settings, appears limited. Meaningful transformation for Mr Madden will take considerable time and will likely need to be supported by professional oversight.

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23 At [308] per William Young J, and see [262] per Glazebrook J.
24 *McLennan*, above n 21, at [29], citing *Poutawa v Chief Executive of the Department of Corrections* [2007] NZCA 206 at [10] and [14].
25 *Moeke v Chief Executive of the Department of Corrections* [2010] NZCA 60 at [25].
26 At [25].
27 At [28]–[29(a)].

…

> 29 The risk measures utilised during the current health assessment provide data, as described above, in relation to re-offending [redacted] The assessor notes that Mr Madden's deviant sexual interests and sexual compulsivity[redacted]. Additionally, the well-established maturational effects associated with a reduction of recidivism are not yet considered relevant in Mr Madden's case, based on his current age. He is yet to complete offence-focused treatment of the appropriate dosage and intensity. Relatedly, to date, Mr Madden has not demonstrated an ability to integrate offence replacement behaviour into his lifestyle, which would otherwise indicate his risk could be considered internally, as opposed to externally, managed. Without a strong support network, Mr Madden's interpersonal functioning, as marked by a longstanding pattern of avoidance, may negatively impact on his ability to maintain a desistance pathway.
>
> 30 Taken together, Mr Madden's risk is likely to endure (remain stable and unchanged) over the medium term.

District Court decision

[27] The Judge stated:

> [66] The applicant seeks a five-year term. This must be assessed in terms of community safety. Mindful of the balance required between the imposition of a second penalty and protection of the community I accept that a five-year term [is] appropriate. In the event [that] Mr Madden engages so as to affect a change in his behaviour it is open for this order to be varied or discharged within the five-year period by this Court.

Submissions

[28] Mr McKillop submits the primary focus of the appeal is on the length of the ESO and the lack of any relationship to treatment prospects, which is the clearest error. An ESO limits rights under s 26(2) of the New Zealand Bill of Rights Act 1990 by imposing a second penalty. A term beyond that necessary to meet the purposes of the Act will be unjustified and not available in law. It is not open to Corrections to fail to offer or deliver appropriate treatment during imprisonment and then seek an ESO during which treatment is not delivered promptly or in appropriate volume. The Judge failed to take into account the long delay between the lodging of the ESO application and its determination, so the effective term was about six and a half years. Taking into account the need for planning and support to transition to life without an ESO, the maximum length of an ESO that can be justified is 18 months. It is wrong to have regard to the ability to discharge an ESO in making an order that is longer than necessary.

[29] Ms O'Sullivan accepts Mr McKendry's reports did not specifically address the recommended term of the ESO. But she submits the five-year term was open to the Court on the totality of the evidence before the Judge. The length of time over which the offending occurred is also relevant, as related to the risk to and protection of the community. So is the available treatment, as one factor, but the evidence before the Judge suggests there were reasonably poor prospects of an ability by Mr Madden to rehabilitate. The Judge did not err in setting the term of five years.

Was the term too long?

[30] It is obviously much more desirable for expert evidence supporting an ESO to discuss a proposed term explicitly, as this Court suggested in *Moeke*.[28] However, Mr McKendry's evidence was that Mr Madden's deviant sexual interests and sexual compulsivity persisted from his adolescence into adulthood and concluded his risk was likely to endure, stable and unchanged, over the medium term. He considered meaningful transformation "will take considerable time".

[31] Given the length of time that could reasonably be expected for Mr Madden to start treatment and for it to sufficiently mitigate the risk of further offending, we consider the Judge was justified in considering a five-year term appropriate. He explicitly assessed it in terms of community safety, as required. Treatment prospects can be relevant because of its effects on community safety, but the Judge was not required to separately trace those effects. The information before him, to which he referred, did that. In addition, this Court has held there is no requirement to reduce the term of an ESO by the time spent subject to an ISO and that a sentencing court is entitled to take comfort from the potential application of s 107M when setting a long ESO.[29] We dismiss this ground of appeal.

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[28] *Moeke*, above n 25, at [28]–[29(a)].

[29] *Bannan v Chief Executive of the Department of Corrections* [2023] NZCA 227 at [46]; and *Woodhouse v Chief Executive of the Department of Corrections* [2011] NZCA 333 at [33].

