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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA591/2022
[2023] NZCA 286

BETWEEN	FABIAN WHATI MOORE Appellant
AND	THE KING Respondent

Hearing: 2 May 2023

Court: Gilbert, Thomas and Woolford JJ

Counsel: S J Gray for Appellant
C P Paterson and L Dittrich for Respondent

Judgment: 10 July 2023 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of preventive detention is quashed and replaced by a sentence of 26 months' imprisonment.

REASONS OF THE COURT

(Given by Thomas J)

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Introduction

[1] In May 2022, Fabian Moore was found guilty by a jury in the District Court of one charge of doing an indecent act on a girl under 12.[1] The District Court declined jurisdiction and transferred Mr Moore to the High Court for sentence as the District Court had reason to believe a sentence of preventive detention might be appropriate.[2] The High Court Judge considered that, under ordinary principles, a sentence of 26 months' imprisonment would have been justified but, in the circumstances of Mr Moore's prior sexual offending, a determinate sentence was insufficient to protect the community from the risk Mr Moore would reoffend upon release. Mr Moore was sentenced to preventive detention with a minimum period of imprisonment (MPI) of five years.[3]

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1 Crimes Act 1961, s 132(3).
2 Sentencing Act 2002, s 90.
3 *R v Moore* [2022] NZHC 2635 [High Court judgment].

[2] Mr Moore now appeals the sentence on the basis the Judge erred in concluding that he posed a significant and ongoing risk to the community.

Background

Criminal history

[3] Prior to the most recent offending, Mr Moore had been convicted on 10 occasions for sexual offences committed between 1990 and 2005.

[4] In 1990, Mr Moore was living at the same address as a seven-year-old girl. One evening when she was asleep in her bedroom he came in, fondled her vagina and penetrated her vagina with his fingers. This occurred again a short time later. It appears Mr Moore had been drinking alcohol on both occasions.

[5] In 1995, Mr Moore was at a social gathering at a neighbour's property and was drinking alcohol. The two complainants aged four and six were asleep in their beds. Mr Moore entered the bedroom and fondled the vagina of the first complainant and penetrated her labia to a small degree with his fingers. He did the same thing to the second victim and then laid on top of her fully clothed and simulated having sex with her.

[6] In 1996, Mr Moore was sentenced to two years' imprisonment on four charges of doing an indecent act on a girl under 12 in respect of the above offending.

[7] Mr Moore was convicted of rape and four charges of sexual violation by unlawful sexual connection resulting from a single incident in 2000 involving his then partner, resulting in a sentence of seven years' imprisonment.

[8] In 2005, Mr Moore was on the street where the four-year-old complainant lived. Earlier that night, he had been drinking alcohol and smoking methamphetamine and cannabis. The complainant's family was having a party and Mr Moore talked with the complainant's mother on the street. She left him outside her house and went to bed. Mr Moore went into the house in the early hours, woke up the complainant telling

her not to say anything and rubbed her pubic area over clothing. He was sentenced to a term of three years four months' imprisonment.

[9] Mr Moore was made subject to the maximum 10-year extended supervision order (ESO) effective from August 2010. We discuss ESOs in more detail later in this judgment but, in general terms, Mr Moore's ESO required him to be electronically monitored by wearing a tracking bracelet, to reside and be present at an approved address between the hours of midnight and 6.00 am, not to possess or consume illicit drugs or alcohol, and not to enter any schools or parks or have unapproved contact with anyone under the age of 16.

[10] Between 2012 and 2020, Mr Moore was convicted of 26 breaches of his ESO conditions. Sentences ranged from conviction and discharge to short sentences of imprisonment.

Present offending (the index offending)

[11] Approximately four weeks prior to the index offending on 9 September 2020, Mr Moore removed his electronic tracking bracelet. He began using alcohol, cannabis and methamphetamine on a daily basis. After meeting the mother of the victim, who was a 16-month-old girl, through an associate, Mr Moore rented a bedroom at her address.

[12] One evening, the victim was at home with her mother, two older siblings and Mr Moore. At the end of the evening, the victim was asleep on the sofa. Her mother covered her in a blanket and went to bed. Everyone else left the room and went to their own beds.

[13] At around 3.00 am the following morning, the victim's mother woke Mr Moore to say she had to leave the house to deal with a family emergency and asked him to listen out for the children. She returned at around 5.00 am and found Mr Moore lying on the sofa with his trousers and underpants down around his ankles, naked from the waist down. Mr Moore was cuddling the clothed sleeping victim who was nestled between his groin/chest and the back of the sofa.

[14] At trial, Mr Moore claimed he was using the bathroom when he heard the complainant crying and coming down the hallway. He picked her up and took her to the living room. He claimed he could not hold the complainant as well as pull up his trousers. He explained that he tried to soothe the victim and lay down on the couch with her (with his trousers and underwear down and genitals exposed), massaging her chest until they both fell asleep.[4]

High Court decision

[15] The main issue before Jagose J was whether Mr Moore posed a significant ongoing risk to the community and should be sentenced to preventive detention. There was no dispute that Mr Moore met the pre-conditions for consideration of preventive detention, as he was over 18 years of age at the time he committed the qualifying sexual offence.[5] The Judge noted that, when Mr Moore was last sentenced on a charge of doing an indecent act on a child in 2006 (after a 10-year gap in such offending), the High Court judge warned, "if you re-offend in the same way on your release, you are then likely to face a sentence of preventive detention".[6]

[16] In identifying what determinate sentence would be appropriate, the Judge assessed the offending as low to moderate in the scheme of qualifying sexual offending. He uplifted the starting point of 18 to 24 months' imprisonment to mark the significant breach of trust in respect of a vulnerable infant, aggravated by Mr Moore's recidivist behaviour and deliberate avoidance of ESO protections.[7] The additional three to six months' uplift led to a starting point of 21 to 30 months' imprisonment. There were no personal mitigating features.[8] The Judge settled on a sentence of 26 months' imprisonment. The duration of his pre-sentence detention meant Mr Moore was eligible for release almost immediately.[9]

[17] The Judge had considered a pre-sentence report prepared by the Department of Corrections and reports from two health assessors, required pursuant to the Sentencing

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4 ESR examined the victim's onesie and the blanket covering her. No semen was found.
5 Sentencing Act 2002, s 87(2).
6 *R v Moore,* HC Hamilton, CRI-2006-019-1786, 9 May 2006 at [43].
7 High Court judgment, above n 3, at [19].
8 At [20].
9 At [21].

