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Public Safety and Serious Offenders: A review of preventive detention and post-sentence orders
Law Commission | Te Aka Matua o te Ture
Wellington

By email: pdr@lawcom.govt.nz

Here ora? Preventive measures for community safety, rehabilitation and reintegration | Preferred Approach Paper – Issues Paper 54

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the Law Commission's (**Commission**) *Here ora? Preventive measures for community safety, rehabilitation and reintegration Preferred Approach Paper* (**PAP**).

1.2 This submission has been prepared with input from the Law Society's Criminal Law and Human Rights and Privacy Committees.[1]

1.3 We note the Law Society also made a submission on the Commission's Issues Paper 51 (**2023 submission**). A copy of the 2023 submission is available on the Law Society's website.[2]

2 General comment

2.1 The Law Society acknowledges that the purpose of the preventive measures regime to protect the safety of the community is important. At the same time, it is essential that such measures strike the right balance between public protection and individual rights. These are complex, challenging cases which will require consideration of some of the most fraught issues in the criminal justice system.

2.2 We are pleased to see that several of the PAP proposals are consistent with recommendations made by the Law Society in its 2023 submission, including that:

(a) An approach with consistent terminology and coherently-linked tests would be appropriate, and that this would be best achieved via a single statutory regime, rather than the current system of involving three separate pieces of legislation.[3]

(b) There should be consideration of the prevalence of people with disabilities, mental health issues and complex behavioural conditions who are subject to

1 For more information on the Law Society's sections and committees, please visit our website: https://www.lawsociety.org.nz/branches-sections-and-groups/.
2 See: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/LC-Public-safety-and-serious-offenders-28_Dan-Moore.pdf
3 2023 submission at [4.8] and [11.1].

preventive detention, Extended Supervision Orders (ESOs) and Public Protection Orders (PPOs). The PAP suggests pathways for a person subject to a preventive measure to move to regimes that provide for compulsory care and treatment for mental health issues or intellectual disabilities: under either the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.[4]

(c) The scope of qualifying offences should be defined to include strangulation and exclude prostitution, incest and bestiality.[5]

(d) There should be greater availability and use of Māori designed and led rehabilitation programmes, where appropriate. The Law Society support placing rehabilitation and reintegration at the forefront of the regime.[6]

2.3 The overarching point made in the 2023 submission remains critical: it is important to consider how far our current preventive regimes go for the purposes of meeting the safety of the community, and whether such limitations on the rights to liberty of the individual are justified. Parliament may properly legislate to curtail individual rights, provided that doing so is justified by the harm sought to be avoided and goes no further than is demonstrably justified in a free and democratic society.

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

3 Summary

3.1 Overall, the Law Society agrees with the Law Commission's preferred approach, subject to the following main points:

(a) *Chapter 7 (Age of eligibility):* An offender who is an adult at the time of application for an order should not be eligible in respect of offences they committed as a youth. While public safety is an important consideration, it also needs to be recognised that youth offenders are cognitively different from adults, more vulnerable, and need to be treated differently.

(b) *Chapter 9 (Overseas offending):* Concerns remain about relying on overseas convictions that may have resulted from a justice system with very different processes and protections than ours.

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4 2023 submission at [2.3]–[2.4].
5 2023 submission at [6.7]–[6.10].
6 2023 submission at [11.1].

(c) *Chapter 10 (Legislative tests):*

(i) Legislative tests for imposing preventive measures should require the court to take into account any reports submitted by the respondent, with fair opportunity provided for obtaining and preparing such reports.

(ii) In line with (i) above, the new Act should provide explicitly that a respondent has a right to be heard in respect of any application.

(iii) Concern about the requirement for the court to take into account how a preventive measure can be administered by Ara Poutama Aotearoa Department of Corrections. Conditions need to be realistic, but an offender should not be punished and subjected to a more restrictive form of measure because of resource limitations.

(d) *Chapter 11 (evidence of reoffending risk):* Consideration of unproven conduct is potentially problematic and risks a court having to make a factual finding in an inappropriate arena.

(e) *Chapter 12 (Proceedings under the new Act):*

(i) Consideration should be given to victims' eligibility for legal aid. Representation should not be reserved for those who are able to afford it.

(ii) Proposal 52 considers guiding principles for probation officers/facility managers. This proposal could be improved by adding a guiding principle that requires probation officers/facility managers to ensure the person subject to the measure is not subjected to a second punishment when exercising their powers.

(f) *Chapter 15 (Residential preventive supervision):*

(i) If the intention from the standard condition (b) is for the subject person to be detained at the address unless leave is permitted, then the detention aspect of the measure should be reflected in the name of the measure.