Issue 2: Intense drive

Law

[32] Section 107IAA(1)(a) requires that, for an ESO to be made, the court must be satisfied that the offender "displays an intense drive, desire, or urge to commit a relevant sexual offence". The intense drive must be "currently possessed", though it need not be externally manifested, at the time of the decision.[30] A court is likely to be satisfied the requirement is met when "there is nothing to suggest that such a trait formerly present no longer subsists".[31]

Evidence

[33] Mr McKendry's addendum report stated:

> 32 Mr Madden's progress in the community over the last year may appear to be evidence against an intense drive, desire, or urge to commit a relevant sexual offence. However, it is the assessor's opinion that it is likely that the conditions of his parole and his engagement with his professional supports have scaffolded his ability to manage his long-term patterns of desire, drive and urges in this regard, and likely limited his exposure to high-risk situations for sexual offending. As such, and upon careful consideration, there is no change to the opinions of the assessor noted in the initial health assessment (H McKendry, 3 May 2021):
>
> *Mr Madden's sexual offending has occurred [redacted] … with varying levels of intrusiveness [Redacted] … Mr Madden has established a lifestyle that facilitates contact with children, and thereafter actively placed himself in situations where contact with potential victims was likely. He acknowledged that the risk of detention by others, the [victim's] expressions of distress, or the [victim's] efforts to avoid the abuse did not deter his sexual offending. Despite awareness of the illegality of his actions, Mr [Madden sexually offended], and he attempted to avoid detection through emotional manipulation of his [victim]. Similarly, Mr Madden's [redacted] … engagement in individual psychological treatment [redacted] … did not act to deter his further offending. While he demonstrated a [redacted] period without detected sexual offending, it appears that, during that time Mr Madden's engagement in casual sexual encounters increased. Some of these encounters have involved risky sexual behaviour that may have led to Mr Madden's physical and emotional harm. He reported a significantly reduced sexual drive since his imprisonment, although this is considered a likely function of the highly structured and controlled environment in which he lives. In summary, it is the assessor's opinion that Mr Madden has demonstrated an intense drive, desire or urge to sexually offend.*

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30 *Alinizi*, above n 16, at [26].
31 At [36].

[34] He also stated:

> 14 In summary, it appears that Mr Madden has maintained overt compliance with his high level of professional oversight and monitoring since September 2021; and it is promising that no further involvement in offending behaviour has been detected. However, all sources of information available to this assessor indicate that Mr Madden's current lifestyle is not dissimilar to his functioning at the time of his sexual offending, and he has verbalised his contempt for the ESO and current restrictions. … Taken together, the true extent of Mr Madden's ability to manage in less-restrictive environments and with reduced oversight remains unknown, particularly as, in this assessor's opinion, he has not used his period of probation to practice relevant skills and strategies in various contexts or discussed these in any depth with professional supports.

District Court decision

[35] The Judge accepted Mr McKendry's opinion on this topic, stating that Mr Madden's "past behaviour informs the present" and the lack of further offending is best explained by the level of supervision over Mr Madden.[32] The Judge concluded, in the absence of meaningful engagement in treatment, Mr Madden's clear pre-existing characteristics and traits continued to be present.

Submissions

[36] Mr McKillop submits the true position demonstrated by the evidence is that Mr Madden has had considerable periods of low oversight since his release from prison. It is not that he has rejected treatment but that he has not yet been offered appropriate treatment. Group-based offending-focused treatment was always inappropriate for Mr Madden. He has made many attempts to seek appropriate treatment and has high motivation. He has been exposed to high-risk situations and has had the opportunity to offend but has not. Accordingly, he lacks an "intense drive" as required.

Was an intense drive displayed?

[37] Mr McKendry's opinion in his first report was that Mr Madden had demonstrated an intense drive, desire or urge to sexually offend for well-explained reasons. In his second report, "upon careful consideration", there was no change to

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[32] Judgment under appeal, above n 1, at [40].

his opinion. Motivation to seek treatment does not mean that an intense drive is lacking if treatment has not yet been obtained or is not yet successful. The Judge was entitled to accept that opinion and to conclude that this statutory criterion was satisfied. We dismiss this ground of appeal.

Issue 3: Self-regulatory capacity

[38] Section 107IAA(1)(c) requires that, for an ESO to be made, the Court must be satisfied that the offender "has limited self-regulatory capacity".