Act 2002 when considering preventive detention. The pre-sentence report recorded 22 convicted breaches of the ESO (there were in fact 26) and assessed Mr Moore as having a high likelihood of reoffending. The two health assessors' reports noted that Mr Moore had a high risk of sexual recidivism, particularly against young female children. They also observed that Mr Moore appeared to have poor self-regulation and continued to place himself in high-risk situations and recommended that he receive further treatment.

[18] The Judge considered whether, given Mr Moore's high risk of reoffending, protection of the community might justify a discrete uplift. However, he decided the community would be adequately protected by Mr Moore spending further time in determinate custody only if it offered a realistic prospect of Mr Moore's reform before release. Given the continuation of Mr Moore's sexual offending against children despite intensive rehabilitation and extended supervision, the Judge could see no such prospect and saw custodial time alone as an obviously inadequate incentive.[10]

[19] In the Judge's view, this case qualified as "exceptional" indecency offending, characterised by "persistent, knowing behaviour, despite firm warnings … accompanied by the necessary cumulative serious harm".[11] None of the other factors which might count against preventive detention — such as a lack of warning, or untried custody, rehabilitation, or supervision — were present in Mr Moore's case.

[20] The Judge was satisfied Mr Moore was likely to reoffend if released on expiry of a determinate sentence. Mr Moore's pattern of offending involved misusing adult relationships to obtain intimate access to vulnerable children. The seriousness of that harm to children, entitled to look to adults for nurture and protection, was incalculable. All the reports (including psychological reports) affirmed Mr Moore's tendency to commit similar offending in the future. Intensive rehabilitative measures had not been effective and Mr Moore deliberately avoided ESO strictures.[12]

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10 At [23].
11 At [23] citing *R v Parahi* [2005] 3 NZLR 356 (CA) at [86].
12 At [24].

[21] Stepping back to observe Mr Moore's 30 years of sexual offending, including six convictions for offending against five different children, and "the inutility" of the ESO for "practically the whole period of its 10-year operation", the Judge was certain that only the incentive of release on demonstrable reform would be sufficient to afford the community protection. A sentence of preventive detention was imposed.[13]

[22] The Judge noted he was required to impose a minimum period of imprisonment of at least five years. He did not consider that Mr Moore's age (49 years) reduced his risk. The unserved balance of a five-year minimum sentence would enable Mr Moore's return to a special treatment unit for child sexual offenders or other appropriate treatment.[14]

Preventive detention and extended supervision orders

Preventive detention

[23] Preventive detention is an indeterminate sentence of imprisonment.[15] It is governed by s 87 of the Sentencing Act. The purpose of preventive detention is to protect the community from those who pose a significant and ongoing risk to the safety of its members.[16] If a court sentences an offender to preventive detention, it must also order that the offender serve a minimum period of imprisonment which cannot be less than five years.[17]

[24] A sentence of preventive detention may only be imposed if a defendant, who was aged 18 or over at the time of offending, has been convicted of a qualifying sexual or violent offence.[18] The court must be satisfied that the defendant is likely to commit another qualifying sexual or violent offence if released at the expiry date of any sentence other than a sentence of preventive detention.[19]

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13 At [25].
14 At [26].
15 Sentencing Act 2002, s 4(1) indeterminate sentence of imprisonment.
16 Section 87(1).
17 Section 89.
18 Section 87(2).
19 Section 87(2)(c).

[25] When considering whether such a likelihood exists, s 87(4) provides that the court must take into account:

> (a) any pattern of serious offending disclosed by the offender's history; and
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> (b) the seriousness of the harm to the community caused by the offending; and
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> (c) information indicating a tendency to commit serious offences in future; and
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> (d) the absence of, or failure of, efforts by the offender to address the cause or causes of the offending; and
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> (e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.

Extended supervision orders

[26] ESOs are imposed under the Parole Act 2002 and have the purpose of protecting 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.[20] The Chief Executive of the Department of Corrections (the Chief Executive) may apply to the court for an ESO before the release of the offender or before the expiry of an existing ESO.[21] While consideration of preventive detention requires reports from two health assessors,[22] an application for an ESO requires only one report which must address factors relating to the risk of reoffending.[23] Section 107IAA sets out the matters on which the Court must be satisfied when assessing such risk as follows:

> **107IAA Matters court must be satisfied of when assessing risk**
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> (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—
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> (a) displays an intense drive, desire, or urge to commit a relevant sexual offence; and
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> (b) has a predilection or proclivity for serious sexual offending; and

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20 Parole Act 2002, s 107I.
21 Section 107F.
22 Sentencing Act, s 88(1)(b).
23 Parole Act, s 107F(2).

(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.

