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Te Whare Māngai o Aotearoa

Justice Committee
Komiti Whiriwhiri Take Ture

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

Presented to the House of Representatives
by Hon Andrew Bayly, Chairperson

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Recommendation

The Justice Committee has considered the Notice of declarations of inconsistency: Public Protection Orders under the Public Safety (Public Protection Orders) Act 2014 and Extended Supervision Orders under the Parole Act 2002, and recommends to the Government that a new, single statute that is rights-consistent replace the existing Public Protection Orders and Extended Supervision Orders legislation.

About the Supreme Court's declarations of inconsistency

In December 2024, the Supreme Court issued its decision in *Attorney-General v Chisnall* regarding public protection orders (PPO) and extended supervision orders (ESO).[1] These orders are provided for under the Public Safety (Public Protection Orders) Act 2014 and the Parole Act 2002. They are designed to protect the public from people who pose the highest risk of serious sexual and violent reoffending at the end of their prison sentence. The Supreme Court found that the PPO regime and the detention aspects of the ESO regime were inconsistent with the right to freedom from a second penalty for the same offence under section 26(2) of the New Zealand Bill of Rights Act 1990 (NZBORA).

On 30 September 2025, the Court issued two declarations of inconsistency to this effect, stating that all aspects of the PPO regime, and the detention-authorising parts of the ESO regime, are inconsistent with section 26(2) of the New Zealand Bill of Rights Act, and that the inconsistency is not justified. The declarations also state that when post-sentence orders are retrospectively made based on historical offending and impose detention-like conditions, the inconsistency can never be justified under NZBORA.

The Attorney-General notified the House of the declarations on 9 October 2025 and they were referred to the Justice Committee for consideration as required by Standing Orders.

This is only the second time that a declaration of inconsistency has been referred to a select committee since the enactment of the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022.[2] For this reason, we set out some background to provide context to the declarations.

1 *Attorney-General v Chisnall* [2024] NZSC 178, 19 December 2024.

2 For the earlier instance, see the report of the Justice Committee in the 53rd Parliament, May 2023.

Background: about declarations of inconsistency

The Supreme Court's 2018 judgment in *Attorney-General v Taylor* confirmed that senior courts have the power to issue declarations that legislation is inconsistent with NZBORA.[3]

In response, the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022 created a statutory requirement for the Attorney-General to notify the House of a declaration of inconsistency. Following a sessional order in the 53rd Parliament, the House adopted Standing Order 269A setting out how the House should consider declarations of inconsistency. This process, set out in Appendix F of the Standing Orders, includes referral to a select committee and a debate in the House on the declaration, the select committee's report, and the Government's response to the declaration.

Legislative history and relevant case law

In November 2003, before the Parole (Extended Supervision) and Sentencing Amendment Bill was enacted, establishing an extended supervision orders regime for high-risk child sex offenders, the Attorney-General issued a report on the bill's consistency with NZBORA. This "section 7" report found it was inconsistent with the rights affirmed in sections 21 and 26(2) of NZBORA (the right to be secure against unreasonable search and seizure, and freedom from double jeopardy). The section 7 report concluded that the new provisions could not be justified under section 5 of NZBORA.[4]

Similarly, before the Parole (Extended Supervision Orders) Amendment Bill was passed under urgency in 2009, the Attorney-General reported that it was inconsistent with the rights against retroactive penalties and double jeopardy (section 26 of NZBORA), and against arbitrary detention (section 22 of NZBORA). The section 7 report stated that the prohibition against retroactive penalties and double jeopardy in section 26 applies if the nature of the ESO regime is characterised as penal (long-term detention of a person), rather than civil (imposing only conditions and restrictions after parole). The Attorney-General found that including a power of long-term detention "would tip the balance of the argument in favour of characterising this regime as penal".

In September 2012, the Attorney-General found that the Public Safety (Public Protection Orders) Bill was consistent with NZBORA because the regime was civil: it created a distinct and non-punitive system of detention with regular reviews. Two years later, the Parole (Extended Supervision Orders) Amendment Bill was introduced to enable an ESO to be renewed and to expand the scope of an ESO from just child sex offences to include sex offences against adults and violent offenders. The Attorney-General's section 7 report stated that extending and modifying the ESO regime appeared to be inconsistent with rights guaranteed by section 26 of NZBORA and could not be justified under section 5.

Relevant case law

In 2017, the High Court issued a PPO for convicted serial rapist Mark David Chisnall because it was not persuaded that an ESO with intensive monitoring would be sufficient to

[3] *Attorney-General v Taylor [2018] NZSC 104*, 9 November 2018, paras 65 and 74.