Evidence

[39] In his addendum report, Mr McKendry stated:

> 36 The current assessment found that the remainder of Mr Madden's imprisonment, following the initial health assessment, was marked by his poor self-regulation … . Since his release in September 2021, concerns regarding Mr Madden's manipulation of staff overseeing his care, seemingly limited insight into his sexual self-regulation difficulties, and his lacking consideration of appropriate employment endeavours also suggest ongoing difficulties with self-regulation. On balance, there remain promising and recent changes, particularly with respect to Mr Madden's self-reported ability to avoid substance use, his engagement in brief safety planning, and general compliance with sentence conditions. This progress should again be considered in the context of the significant professional oversight currently in place and Mr Madden's longer-term difficulties managing his behaviour as noted in the initial health assessment:
>
> *Indication of Mr Madden's poor self-regulatory capacity is evident across his youth, particularly through several convictions for general offending, substance abuse, and involvement in risky sexual behaviour. Mr Madden also acknowledged previous difficulty managing his high sexual drive and engagement in frequent sexual behaviour. While clear long-term planning and grooming behaviour is evident in his index … offending, Mr Madden's behaviour indicated that he prioritised immediate gratification without giving due consideration to the medium and longer-term consequences of his behaviour for himself and others. It also appears that Mr Madden may have self-exited from his treatment programme without a more comprehensive consideration of the consequences. He continues to threaten self-harm in prison, in what appears to be, in part, an attempt to manipulate his circumstances in that environment. At the time of writing, Mr Madden has limited appropriate personal supports that might provide external guidance, to assist him to regulate his emotional state and behaviour appropriately and the assessor remains uncertain as to Mr Madden's desire to meaningfully engage with those supports. However, he currently expresses motivation to manage his sexual behaviour appropriately and to date he has not demonstrated concerning sexual behaviour in the prison environment. This behaviour is recent and confined to a highly structured and monitored setting;*

> *but it nevertheless suggests that, if well supported, directed, and subject to external controls, Mr Madden can manage himself appropriately and effectively. Ultimately, however, the weight of evidence available to this assessor suggested Mr Madden has impaired self-regulatory capacity.*

District Court

[40] The Judge stated:[33]

> [48] I find that Mr Madden does have limited self-regulatory capacity. That does not mean that his behaviour cannot be regulated when in a structured environment with professional oversight. But being able to act appropriately when subject to controls is not the same as having self-regulatory capacity. While I do not disregard Mr Madden's assertions regarding his reduction or lack of deviant thoughts or the management of his sexual behaviour, I do not place great weight on his self-reporting in the light of other information and evidence contrary to that self-report.

Submissions

[41] Mr McKillop acknowledges that Mr McKendry's reports agree that Mr Madden's past behaviour suggested a lack of self-regulatory capacity. But Mr Madden says he does not currently lack self-regulatory capacity such that an offending risk results. Progress has been made. Mr Madden has not prioritised immediate gratification, has not entered a long-term relationship he recognised could be negative for him, and appeared to be thinking about his future. There are no current concerns about substance use.

Was limited self-regulatory capacity displayed?

[42] Mr McKillop's submissions essentially rest on Mr Madden's self-reporting. The Judge did not place much weight on that. He was entitled not to do so. The evidence before him provided a reasonable foundation for the finding that Mr Madden had limited self-regulatory capacity. We dismiss this ground of appeal.

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[33] Judgment under appeal, above n 1.

Issue 4: Remorse and Understanding

Law

[43] Section 107IAA(1)(d) requires that, for an ESO to be made, the court must be satisfied that the offender:

> (d) displays either or both of the following:
>
> (i) a lack of acceptance of responsibility or remorse for past offending:
>
> (ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.

[44] The focus of the inquiry is on whether the "acceptance of responsibility, remorse, understanding, or concern are material in the given case" and are present to such a degree that they act to mitigate the relevant risk.[34]

Evidence

[45] In his addendum report, Mr McKendry stated:

> 38 During the current assessment, Mr Madden reiterated his acceptance of responsibility for his behaviour, and the remorse he felt about his offending, particularly in considering the long-term impact on his [victim]. He continues to express a desire for offence-focused treatment and appears to have made reasonable efforts to engage in such endeavours, albeit unsuccessfully to date. On balance, since his release Mr Madden has continued to express strong disagreement with his sentence conditions and demonstrated reluctance to discuss his offending behaviour or other risk-related matters with his probation officer. This suggests that Mr Madden is yet to engage in appropriate behaviour change that would demonstrate genuine responsibility-taking and remorse. As such, the evidence offered in the initial health assessment remains relevant:
>
> *Verbal responses from Mr Madden indicate an acceptance of responsibility and remorse for his sexual offending behaviour. He made acknowledgement of the probable harm his behaviour has caused to direct and indirect victims as well as the impact his offending has had on his own life. Despite his recent withdrawal from treatment, Mr Madden has expressed a desire to re-engage with offence-focused intervention, to prevent his further victimisation of others. Somewhat balancing these observations, Mr Madden's withdrawal from group treatment may also indicate that his verbal expressions of responsibility are yet to translate to reliable behavioural change. With respect to remorse more specifically, Mr Madden appeared guarded during the current assessment, and was noted to provide vague information, suggestive*