…

[27] The term of an ESO cannot exceed 10 years and must be the minimum period required for the purposes of the safety of the community in light of the level of risk posed by the offender, the seriousness of the harm that might be caused to victims, and the likely duration of risk.[24] ESOs are subject to standard conditions and any special conditions which might be imposed.[25] Standard conditions include an offender being required to report to a probation officer as and when required, obtain prior written consent to a change of address or employment, and attend a rehabilitative and reintegration needs assessment. An offender is prohibited from associating with or contacting a person under 16 years of age except with prior written approval of a probation officer and in the presence of a supervising adult.[26]

[28] Special conditions may be imposed by the court at the time the order is made on an interim basis, or at any time before the ESO expires or is cancelled by the Parole Board on application by the Chief Executive or a probation officer.[27] They must be designed to reduce the risk of reoffending, facilitate or promote rehabilitation or reintegration and provide for the reasonable concerns of victims.[28] Special conditions may include conditions which prohibit the offender from: using a controlled drug, psychoactive substance or alcohol; associating with a person or class of persons; and entering or remaining in specific places or areas. The offender may also be required to submit to electronic monitoring, to participate in a rehabilitation and reintegration programme and to take prescription medication.[29] When applying

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24 Section 107I(4) and (5).
25 Section 107J.
26 Section 107JA.
27 Sections 107K and 107IA.
28 Section 15(2).
29 Section 15(3).

for an ESO, the Chief Executive may also apply for an order for an intensive monitoring condition.[30] Such a condition requires an offender to submit to being accompanied and monitored for up to 24 hours a day for a maximum of 12 months. This order may only be made once, even if the offender is subject to repeated ESOs.[31]

[29] The offender or a probation officer may apply to the Parole Board for the variation or discharge of any condition of the order.[32]

[30] An ESO and its conditions are subject to ongoing review. A sentencing court must, before the review date, commence a review of an ESO in order to ascertain whether there is a high risk the offender will commit a relevant sexual offence or very high risk of a relevant violent offence within the remaining term of the order. If an offender has not ceased to be subject to an ESO since first becoming subject to it, the review date is 15 years after the date on which the first ESO commenced and thereafter five years after the imposition of any and each new ESO.[33] If the offender is in legal custody at any point, time ceases to run for the purpose of calculation of the review date.[34] High-impact conditions must be reviewed every two years. A high-impact condition requires the offender to stay at a specified residential address for more than a total of 70 hours during any week, or requires the offender to submit to electronic monitoring that enables his or her whereabouts to be monitored when not at his or her residence.[35]

[31] An ESO's conditions are suspended and time ceases to run on the order during any period the offender is in legal custody in accordance with the Corrections Act 2004, and any subsequent period following the offender's release (if applicable) until the offender's statutory release date.[36] This also applies to an offender subject to an ESO who is sentenced to another determinate sentence of imprisonment.[37] In the case of an offender detained under a sentence of imprisonment, the ESO conditions are

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30 Section 107IAB.
31 Section 107IAC.
32 Section 107O.
33 Section 107RA.
34 Sections 107RA(7) and 107P.
35 Section 107RB.
36 Section 107P(1).
37 Section 107Q(2).

reactivated after the offender's statutory release date and in place of any other release conditions that would otherwise apply.[38] If an offender who is subject to an ESO is sentenced to an indeterminate sentence, such as preventive detention, the ESO is cancelled. However, if the sentence is subsequently quashed or otherwise set aside, the ESO is to be treated as if it had not been cancelled.[39]

Human rights implications

[32] ESOs and preventive detention are some of the most coercive exercises of state power in New Zealand law and engage human rights issues. New Zealand courts and international human rights bodies have found these regimes to be inconsistent with human rights.

[33] In *Miller v New Zealand*, the United Nations Human Rights Committee concluded that New Zealand's preventive detention law breached the protection against arbitrary detention under the International Covenant on Civil and Political Rights.[40]

[34] This Court, in *Chisnall v Attorney-General*, declared that the ESO and public protection order (PPO) regimes were inconsistent with the protection against second punishment under s 26(2) of the New Zealand Bill of Rights Act 1990 and that the inconsistencies had not been justified.[41] The case is currently with the Supreme Court.

[35] We note that the Law Commission is undertaking a review of the laws relating to preventive detention and post-sentence supervision or detention. This review will include, but not be limited to, consideration of whether the laws reflect current understandings of reoffending risks and provide an appropriate level of public protection; te Tiriti o Waitangi | the Treaty of Waitangi, ao Māori perspectives and any matters of particular concern to Māori; consistency with domestic and international human rights law; and the relationship between sentences of preventive detention,

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38 Section 107P(2), and in the case of an offender who is detained under a court order, on the date the offender is released.
39 Section 107Q(3).
40 *Miller v New Zealand* (2017) 11 HRNZ 400.
41 *Chisnall v Attorney-General* [2021] NZCA 616, [2021] 2 NZLR 484.

ESOs and PPOs. The Commission will report to the Minister responsible for the Law Commission by the end of 2024.[42]

The appeal

[36] The issue at the heart of this appeal is the way in which the Judge approached the question of whether Mr Moore was likely to commit another qualifying sexual or violent offence if released at sentence expiry date. When considering whether such a likelihood exists, the court must take into account the five factors under s 87(4) of the Sentencing Act. It is here, in Ms Gray's submission, for Mr Moore, that the Judge fell into error. She contended that the Judge overstated the gravity of the offending, failed to acknowledge the 15-year gap in offending, and failed to give effect to the principle that a lengthy determinate sentence is preferable. As a result, the sentence was manifestly excessive and disproportionately harsh in the context of the New Zealand Bill of Rights Act 1990 (NZBORA).

[37] In our analysis of whether there was an error in the sentence, we begin by addressing whether Mr Moore is likely to commit another qualifying sexual or violent offence if released at the expiry date of any sentence other than a sentence of preventive detention, with a focus on the s 87(4) considerations.

Does Mr Moore's history disclose any pattern of serious offending?

[38] In Ms Gray's submission, the Judge was wrong to conclude that Mr Moore's history disclosed a pattern of serious offending. She accepted that this had been the case prior to imposition of the ESO and in particular prior to his completion of Te Piriti sex offender's programme (Te Piriti). Te Piriti is an intensive group-based treatment programme targeting risk factors for sexual offending against children.