(ii) If detention is intended then minimum entitlements should be expressed in relation to this measure, similar to that provided in the secure preventive detention measure.

(iii) The facilities proposals would be better supported by inclusion of general principles and a prescribed minimum standard of acceptable environment for a facility location.

(g) *Chapter 16 (Secure preventive detention):* As with (f)(iii) above, the facilities proposals would be better supported by inclusion of general principles and a prescribed minimum standard of acceptable environment for a facility location.

(h) *Chapter 17 (non-compliance and escalation):*

(i) An escalation should only result where there is an increase in the risk assessment of the subject person.

(ii) Concern about the appropriateness of treating subject persons in the same way as remand prisoners, when the term of their stay could be in the realm of years. Remand facilities are designed for short-term stays

and as such do not have the same level of facilities available to provide for quality of life as, for example, low-risk prison units.

(i) *Chapter 18 (Duration and reviews of preventive measures):*

(i) Further consideration of a determinate period with the right to renew is worthwhile.

(ii) Resumption of a preventive measure, following suspension for a determinate prison sentence, should take place upon release from prison, not sentence expiry.

(iii) Further consideration of the imposition of a leave requirement to apply to terminate a measure is worthwhile. If concern is burdening the system with applications, a requirement for a material change in circumstances could potentially address the concern.

(iv) Clarification of procedural matters such as the ability to apply for legal aid, have representative counsel, ability to make submissions/be heard, whether proceedings would occur on the papers or in open court would be supported.

4 Chapter 3: Preventive measures, community safety and human rights

P1: The law should continue to provide for preventive measures to protect the community from serious sexual or violent reoffending by those who would otherwise be released into the community after completing a determinate sentence of imprisonment.

4.1 The Law Society agrees with the Commission's proposal to continue to provide for preventive measures, subject to the measures being capable of justification in each case. This will turn on the risk posed by an individual and on the strength of evidence. How measures are implemented is equally important, because their application can be unduly restrictive and may infringe rights if adequate care is not taken.

P2: The preventive measures the law should provide for are: community preventive supervision, residential preventive supervision, and secure preventive detention.

4.2 The proposed gradation of the three measures, signifying different degrees of supervision or detention, is commendable and will likely give the Court increased options to consider the least restrictive or severe measure to address the assessed risk of re-offending. The plain English descriptors are also likely to help the public more readily understand the differences between each measure.

5 Chapter 4: A single post-sentence regime

P3: A new statute should be enacted to govern all preventive measures (the new Act).

5.1 The Law Society agrees pursuing a new singular statute to govern all preventive measures would improve the regime's legislative coherence and public accessibility to the law. It would also be more efficient from a drafting and legislative design perspective.

P4: Sections 87–90 of the Sentencing Act 2002 providing for preventive detention should be repealed. Part 1A of the Parole Act 2002, providing for ESOs, should be repealed. The Public Safety (Public Protection Orders) Act 2014, providing for PPOs, should be repealed.

5.2 The PAP makes a compelling case in outlining the problems associated with the actuarial assessments involved in determining risk of reoffending and how these relate to the suite of legislative measures intended to reduce such risk to the community. The key problems include differences in the language used in different legislation.

5.3 Section 87(2)(c) of the Sentencing Act 2002 requires the court to be satisfied the person is "likely" to commit another qualifying offence in order to impose preventive detention. The threshold is, however, different for (**ESO**) and (**PPO**). The Parole Act 2002 and the Public Safety (Public Protection Orders) Act 2014 focus on the "high" or "very high risks" of reoffending the person poses, coupled with whether they display certain traits and behavioural characteristics.

5.4 The problems also include the different stages of the criminal justice process at which the risk assessment is performed, be it at sentencing for preventive detention, or post-sentencing in the civil jurisdiction for ESOs and PPOs. This sequencing undermines the ability of the preventive regimes to be consistent with human rights obligations. The Law Commission rightly draws attention to the United Nations Human Rights Committee's views regarding whether preventive detention raises issues of arbitrary detention in breach of article 9 of the International Covenant on Civil and Political Rights, and the Court of Appeal's findings in *Chisnall v Attorney-General* that the ESO and PPO regimes were punitive post-sentence orders that, on the evidence presented, unjustifiably limited the protection against second punishment under section 26(2) of the New Zealand Bill of Rights Act 1990 (**Bill of Rights**).[7]

5.5 In its 2023 submission, the Law Society preliminarily supported Proposal 3A. As noted at 11.2 of the Law Society's 2023 submission, further consideration was necessary before committing to one of the options proposed. Proposal 3C now seems more persuasive. It proposes repeal of the subject sections, with replacement of preventive detention with orders imposed post-sentence (including ESO). This will better respond to the perceived information deficit at sentence, which is seen as inhibiting accurate actuarial assessment of risk of reoffending at that stage.