[34] *McIntosh v Chief Executive of the Department of Corrections* [2021] NZCA 218 at [23].

of his attempts at portraying a positive image. Additionally, his limited emotional reactivity during the current health assessment was inconsistent with his assertions of remorse. [redacted]. Taken together, it is this assessor's opinion that, when settled Mr Madden appears able to reflect on his behaviour and express responsibility for his sexual offending. There is less clarity regarding the presence of Mr Madden's genuine remorse for his actions, although this may be accounted for by his difficulties with emotional tolerance and expression more generally.

…

40 Promisingly, Mr Madden continued to demonstrate a considered perspective of the possible impacts of his sexual offending on his [victim], including that those impacts could be life-long. He reported having researched potential impacts of sexually abusive behaviour specifically, to improve his understanding. Despite this, Mr Madden has continued to demonstrate periods of limited consideration for the impacts of his behaviour, such as suggesting employment that is likely to place him in contact with those under the age of 16 or avoiding risk-related discussions with his professional supports. Taken together, this assessor maintains the opinion presented in the initial health assessment:

Mr Madden appeared to have considered, in some depth, the impact his sexually offensive behaviours likely had on his [victim], the [victim's family], and the wider community. He demonstrated empathy for the [victim], particularly by drawing on his own early experiences of sexual abuse; and appeared able to appreciate the biological, psychological, and social implications of sexual abuse more generally. During the current assessment, Mr Madden was aware of the offence-permissive thinking patterns that contributed to his behaviour, although did not demonstrate over-reliance on these to explain his actions to the assessor. On balance, Mr Madden has evidently prioritised his own sexual gratification over his consideration of the probable impacts of his behaviour, on multiple occasions and despite … sanction and defence-related treatment. Taken together, it is this assessor's view that Mr Madden's understanding for and concern about impact on [the victim] is recent but nevertheless present. However, it remains unclear if these expressions of concern and intellectual awareness about the harm sexual offending causes will meaningfully reduce Mr Madden's risk of future sexual offending, particularly if in the presence of additional risk factors and given he is likely to prioritise his own sexual gratification over the needs of others.

District Court decision

[46] The Judge stated:[35]

[56] In all the circumstances I consider Dr McKendry is right to be sceptical about Mr Madden's statements of remorse and accepting responsibility. Put in trite terms, actions matter more than words. If there had been meaningful engagement with programmes that can achieve appropriate behaviour change, then that may have given credibility to expressions of remorse and of taking responsibility. In the absence of substantive

[35] Judgment under appeal, above n 1 (footnote omitted).

> engagement, I am satisfied that Mr Madden still exhibits a genuine lack of acceptance of responsibility or remorse for past offending.
>
> …
>
> [59] The opinion of Dr McKendry in the two reports is something of a double-edged sword for Mr Madden. Concentrating specifically on the test under s 107IAA(1)(ii) of the Act, it supports Mr Madden having some understanding of the impact of his sexual offending on the [victim]. On the face of it, that level of understanding appears to be significant. Against that, Dr McKendry expresses concern as to whether that level of understanding is of such a nature to mitigate risk. In other words, he expresses doubt that the understanding would prevent Mr Madden prioritising his own sexual gratification.
>
> [60] As the Court of Appeal noted in *McIntosh v Corrections* the issue is whether this understanding exists to a sufficient degree to mitigate risk. I find this factor to be finely balanced. On one hand, Dr McKendry considers Mr Madden has genuine understanding that has been maintained between the original assessment and the update. On the other hand, Dr McKendry expresses doubt as to whether this understanding would in fact mitigate risk. Similarly, there is a fine balance between the protective purpose of this legislation and the fact that it is in breach of [the Bill of Rights] and that strong justification is needed before an ESO is imposed. Given my finding as to the previous criterion it is not strictly necessary for me to determine this issue. That said, I consider that the protective purpose of the Act and the concerns that the level of understanding would not be sufficient to protect against the risk of further offending means I am satisfied that this criterion is made out.