[39] Ms Gray suggested that Mr Moore's last *serious* sexual offence occurred in 2005 when he was on parole following his sentence of imprisonment imposed in 2000 for sexual offending against his former partner. Three months after his release, Mr Moore sexually offended against a four-year-old girl when he went into her house

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[42] Law Commission *Public safety and serious offenders: a review of preventive detention and post sentence orders* (NZLC IP51, 2023).

in the early hours of the morning, woke her up, told her not to say anything, and rubbed her pubic area over clothing. In 2006, the High Court declined to sentence Mr Moore to preventive detention, reasoning that the particular offending was comparatively low level and opportunistic, that Mr Moore was remorseful and showed insight, and was willing to undergo further treatment.[43]

[40] While serving his sentence of three years and four months' imprisonment for that offending, Mr Moore attended the core Te Piriti programme for 13 months between 2007 and 2008, and then participated in the maintenance group. He attended a relapse prevention group for sex offenders in 2010–2011. Both health assessors accepted that, as a result, Mr Moore obtained some insight into the harm his offending caused, whereas he had not previously displayed any empathy. They assessed Mr Moore's tendency to be aroused sexually in relation to young girls to have been reduced.

[41] In Ms Gray's submission, the Judge failed to give adequate weight to the fact that Mr Moore had not been convicted of any sexual offending for 15 years between 2005 and 2020. Given the significant gap in offending, Ms Gray submitted that the index offending should not be included as part of a "pattern" of serious offending.

[42] Ms Paterson, for the Crown, pointed out that, while both health assessors recognised the gap in offending, neither attributed this to Mr Moore's ability to self-regulate over this period. Dr Whiting suggested that repeated breaches and recall to prison might have played an important role in preventing reoffending rather than self-regulation. Ms Richards' report noted Mr Moore had breached his ESO by being in contact with children. In 2014, a young family member claimed Mr Moore touched her when he had accompanied her to public toilets. Ms Paterson then drew our attention to this Court's caution in *Morris v R* — that while a lengthy period of non-offending may be "creditable", it depends on the reliability of the self-report and the likelihood of reporting by complainants.[44]

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43 *R v Moore*, above n 6, at [42].
44 *Morris v R* [2021] NZCA 491 at [38].

[43] In any event, it is clear that the Judge did consider the "offence free" period and evaluated evidential material before him.[45] He was justified in his conclusion that the custodial and supervisory constraints on Mr Moore had resulted in a lack of opportunity to offend or, perhaps more accurately, a period where Mr Moore was not convicted of sexual offending. Nevertheless, there was a pattern.

Gravity of offending overstated?

[44] Ms Gray then submitted that the Judge wrongly described the index offending as an escalation in seriousness of sexual offending rather than a reduction. The Judge had observed that the fact the offending was against an infant victim might be thought of as an escalation to avoid detection.[46] However, in Ms Gray's submission, over time, Mr Moore's offending has significantly reduced in severity. The 1990 and 1995 offending involved digitally penetrating young girls but by 2005 this had reduced to rubbing the complainant's crotch area over clothing. In the index offending, the indecency stemmed from Mr Moore's state of nudity which, while indecent, was not sexual.

[45] Ms Gray accepted the victim was vulnerable by virtue of her age and dependence on adults. However, in her submission, there was no premeditation involved in the offending, which was itself brief. The victim was asleep and likely will have no memory of the incident, she suggested, so the harm caused by the offending was limited. The Judge acknowledged the offending was "toward (but not at) the lower end of indecent acts".[47]

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45 The Judge took into account: Mr Moore's criminal history; the fact that the last of Mr Moore's offences occurred after a 10-year gap in offending; that Mr Moore was made subject to a 10-year ESO; that the PAC Report recorded 22 breaches of the ESO and assessed Mr Moore as having a high likelihood of reoffending, noting a pattern of offending against girls by befriending their mothers; that Mr Moore had participated in and received intensive rehabilitative treatment which had not taken hold; and the fact Mr Moore had spent only relatively brief periods in the community since the ESO was imposed: High Court judgment, above n 3, at [9]–[24].

46 High Court judgment, above n 3, at [20]. In so holding, the Judge relied on this Court's comment in *McInnes v R,* where it was noted that although the pattern of offending may have changed, it remained "exploitative sexual predation of vulnerable members of society". *McInnes v R* [2016] NZCA 216 at [21(a)].

47 At [19].

[46] While the indecent assault on its own might be considered lower level offending, there is no doubt that, in context, it was serious. The relevant factors included:

(a) Mr Moore was subject to an ESO at the time of the offending.

(b) Mr Moore cut off his electronically monitored bracelet so that Corrections was unaware of his whereabouts.

(c) Mr Moore, in further breach of the ESO, was not only in contact with children but residing in a house where young children were present.

(d) On the night in question, Mr Moore consumed alcohol and other illicit substances in breach of his ESO, knowing that substance abuse had been a material contributor to his prior offending.

(e) The complainant was particularly vulnerable. At 16 months old, she was unable to protect herself and unable to explain what had happened. There was simply no evidence of what had in fact occurred, other than the state in which Mr Moore was found, naked and cuddling the clothed victim.

[47] For these reasons, we do not accept Ms Gray's submission that the index offending is "nowhere near" the seriousness of the previous offending. She accepted, of course, that both the index offending and the prior offending were of serious concern.

[48] There is no doubt that Mr Moore's history discloses a pattern of serious offending.

What was the seriousness of the harm caused by the offending?

[49] The victim's mother provided a victim impact statement to the Court. It was some two years after the date of the index offending, yet she described herself as continually reliving the nightmare. She described Mr Moore's behaviour as having

"broke[n] [her] as a mother" and said she would not trust anyone again. There is no doubt that indecent behaviour towards the community's most vulnerable members can cause serious harm.

Was there information indicating a tendency to commit serious offences in the future?