[4] All references in this section to Attorney-General reports and case law can be found in the bibliography.

mitigate the very high risk that he posed. Mr Chisnall appealed the PPO, and the Court of Appeals quashed the order, finding that the High Court should have considered whether the controls available with an ESO would have been sufficient to mitigate the risk he posed.

Following the Supreme Court's 2018 judgment in *Attorney-General v Taylor*, the High Court issued the first declaration in November 2019. It declared that section 107I(2) of the Parole Act 2002 (regarding extended supervision orders) was inconsistent with section 26(2) of the New Zealand Bill of Rights Act if the order applied retrospectively. Justice Whata was satisfied that the public protection order regime did not limit section 26(2) because it was penal in nature. The Court of Appeal confirmed the High Court's declaration and issued a declaration of inconsistency that both the ESO and PPO regimes imposed a second penalty, which was an unjustified limitation upon section 26(2).

In December 2024, the Supreme Court issued its decision in *Attorney-General v Chisnall*, that narrowed the declaration of inconsistency made by the Court of Appeal. The following year, the Supreme Court made its declarations of inconsistency.

Law Commission proposals

In April 2025, the Law Commission published *Here ora | Preventive measures in a reformed law*, a report on its review of the public protection order and extended supervision order regimes.[5] It concluded that an overhaul of the law governing preventive detention, extended supervision orders, and public protection orders is needed, and made several recommendations. It recommended introducing a new, single statutory regime that would provide a cohesive graduated approach to prevent serious reoffending. Under a new Act, post-sentence orders would be imposed at the end of person's determinate sentence for their qualifying offending. A new Act would provide for three preventive measures, of varying degrees of restrictiveness. Each measure would operate independently, and offenders could move between the measures. The restrictions each measure imposes would be specified clearly in the legislation. The three measures would be:

- community preventive supervision: supervised life in the community
- residential preventive supervision: detention in a community-based residential facility
- secure preventive supervision: detention in a secure facility designed to stop people from leaving.

Other recommendations made by the Law Commission include adjusting the list of qualifying offences, revising the legislative tests for imposing preventive measures, and providing greater entitlements to rehabilitation and reintegration.

Summary of submissions on the declarations

After the notice of declarations of inconsistency was referred to our committee, we invited submissions from selected organisations and individuals. The submissions we received drew attention to the following three themes.

5 Law Commission, *Here ora | Preventive measures in a reformed law*.

Need for preventive measures to protect public safety

Most submitters observed that there remains a need for preventive measures to protect the community from further offending. The New Zealand Law Society commented that "preventive measures have an important role in protecting the community from harm, and as such, the law of Aotearoa… should continue to provide for preventive measures for serious sexual and violent offending." Some submitters acknowledged that preventive measures need to be reformed to address the declarations of inconsistency issued by the Supreme Court, and suggested how these measures could operate under a new regime.

Human rights for offenders and victims are important

Submitters raised the human rights implications of PPOs and ESOs, with several submitters commenting that the limits these post-sentence orders place on rights are not justified. The Human Rights Commission emphasised the importance of section 26(2) of NZBORA, stating "the protection against double punishment is a core safeguard against abuse of State power and a critical protection of individual liberty." Several submitters expressed concern that PPOs and ESOs can be made retrospectively, with the New Zealand Law Society proposing that removing the retrospective detention aspects of the regimes should be prioritised.

Importance of rehabilitation and reintegration

The Department of Corrections' chief executive is not required to provide rehabilitative programmes for those on an extended supervision order. However, the chief executive is required to provide rehabilitation to those subject to a public protection order "if the treatment has a reasonable prospect of reducing the risk to public safety posed by the resident". Some submitters proposed changes to the PPO and ESO regimes that would place greater focus on an offender's rehabilitation and reintegration, while they are subject to post-sentence orders. This was noted in the Supreme Court's decision, which found that "a rehabilitative focus also more clearly distinguishes preventive regimes from punishment".

Our response to the declarations

We note that Parliament's intent when it introduced the Parole (Extended Supervision) and Sentencing Amendment Bill in 2003 is an important consideration. In the Minister's speech, he stated that the bill may constitute a breach of NZBORA. However, he believed "the right of children to be protected in these instances must come before the right to total freedom of a child sex offender released from prison who is deemed likely to offend again".[6]

When the Public Safety (Public Protection Orders) Bill was introduced to the House, the Minister questioned whether anyone "would place someone who has a very high risk of imminent and serious sexual or violent offending in any community".[7] She believed that the bill struck the right balance between the liberty rights of individuals under a public protection order and Parliament's duty to protect people from dangerous offenders. We think Parliament's intent in passing these bills into law is still justified. Parliament has a duty to

6 New Zealand Parliament, *Hansard*, 19 November 2003.

7 New Zealand Parliament, *Hansard*, 17 September 2013.

protect the public, especially children, from serious sexual or violent offenders who pose a high risk of reoffending.