5.6 It will also go some way to remedying the hopelessness felt by offenders sentenced to preventive detention by allowing them to access and benefit from rehabilitation before their risk of reoffending is assessed. Intuitively, it is sensible that such an assessment is performed closest to the point of potential release to ensure up-to-date information informs decision-making on risk, rather than information regarding the gravity of the offence tainting that decision-making at the front-end of sentence imposition. The Law Society agrees that indeterminate imprisonment beyond a punitive prison sentence is not an appropriate way of addressing the risks a person may reoffend. The international and domestic human rights jurisprudence sensibly provides that, if community safety

7 [2021] NZCA 616, [2022] 2 NZLR 484 and [2022] NZCA 24, (2022) 13 HRNZ 107.

requires that a person be detained beyond a punitive prison sentence, detention must occur in distinct conditions.

5.7 In the Law Society's view, a gradation of preventive measures will facilitate the imposition of the least restrictive preventive measure appropriate in the circumstances. The Law Society further agrees that it is not appropriate to maintain preventive measures at sentencing.

P5: All preventive measures should be imposed as post-sentence orders. The new Act should require applications for a preventive measure against an eligible person under a sentence for a qualifying offence to be made prior to the person's sentence expiry date or the date when the individual ceases to be subject to any release conditions, whichever is later.

5.8 For the reasons set out above (see P4), the Law Society agrees with this proposal.

P6: If it appears to a court sentencing an eligible person following conviction of a qualifying offence that it is possible an application for a preventive measure will be made against that person, the court should, at sentencing, have power to:

(a) notify the eligible person of the possibility a preventive measure may be sought against them; and

(b) record that the person has been notified.

For the avoidance of doubt, when a sentencing court has not given notice, a person's eligibility to have a preventive measure imposed on them should not be affected.

5.9 The Law Society considers this approach has merit, subject to the proviso that 'notice' should be just that: it is informative of the potential exposure of an individual but should not be determinative of any future outcome. A notice requirement could be integrated with a Corrections or Probation Service responsibility to thereafter explain the subject regime in more detail to an individual who has been notified, including how they can access further information and advice while in prison, and what rehabilitative measures are or will be made available to them.

6 Chapter 5: Reorienting preventive measures

P7: The purposes of the new Act should be to:

(a) protect the community by preventing serious sexual and violent reoffending;

(b) support a person considered at high risk of serious sexual and/or violent reoffending to be restored to safe and unrestricted life in the community; and

(c) ensure that limits on a person's freedoms to address the high risk they will sexually and/or violently reoffend are proportionate to the risks and are the least restrictive necessary.

6.1 The Law Society agrees that a new regime should articulate the purposes and principles that apply specifically to determining whether to impose preventive measures post-sentence. In this regard it should be differentiated from the Sentencing Act 2002, which features several competing purposes and principles that are applied at a different stage of the criminal justice process.

P8: In proceedings under the new Act, if it appears to the court that a person against whom a preventive measure is sought, or a person already subject to a preventive measure, may be "mentally disordered" or "intellectually disabled", the court should have power to direct the chief executive of Ara Poutama Aotearoa | Department of Corrections to:

(a) consider an application in respect of the person under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; and

(b) if the chief executive decides not to make an application, to inform the court of their decision and provide reasons for why the preventive measure is appropriate.

6.2 The Law Society agrees with this proposal. It may also assist to guide or inform future reform of the Mental Health (Compulsory Assessment and Treatment) Act 1992 and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 regimes and thereby contribute to providing a more supportive environment for those within the scope of this proposal.

P9: If at any time it appears to the chief executive of Ara Poutama | Department of Corrections that a person subject to a preventive measure is mentally disordered or intellectually disabled, the chief executive should have power to make an application in respect of the person under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

6.3 The Law Society agrees with this proposal.

P10: For the purposes of any application under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 made in relation to a person against whom a preventive measure is sought, or who is already subject to a preventive measure, the person should be taken to be detained in a prison under an order of committal.

6.4 The Law Society agrees with this proposal. Until an alternative order is made there is no basis for a change of custody location.

P11: If a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or a compulsory care order under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 is imposed on a person subject to a preventive measure, the preventive measure should be suspended. While suspended, a probation officer should be able to reactivate any conditions of the preventive measure to ensure that the person does not pose a high risk to the community or any class of people.

6.5 The Law Society agrees with this proposal, but considers that it should be contingent on updated assessments and judicial oversight rather than at the discretion of the probation officer. In other words, it should not be axiomatic that one order ends and another begins without reasoned consideration by the court, given the potentially draconian nature of the orders.