[50] A sentence of preventive detention must not be imposed unless the court has considered reports from at least two appropriate health assessors about the likelihood of the offender committing a further qualifying sexual or violent offence.[48] The Judge considered the reports of Dr Whiting, a forensic psychologist, and Ms Richards, a registered clinical psychologist.

Dr Whiting

[51] Dr Whiting identified a number of risk factors which indicate Mr Moore may be at risk of similar offending in the future, with 16 of 20 risk factors being present. In his opinion, Mr Moore's repeated breaches of the ESO with relapses into substance use indicate a degree of lack of insight and suggest he has struggled to transfer the skills learnt in rehabilitation programmes into sustainable self-regulation in the community. Despite reporting he had gained insight into his offending, Mr Moore repeatedly breached his ESO conditions by using substances and having contact with children. Dr Whiting said this behaviour could be viewed as suggesting an absence or failure of effort by Mr Moore to address future cause/s of his offending.

[52] Mr Moore has a long history of poly substance abuse starting at an early age. Dr Whiting considered Mr Moore, when intoxicated, would be at increased risk of offending in the future. Substance use has played a crucial role in Mr Moore's offending and offending against children occurred when he was intoxicated. Dr Whiting said, "I speculate substances are a significant disinhibiting factor as it would impair Mr Moore's reasoning and reduce his level of anxiety, empathy and guilt (emotions which are all protective against re-offending)". A relapse of substance use has been the main cause of the breaches of his ESO.

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[48] Sentencing Act, s 88(1).

[53] Mr Moore has been on anti-psychotic and anti-depressant medication since 2008. He has been diagnosed with post-traumatic stress disorder.

[54] Dr Whiting was of the opinion that Mr Moore "is currently at 'high' risk of sexual recidivism, particularly against young females, if he were to be released into the community at this point in time". The likely scenario would be a repeat of a similar type of offending when intoxicated and with access to potential victims.

[55] Dr Whiting considered it important to acknowledge that Mr Moore expressed remorse and a desire to address his substance abuse problems. He opined that a determinate sentence of sufficient length to provide him with the opportunity to engage in a repeat sex offender's programme to reinforce previous lessons may mitigate risk in the future. However, he said that the fact Mr Moore's current offence occurred under conditions of an active ESO could lead to the view that a more restrictive regime might be necessary to mitigate Mr Moore's long-term risk of offending, while providing adequate protection to the community at the time of any future release. He noted that one of the principal advantages of a sentence of preventive detention is that it allows any gains made through rehabilitative treatment to be assessed by the Parole Board prior to release.

Ms Richards

[56] Ms Richards assessed Mr Moore as posing a level of "well above average" risk of sexual reoffending. This risk category is the highest and applies to individuals who are likely to require extensive correctional interventions to reduce their risk level to average risk. Mr Moore's predicted rate of sexual recidivism was assessed as being 3.12 times greater than the typical adult male with a current sexual conviction in New Zealand. Ms Richards noted that a number of factors were related to his recidivism risk, including a sexually deviant lifestyle, cognitive distortions, substance abuse and poor emotional control.[49] Ms Richards did not address Mr Moore's imminent release into the community as she believed there was little likelihood he would be released in the next three years.

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[49] The other factors identified were sexual compulsivity, offence planning, inadequate community support, sexual offending cycle, impulsivity, poor compliance with community supervision, deviant sexual preference, and intimacy deficits.

[57] In Ms Richards opinion, if Mr Moore were to commit a sexual offence in the future, it would likely involve offending against a female child. Potential victims are most likely to be pre-pubescent female children known to Mr Moore, although opportunistic offending against a stranger could not be ruled out. Reoffending would likely be precipitated by a relapse into drug and alcohol use, stopping his antipsychotic medication, increased stress, and sexual preoccupation.

[58] Ms Richards noted that Mr Moore has completed extensive psychological treatment for child sexual offending and has been subject to the ESO since 2010. During that time, he demonstrated some early signs of desistance but also committed the index offence, has been subject to an allegation of sexually offending against a child (a young family member) and has been convicted of numerous breaches of the ESO. Ms Richards was concerned that he has continued to place himself in high-risk situations, abused substances, and had sporadic unsupervised contact with children. Ms Richards noted that Mr Moore may eventually be managed again with strict monitoring in the community. She considered professional oversight and support is the most meaningful protection, through medication, supervised living, and external control.

[59] Ms Richards described Mr Moore as having demonstrated mixed success in addressing the causes of his offending and showing some insight. He struggles most in recognising early warning signs and removing himself from risky situations in the community. His history of complex trauma and repeated head injuries may have adversely impacted his self-regulation. Without having internal skills to manage himself, he requires external supports, structure and supervision to keep himself and those around him safe. Strict monitoring and wrap-around support in the community will be an important component of future release plans.

[60] Ms Richards assessed that Mr Moore's above average risk of reoffending and overall level of rehabilitative needs indicates that a return to Te Piriti is the most appropriate rehabilitation pathway for Mr Moore. His identified cognitive disabilities may present a barrier to meaningful engagement and treatment plans.

[61] On the basis of this expert evidence, there is no doubt that, without appropriate oversight and support, there is a high risk that Mr Moore will commit serious offences in the future.

Has Mr Moore failed to address the cause or causes of offending or failed in his efforts to do so?

[62] Dr Whiting acknowledged the relatively lengthy period of no offending and that this occurred after completion of Te Piriti when Mr Moore had reported gaining some insight into the offending. Dr Whiting considered Mr Moore required a high level of oversight and "the ESO regime and the repeated breaches with recall to prison may have played an important role in preventing reoffending".

[63] Ms Richards likewise attributed Mr Moore's desisting from sexual offending during the last 15 years to be primarily due to the intense scrutiny pursuant to the ESO rather than self-regulation. She also considered that, while Mr Moore had previously engaged well in offending related treatment, his poor sentence compliance and commission of the index offence suggested this was no longer protective for Mr Moore.