Under the PPO and ESO regimes, offending that pre-dates the creation of these regimes can count as a "qualifying offence", which makes the offender eligible for a post-sentence order after release from prison. We think that including historic offending is important for understanding the potential risk of reoffending when making a post-sentence order when a person is released from prison. This consideration should be retained for eligibility for a PPO and ESO. For example, offenders with convictions for child sex offences can have a history of offending that started in childhood, before the legislation came into effect. We recognise the risk that these offenders pose can be enduring, and it is important to ensure that the right of victims to feel safe is prioritised when considering applying a post-sentence order to an offender.

We think substantive legislative change regarding post-sentence orders is needed. We recommend that a new, single statute should replace existing legislation. We acknowledge that legislative reform will be complex, and detailed policy work will be needed to consider both public safety and the human rights of offenders and victims. During our 2024/25 annual review of the Department of Corrections, the chief executive told us that the department is currently working on any changes that could be made to the PPO and ESO regimes. We heard that the policy work would likely be completed over the next two years.

Principles

We consider that the following principles should be brought to bear on any new post-sentence order regime:

- The guiding principle is that the orders should protect the community from further harm.
- Orders should be preventive in nature and not punitive.
- In so far as is possible the regime should foster wellbeing and promote independence of the person subject to the order.
- The making of orders should be subject to court oversight and periodic review.
- Restrictions imposed should be proportionate to the level of risk to public safety.

We discussed how the Government might respond to the declarations of inconsistency and approach potential legislative reform. We think that the Government should consider the following components as part of a new legislative framework.

Component 1: A graduated approach to post-sentence orders

We think that any change to the legislative regimes for post-sentence orders should provide for a graduated approach to preventive measures, with varying degrees of restrictiveness. The Law Commission's report suggested three levels of preventive measures. We think that this graduated 3-tier approach would enable the court to impose the most appropriate and least restrictive measure to address the risks of reoffending.

The least restrictive measure, as proposed by the Law Commission, would be "community preventive supervision". This measure would enable a person to live in the community subject to several conditions that would require supervision and monitoring. The conditions could include:

- notifying the probation officer of their residential address and obtaining written consent before moving to a new address
- not leaving or attempting to leave the country without prior written consent
- notifying the probation officer of their employment and obtaining written consent before changing their employment
- not consuming drugs or alcohol
- being subject to a nighttime curfew
- not being allowed to enter certain locations, such as schools and parks.

The next level of supervision, as proposed by the Law Commission, would be “residential preventive supervision”. Residential preventive supervision is intended for those people who cannot be safely placed into the community under supervision, but who do not need to be made subject to secure preventive detention. This middle tier would require a person to be detained at a residential facility, with the aim being to provide a structured environment that is as close to life in the community as possible. The facility should be designed in a way that would not physically prevent a person from leaving and it should offer effective rehabilitative and reintegrative interventions. This level of supervision would also function as a bridge between secure preventive detention and community preventive supervision.

We think that the law should continue to enable the detention of a person in a secure facility that is designed to stop them from leaving. Therefore, “secure preventive detention”, as also suggested by the Law Commission, would be the most restrictive measure, and it should only be imposed where less restrictive preventive measures do not provide adequate community protection. The secure facility should be on the grounds of a prison but separate from the main prison building. The facility should be designed in a way where a person can be accommodated in a separate room or self-contained unit that provides the detainee with privacy and a reasonable level of comfort.

Component 2: Preventive rather than punitive approach

While it is important to protect the public from any further harm, offenders who have served their sentence in prison for the crimes they have committed should not be subject to any further punishment. Therefore, any change to the public protection order and extended supervision order regimes should take a preventive rather than a punitive approach.

We consider that any post-sentence order regime should be guided by three principles:

- The rights and freedoms of a person subject to community preventive supervision should be restricted no more than necessary to ensure the safety of the community.
- A person who is detained in a residential or secure facility should have as much autonomy and quality of life as possible.
- Any person who is subject to a preventive measure should be given the opportunity to demonstrate rehabilitative and reintegrative progress that could enable a move towards a less restrictive preventive measure or unrestricted life in the community.

Rehabilitation and reintegration programmes and activities enable people subject to preventive measures to address the causes of their offending and learn to live safely in the community. We agree with the submitters who proposed that rehabilitation and reintegration

should be foundational components of any new legislative regime. A rehabilitative and reintegrative focus would make it clear that the any new post-sentence regime is preventive rather than punitive in nature.