Submissions

[47] Acknowledging the divergence of expert views, Mr McKillop submits that the better view is that Mr Madden does exhibit acceptance of responsibility and remorse for past offending. It is not legitimate to equate opposition to ESO conditions with a lack of remorse or to speculate as to the reasons for Mr Madden's exit from Kia Marama, as Mr McKendry does. Mr McKendry's evidence on understanding for, or concern about, victims was equivocal.

Was there remorse and understanding?

[48] Mr McKendry's first and addendum reports both considered the conflicting indications about whether Mr Madden accepted responsibility and felt remorse for his offending. Mr McKendry's opinion was that Mr Madden had understanding for and concern about the impact of offending on victims. But he considered it was unclear if that would meaningfully reduce Mr Madden's risk of future offending. This was an adequate evidential foundation for the Judge's conclusion that Mr McKendry was right

to be sceptical. That included Mr Madden's lack of engagement with his probation officer regarding his offending related behaviour and risk factors, the attitudes he displayed during his assessment, and Mr McKendry's doubts that Mr Madden's understanding of the effects of his offending on victims would meaningfully reduce Mr Madden's risk of future sexual offending. The Judge considered the matter carefully, grounding his decision on this Court's linking of the effect of these factors on the mitigation of risk to a sufficient degree. He did not err. We dismiss this ground of appeal.

Issue 5: Discretion

Law

[49] Section 107I provides the court with a discretion to make an ESO if the statutory requirements are fulfilled. In *Mosen v Chief Executive of the Department of Corrections*, this Court held:[36]

> [31] … [I]f the statutory criteria are met, a court must balance the right not to be subject to a second penalty (that is, being subject to an ESO when a person has served his sentence for a [sexual] offence) against the statutory purpose to protect the public from the very high risk that an offender will commit a relevant [sexual] offence. Put more simply in *R (CA586/2021) v R*, and as adopted in *Wilson v Department of Corrections*, "strong justification" is required for an ESO and this is the "lens" through which this Court must assess whether the Judge erred in making the order.

District Court decision

[50] The Judge held:[37]

> [65] Given the high level of harm that any future serious sexual offending would cause, were it to follow a similar pattern to what has already happened, I consider there is a strong justification for an ESO. Further, I consider it is proportionate in terms of reducing the risk of future offending. I conclude that the ESO should be imposed.

Submission

[51] Mr McKillop submits an ESO is not justifiable merely to manage a treatable untreated risk in circumstances where an offender accepts his offending and has the

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36 *Mosen*, above n 12 (footnote omitted).
37 Judgment under appeal, above n 1.

capacity to reduce his risk of reoffending through treatment. The length of time Mr Madden has already spent subject to an ESO but untreated means that the ESO is more akin to a third penalty than a second. The discretion to decline an ESO ought to be exercised in Mr Madden's favour.

Should the ESO have been declined as a matter of discretion?

[52] ESOs are regarded as imposing a penalty — a second punishment unjustifiably inconsistent with the Bill of Rights.[38] Accordingly, as noted above, this Court has held that "strong justification" is required to make an ESO.[39] The imposition of an ESO directly interferes with the rights and freedoms of the person subject to the ESO. The Judge found that justification here in the high level of harm of any future serious sexual offending by Mr Madden, based on his past pattern of behaviour and risk factors. He did not err in doing so. While it is clearly desirable for a treatable risk to be treated, a court cannot ignore the existence of an untreated risk.

Issue 6: Name suppression

[53] Mr Madden seeks anonymisation and name suppression under s 200(2)(a) of the Criminal Procedure Act 2011. The threshold for permanent name suppression is not met. As with Mr Madden's previous application in the District Court at his sentencing, there is no evidence he would suffer extreme hardship if his name were known. If there were, it would likely have manifested since 2019. Mr Madden's request is motivated primarily by the nature of the information contained in his affidavit and referred to in the psychological reports. We have dealt with that in the way in which we have worded the judgment, so as not to disclose the precise nature of that information. We also offered Mr Madden the opportunity to comment on that aspect of the judgment, only, prior to its publication.

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[38] *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 [*Chisnall* (substantive judgment)] at [138]; and *Chisnall v Attorney-General* [2022] NZCA 24, (2022) 13 HRNZ 107 [*Chisnall* (declarations judgment] at [3(a)].

[39] *Chisnall* (substantive judgment), above n 38, at [190]. See also *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225 at [53], citing *Chisnall* (substantive judgment) at [190]; and *Wilson v Chief Executive of the Department of Corrections* [2022] NZCA 289 at [47].

Result

[54] The application to adduce further evidence is declined.

[55] The application for permanent name suppression is declined.

[56] The appeal is dismissed.