[64] In Ms Gray's submission, the 15-year conviction gap is evidence that Mr Moore's previous attempts at rehabilitation and the conditions of his ESO have previously successfully tempered the risk of reoffending. Ms Gray submitted the Judge was wrong to find that intensive rehabilitation and ESOs have not worked and that there was no realistic prospect of Mr Moore's reform.[50]

[65] In response, Ms Paterson referred to Dr Whiting's observation that, despite reporting insight, Mr Moore repeatedly breached his ESO by using substances and having contact with children and placing himself in high risk situations. Ms Paterson pointed out that, when Mr Moore gave evidence at his jury trial on the index offending, he accepted in cross-examination that participation in treatment programmes had made him aware of which situations were "high risk" for him, notably a combination of consumption of alcohol and proximity to children. Yet, she said, Mr Moore cut off his

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50 High Court judgment, above n 3, at [22].

ESO bracelet and began boarding with a mother of young children. He had consumed alcohol before agreeing to look after the children that night. He chose to place himself in a situation which he knew was high risk for him.

[66] Ms Paterson conceded that the Judge had taken a more cynical view of Mr Moore's prospects than the experts. But she submitted that was not unreasonable in circumstances where Mr Moore has received significant rehabilitative intervention as well as being subject to ESO oversight, but still reoffended.

[67] It is not correct to say that Mr Moore has failed to address the cause or causes of offending. As the health assessors acknowledge, he has gained some insight and demonstrated some measure of success. He understands which situations are high risk for him. It is apparent, however, that Mr Moore has quite some way to go and as Ms Richards observed still requires "[s]trict monitoring and wrap-around support in the community", including further rehabilitation.

Is a lengthy determinate sentence preferable?

[68] Ms Gray referred to *R v Leitch* where this Court suggested a higher end sentence may be justified in cases where a finite sentence is preferred to a sentence of preventive detention and where the need to protect society justifies an increase to the sentence which might otherwise have been imposed.[51] She suggested the circumstances in *Carline v R*, a case involving low level indecent assaults, were similar to the present case.[52] The original starting point of 15 months was uplifted by a further 24 months (260 per cent) to allow Mr Carline to complete a sex offenders' programme and in this way offer sufficient community protection as an alternative to preventive detention.[53] She suggested that Mr Moore's starting point could be uplifted in the region of 250 per cent, bringing the overall starting point to around 60 months' imprisonment. This would enable him to again attend Te Piriti while in custody. Te Piriti is a programme available only to those serving a custodial sentence.

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51 *R v Leitch* [1998] 1 NZLR 420 (CA) at 430.
52 *Carline v R* [2016] NZCA 451.
53 At [22]–[24].

[69] Ms Paterson noted that the Judge expressly considered the alternative of a lengthy determinate sentence but concluded it was not appropriate given Mr Moore's history and risks. The Judge distinguished *Carline*, noting the offending in that case was much less serious (largely comprising low-level indecent assault and criminal harassment of women) and Mr Carline had not faced any lengthy custodial sentence, meaningful exposure to rehabilitative programmes, or supervision.[54] Ms Paterson suggested Mr Moore's case is more analogous to *R v K* where a sentence of preventive detention was upheld, this Court noting in particular that Mr K had shown no real remorse or desire to cease offending, even after attendance at Te Piriti.[55]

[70] We are not attracted by the proposition that we should increase Mr Moore's starting point by 250 per cent. We agree with Ms Paterson that the starting point should be fixed in a principled way with reference to the index offending. It would be contrived to uplift the starting point by such a high percentage for the purpose only of imposing a custodial sentence of sufficient length to allow Mr Moore to re-engage with Te Piriti.

[71] Even if the finite sentence were doubled, Mr Moore would likely be released in the next two years. That possibility did not appear to be contemplated by the health assessors. Ms Richards' assessment of Mr Moore's dynamic risk factors proceeded specifically on the basis that he would have little likelihood of being released in the next three years. Both Dr Whiting and Ms Richards considered Mr Moore required significant further intervention to mitigate future risk. Those opinions were based, however, on the proposition that Mr Moore would be released into the community without supervision.

[72] Having examined the s 87(4) considerations, we are satisfied that if Mr Moore were released without supervision, he would be likely to commit another qualifying sexual offence if released at expiry of the finite sentence of 26 months' imprisonment arrived at by the Judge.

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54 High Court judgment, above n 3, at [17]. Ms Paterson suggests *Parahi v R,* above n 11, is also distinguishable.

55 *R v K* CA57/00, 30 March 2000 at [8].

[73] However, the reality is that when Mr Moore is released from prison, he will still be subject to the ESO.

[74] In *R v Parahi*, this Court noted that "there has to be a significant, ongoing risk of serious harm before somebody is incarcerated indefinitely, particularly for lower-level offences".[56] That said, the test may be met in an appropriate case, even when the relevant offences are indecencies as opposed to sexual violations:[57]

> … that is because of the seriousness of their cumulative effect on the lives of their past victims and the likelihood of seriousness of future effect on the lives of future victims. Such cases are likely to be exceptional, and will usually turn on persistent, knowing behaviour, despite firm warnings (although that is not an absolute prerequisite), accompanied by the necessary cumulatively serious harm.

[75] Mr Parahi was convicted of indecent assault on a female under 12. The offending happened when he was on parole from previous sexual offending against two 12-year-old girls. He had a historical conviction for rape as well as convictions for indecencies. This Court considered Mr Parahi's circumstances to be on the cusp of preventive detention but concluded preventive detention was not the appropriate outcome. It was the fact of the distinct possibility of an ESO being made prior to Mr Parahi's release from a finite sentence which had a "real influence" on the decision of the Court.[58]

[76] This Court has said that the possibility of an ESO must be considered when determining whether a finite sentence will provide adequate protection to the community.[59] While an ESO is not an alternative to preventive detention, it has been described as a "potential safety valve" which shores up the principle that a lengthy finite sentence is preferable to preventive detention.[60] In a finely balanced case, the potential availability of an ESO may tip the balance in favour of a finite sentence in the case of lower level sexual offenders.[61]

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56 *R v Parahi*, above n 11, at [85].
57 At [86].
58 At [88]–[90].
59 *R v Mist* [2005] 2 NZLR 791 (CA) at [100]; and *Grant v R* [2017] NZCA 614 at [52].
60 *R v Mist*, above n 59, at [101].
61 *R v Parahi*, above n 11, at [87].