We consider that the language used in the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 could guide policy makers on language that focuses more on prevention and care. Section 3 states that one purpose of that Act is to provide for the appropriate use of different care levels for individuals who are no longer subject to the criminal justice system. We think any new post-sentence legislative regime should provide for a comprehensive initial needs assessment and a coordinated treatment and supervision plan. The needs assessment would serve as a starting point for supporting a person's rehabilitation that would be designed to improve their wellbeing.

Component 3: Notification at sentencing of possible post-sentence order

The main concern of the declarations of inconsistency is that all aspects of the PPO regime, and the parts of the ESO regime that authorise detention of offenders, are unjustifiably inconsistent with section 26(2) of NZBORA (freedom from a second penalty for the same offence). We consider that one way of addressing this concern is for a person to be notified at sentencing of the possibility that they could be made subject to a preventive measure at the end of their sentence. We recognise that a notification of eligibility for a preventive measure may not change the nature of post-sentence preventive measures, nor will it remove a person's anxiety about being made subject to them. It will, however, give fair warning of the possibility.

Component 4: Type and conditions of preventive measure determined by the court

Under the current extended supervision order regime, Corrections' chief executive may apply to the "sentencing court" for an ESO.[8] The sentencing court determines whether to impose an ESO by applying the test set out in section 107I of the Parole Act. Similarly, Corrections' chief executive may apply to the High Court for a PPO against an eligible person. The court decides whether to impose a public protection order based on the tests in section 13(1) of the Public Safety (Public Protection Orders) Act.

Currently, the conditions of an extended supervision order that an offender is subject to are initially set by the court but are confirmed at a later date by the Parole Board. We note that the Parole Board can impose special conditions and amend conditions at any time. We think this could potentially undermine the obligation of the courts to impose the least restrictive measure that is proportionate to the risk a person poses.

We consider that under any new post-sentence regime, the initial type of preventive measure placed on a person should be determined by the courts. The District Court should determine applications for community preventive supervision, while the High Court should determine applications for residential preventive supervision and secure preventive

[8] The sentencing court is the High Court or the District Court, depending on which court most recently imposed a sentence of imprisonment on the offender.

detention. We think this approach would ensure appropriate allocation of workload between the courts.

Under a new post-sentence regime, we think that the courts, rather than the Parole Board, should consider imposing any special conditions as part of a preventive measure. We understand that the Law Commission has suggested that a panel should be set up to review any person who is subject to a post-sentence order to mitigate any BORA concerns. Any order should be subject to a periodic review by the courts to ensure oversight. A potential review panel should be expected to have access to a wide range of advice, such as psychological, offending history, custodial behaviour, and Parole Board decisions. The possible establishment of a review panel would give rise to the ongoing role of the Parole Board and whether elements of the Parole Board would intersect with the review panel.

We consider that it is also more appropriate for special conditions to be imposed through a court decision, which can be subject to an appeal. Further, it is important that the court imposing the measure is satisfied that the type of preventive measure it imposes and the special conditions attached to it is the least restrictive measure to address the risks the person poses.

Conclusion

We recommend to the Government that a new, single statute that is rights-consistent should replace the existing public protection order and extended supervision order legislation. The new regime should include three tiers of graduated post-sentence orders to manage high-risk offenders and have an increased focus on rehabilitation and reintegration. Importantly, the new regime should have the effect of continuing to protect the public from any further victimisation and maintain respect for the dignity of victims. We urge the Justice Committee of the 55th Parliament to monitor the progress the Department of Corrections makes on any proposed changes to the post-sentence regimes.

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Chief Executive of the Department of Corrections v Chisnall [2017] NZHC 3120

Chisnall v Chief Executive of the Department of Corrections [2019] NZCA 510

Chief Executive of the Department of Corrections v Chisnall [2019] NZHC 3126

Chisnall v Attorney-General [2021] NZCA 616 and *Chisnall v Attorney-General* (NO 2) [2022] NZCA 24

Appendix

Committee procedure

We met between 16 October 2025 and 2 April 2026 to consider the declarations of inconsistency. We issued a targeted call for submissions with a closing date of 23 January 2026. We received submissions from 10 submitters and heard oral evidence from 4 submitters. We received advice from the Department of Corrections and the Ministry of Justice.

Committee members

Hon Andrew Bayly (Chairperson)
Hon Ginny Andersen (to 25 March 2026)
Jamie Arbuckle
Carl Bates
Camilla Belich (from 25 March 2026)
Tākuta Ferris
Rima Nakhle
Dan Rosewarne (from 25 March 2026)
Tom Rutherford
Todd Stephenson
Vanushi Walters (to 25 March 2026)
Hon Dr Duncan Webb
Dr Lawrence Xu-Nan

Related resources

The documents we received as advice and evidence are available on the Parliament website, along with the recording of our meeting on 12 February 2026.