[77] It is at this stage of the sentencing analysis that we consider the Judge erred. He was of the view that the ESO had been of no real effect throughout its duration. His opinion that the ESO would not provide adequate protection to the community on Mr Moore's release was implicit in his decision, although he did not say so in terms. He did not discuss the possibility of more stringent special conditions being added to the ESO.

[78] The force of the appeal is that the protection of the community will require the existing (strengthened) ESO, and Mr Moore will likely need to be subject to ESO restrictions for some considerable time.[62] Therefore, the question is whether a determinate sentence will provide adequate protection to the community if Mr Moore is released at sentence expiry *but subject to the ESO*. As discussed at [31] above, the ESO will be reactivated on Mr Moore's statutory release date. It has approximately two years left to run. We note that the special conditions can be reviewed and enhanced to reduce the risk of reoffending and promote Mr Moore's rehabilitation and reintegration.[63]

Will a finite sentence together with the ESO adequately protect the community?

[79] Ms Paterson made a forceful submission when she said, had Mr Moore not already been subject to the ESO, which he repeatedly breached and while subject to which he committed sexual offending, it might be appropriate to conclude that preventive detention was not necessary for the protection of the community. However, keeping Mr Moore in the community subject to an ESO has not kept the community safe, she said, as evidenced by the index offending, and it could not be assumed that such an approach will keep the community safe in future.

[80] In order to respond to that submission, we begin by analysing Mr Moore's circumstances and whether the ESO has indeed been of no use, as the Judge would have it. This includes examining the events which led up to the index offending.

Mr Moore's ESO history

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62 Parole Act, s 107F(1)(b). The Chief Executive may apply for an ESO where the offender is subject to an ESO, at any time before the expiry of the order.

63 See [28] above; and Parole Act, s 107K.

[81] Mr Moore is 49 years old. He was 47 at the time of the index offending. He first offended in 1990 when he was 17, followed by further offending at age 22. Mr Moore was 26 years old when he raped an adult female. He was 32 in 2005 when he committed an indecent assault. The High Court gave Mr Moore a clear warning in 2006 when he narrowly avoided preventive detention.[64] He has since spent 12 years under the ESO, including periods in custody. In 2019, his application for cancellation of the ESO was refused.[65]

[82] The most recent conditions of Mr Moore's ESO were:

(a) To reside at and not move from an approved address or be away from that address between midnight and 6.00 am daily without prior written consent of a Probation Officer.

(b) To attend a Te Piriti Relapse Prevention/Maintenance Programme as directed and only engage in any kind of employment, training or groups with prior approval.

(c) Not to possess or consume illicit drugs or alcohol.

(d) Not to enter the Hamilton region or any schools or parks without prior approval or to associate or contact a person under the age of 16 without prior approval from a Probation Officer and under the supervision of an adult.

(e) To submit to and comply with the requirements of electronic monitoring.

[83] Between 2012 and 2020, Mr Moore was convicted of 26 breaches of ESO conditions and two failures to comply with his reporting obligations under the Child Sex Offenders' Register.[66] Breaches of the ESO included making contact with children, entering schools or playgrounds, consuming alcohol, staying away from his

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64 See *R v Moore,* above n 6, at [42]–[43].
65 *Moore v Chief Executive of the Department of Corrections* [2019] NZHC 1212.
66 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 39.

address without permission, failing to submit to electronic monitoring, and associating with children under 16 years old without an approved adult present. Of particular concern are the breaches involving unauthorised contact with children which are recorded as follows:

> … Between 5 November 2012 and 14 February 2012 Mr Moore received five breaches relating to staying overnight away from his address and alcohol consumption. He was spending time at his girlfriend's residence, where her five-year-old daughter also lived… Case notes indicate that Mr Moore spoke with the five-year-old on the telephone and accompanied her mother to school pick-ups … Of concern was that Mr Moore had relapsed into alcohol use at that time and his behaviour and living circumstances were similar to the high-risk situations in which his early sexual offending occurred.
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> … On 27 April 2014, during an approved visit to his mother's address in Hamilton, Mr Moore was witnessed by two family members taking [several young female family members under the age of nine], to the park for about one hour. Case notes later documented that one of the [girls] made an allegation about Mr Moore taking her into the toilets and touching her … Mr Moore denied any inappropriate behaviour and, in the current assessment, maintained having no sexual arousal or intention to offend against the girls. He has previously claimed that [the girls] displayed sexualised behaviour in front of him (e.g., pulling their pants down, trying to kiss him on the mouth) but did not appear to think this was unusual …

[84] Mr Moore was sentenced for breaching the ESO every year between 2012 and 2021 and twice each year in 2014, 2017 and 2018. Taking into account concurrent sentences, Mr Moore has been sentenced to a total of approximately 56 months' imprisonment between 2012 and 2021 for breaches of the ESO. The sentences of imprisonment were all short sentences, meaning Mr Moore would have served (approximately) half that time in custody.[67]

[85] The leadup to the index offending is described as follows:

> … official information states that on 21 August 2020, Mr Moore had contacted the GPS Immediate Response Team (GIRT) advising that he did not have transport back to his approved address in time for curfew. GIRT began liaising with Mr Moore on alternative means of returning to his approved address, including instructing him to walk to the nearest [p]olice [s]tation. Police made multiple attempts to contact Mr Moore and attended the address where he was located. However, this was a gated block of flats that was inaccessible to [p]olice. At 3.54 am it was detected that Mr Moore had removed and discarded his GPS tracking anklet. At that time his whereabouts were unknown, and a breach of Mr Moore's [ESO] was initiated by way of failing

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[67] Depending upon how long Mr Moore might have been remanded in custody before being sentenced, he might have spent more than half the sentenced periods in custody.

> to submit to electronic tracking. Case notes document text messaging between Mr Moore and his probation officer on the morning of 22 August 2020, in which Mr Moore asked for forgiveness and stated he was "not in a good way". His probation officer tried to encourage Mr Moore to return to his address or hand himself in. Mr Moore disclosed that he had not had his medication for two weeks …

[86] At some stage, Mr Moore began living with the victim, her mother and her other children before the index offending occurred on 9 September 2020. There was, therefore, a period of 20 days unaccounted for. We have no information about the steps undertaken by Corrections to locate Mr Moore but, particularly given he had told his probation officer he was "not in a good way" and had not taken his medication for two weeks, Mr Moore's unknown whereabouts must have been of considerable concern.

Discussion

[87] For 15 years, between 2005 and 2020, Mr Moore was not convicted of sexual offending. Since the imposition of the ESO in 2010, Mr Moore has been in the community apart from periods in custody and, until the index offending in 2020, remained free of convictions for sexual offending. That is attributable to the efficacy of the ESO (coupled with periods in custody). The Judge was not correct when he described the ESO as of no use.

[88] Most breaches of the ESO related to Mr Moore's behaviour following consumption of alcohol. It is clear that substance abuse is a high risk factor for Mr Moore. He meets the criteria for substance abuse disorder. A condition of the ESO is that Mr Moore does not consume alcohol or non-prescription drugs. At one point he was subject to a special condition that he wear a device which would record whether he had consumed alcohol. He was compliant with that condition for six months and the condition was then removed. It might be thought that this condition should be reinstated, together with some rehabilitative measures designed to address his substance abuse.

[89] Mr Moore is a man who has faced significant challenges in his childhood which no doubt contributed to his offending. He is not, however, a man without prospects of rehabilitation, as the health assessors acknowledge. He has made

progress. It is of note that Mr Moore had not taken his medication for two weeks prior to removal of his tracking device. Clearly, oversight of his medication regime is needed.

[90] While Te Piriti is recognised as the most effective programme to treat child sex offenders, we can expect Corrections to ensure that Mr Moore is engaged in the best available programme in the community and, in any event, it would appear that Te Piriti's relapse prevention/maintenance programme is available in the community.[68]

[91] We also understand that Mr Moore is or has been receiving, or is seeking to access, sensitive claims counselling through Accident Compensation Corporation in respect of his own extremely challenging background, which involved him being physically, emotionally, and sexually abused from a very young age. Mr Moore witnessed his father regularly inflicting violence on Mr Moore's mother and, later, on his girlfriends, one of whom died as a result in Mr Moore's presence. He has been diagnosed with post-traumatic stress disorder. This counselling will also assist in his rehabilitation.

[92] It is sometimes said that preventive detention is an incentive for an offender to avail themselves of rehabilitative programmes while in prison so they can demonstrate they can be safely released into the community.[69] That might sound good in theory but we must have regard to reality. If sentenced to preventive detention, we are concerned that Mr Moore may well be a low priority for any rehabilitative programmes and left to languish in prison without suitable treatment. Priority for courses is given to those approaching parole eligibility. Special conditions could be added to the ESO to require Mr Moore to participate in rehabilitation programmes to address his needs while in the community.

[93] The easy answer would be to uphold the sentence of preventive detention because that would completely remove any risk of reoffending. But it would be an extreme step to sentence a person to an indeterminate sentence of imprisonment in

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68 See Mr Moore's current ESO conditions at [82] above.

69 See for example *R v Bryant* CA 236-03, 16 December 2003 at [23]; and *Nuku v R* [2019] NZCA 25 at [18].

respect of offending which would otherwise attract a sentence of around 26 months' imprisonment. The notion that a person who would otherwise receive such a sentence should be subject to preventive detention when, had he received a lengthy determinate sentence, he would likely not be, does not sit comfortably.[70] We would be upholding the sentence of preventive detention only because of a lack of confidence that the protective measures included in the ESO will be properly implemented and monitored. That would be to punish Mr Moore for failings within the system. That cannot be right. It would amount to disproportionately severe treatment or punishment, inconsistent with the right in s 9 of NZBORA.

[94] We do not consider that Mr Moore's case falls into the exceptional category whereby he poses a significant ongoing risk of serious harm, provided he is subject to the ESO.

[95] We conclude that an ESO (renewed in future if the circumstances warrant it) with stringent special conditions including a focus on rehabilitation should, if appropriately managed and monitored, allow Mr Moore to remain in the community consonant with community safety. That places a heavy responsibility on Corrections. We acknowledge the challenges that someone like Mr Moore poses for those charged with managing him in the community. No doubt the Chief Executive will wish to consider whether further special conditions should be included in the ESO on Mr Moore's release.

[96] The risk is a high one, involving our most vulnerable section of the community, young children. This is a very finely balanced decision. We cannot decline to impose preventive detention by reason only that it is inconsistent with any provision of the NZBORA, but we must be satisfied preventive detention is proportionate and the least restrictive outcome.[71] We are not so satisfied. The determinate sentence of 26 months' imprisonment, together with the ongoing ESO, is the correct outcome.

[97] For the avoidance of doubt, we record that the ESO will be reactivated upon Mr Moore's release from prison.

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70 Similar observations were made by this Court in *R v Burkett* CA416/00, 21 February 2001.
71 New Zealand Bill of Rights Act 1990, s 4(b).

Result

[98] The appeal is allowed.

[99] The sentence of preventive detention is quashed and replaced by a sentence of 26 months' imprisonment.

Solicitors:
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