7 Chapter 6: Te ao Māori and the preventive regimes

P12: When imposing a preventive measure, the new Act should require the court to consider whether the preventive measure should be administered by placing the person within the care of a Māori group or a member of a Māori group, such as:

(a) an iwi, hapū, or whānau;

(b) a marae; or

(c) a group with rangatiratanga responsibilities in relation to the person.

7.1 The discussion on tikanga is considered and detailed. The Law Society agrees that the current law fails to give meaningful effect to the Crown's Treaty obligations and that a preventive measures regime should strive to remedy this. Any case for equal treatment can only be premised on an equal starting point. Research has shown that Māori within

the criminal justice system start from a position of disadvantage when compared to the population at large, something influenced and informed by the adverse effects of colonisation on Māori over time. Within this context, the Law Society supports the proposed legislative shift towards a more rehabilitative approach, developed in active partnership with Māori, to align preventive measures more closely with Treaty and human rights obligations.

7.2 Placement within the care of a Māori group, led by Māori, will go some way to achieving this. It follows that any such placement must be Māori-designed and led and appropriately resourced. While agreeing with Te Hunga Rōia Māori o Aotearoa that this may be less than genuine tino rangatiratanga (in the sense that any new preventive regime will still be governed by state law), it would offer some improvement on the options presently available.

8 Chapter 7: Age of eligibility

P13: The new Act should require that a person is aged 18 years or older to be eligible for a preventive measure.

8.1 The Law Society agrees as a matter of principle that a minimum age of 18 years old as the age of eligibility is appropriate. However, an offender who is an adult at the time of an application for an order should not be eligible in respect of offences that they committed when they were a youth. While public safety is a consideration, it also needs to be recognised that youth offenders are cognitively different than adults, more vulnerable, and need to be treated differently.

8.2 Given the view that the new orders would be imposed towards the end of sentence, it would be very rare that a defendant would be under 20 at the time that an indeterminate sentence is sought. That is because they would be likely approaching the end of a much longer sentence. In addition, the Court of Appeal's decision in *Dickey v R* should mean that indeterminate sentences would rarely be imposed on young offenders.[8]

9 Chapter 8: Qualifying offences

P14: The new Act should continue to require that a person has been convicted of a qualifying offence in order to be eligible for a preventive measure.

9.1 The Law Society agrees with this proposal, with the caveat that the offending itself must be of sufficient gravity. Given the indeterminate nature of these orders, rather than merely considering 'risk' there needs to be sufficiently serious underlying proven conduct to justify imposing a preventive measure. The alternative would be an approach similar to orders under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, where a defendant can end up in indeterminate detention for very minor criminal offending because they are deemed 'too risky' to release.

9.2 In addition, the Law Society is of the view that in order to be eligible for a preventive measure, a person should have been sentenced to a long-term sentence of imprisonment.

8 *Dickey v R* [2023] NZCA 2.

This is one way of ensuring that the offending that has been committed is of sufficient gravity in order to justify a preventive measure.

P15: Qualifying offences should be the same for all preventive measures under the new Act.

9.3 The Law Society agrees with this proposal. The current divergence in approach amongst the different regimes can lead to confusing and divergent outcomes.

P16: To be eligible for a preventive measure under the new Act, a person must have been convicted of an offence set out in Table 1 in Appendix 1, with the following amendments:

(a) The offence of strangulation and suffocation (section 189A of the Crimes Act 1961) should be added as a qualifying offence.

(b) The following offences should be removed as qualifying offences:

(i) Incest (section 130 of the Crimes Act 1961).

(ii) Bestiality (section 143 of the Crimes Act 1961).

(iii) Accessory after the fact to murder (section 176 of the Crimes Act 1961).

9.4 The Law Society remains of the views set out in the 2023 submission.[9] However, overall, the amended list does strike the right balance. We have only brief additional comments.

(a) *Offending involving objectionable material:* The Commission asked for feedback on the inclusion of Films, Videos, and Publications Classification Act 1993 (**FVPC**) offending in particular, concluding that the matter was 'finely balanced', and noting there is a link between some offenders progressing from FVPC offending to contact offending. Inclusion of FVPC offending is supported.

(b) *Strangulation:* Strangulation as an offence is highly prevalent. However, it is a serious offence that can be correlated with future harm, and its inclusion is supported. However, in practice, strangulation is likely to be similar to indecent assault, in that an indeterminate sentence should be sought only where there is a serious pattern of repeated conduct.

[9] At paras 6.3, 6.8 – 6.10.

P17: All qualifying offences listed above should also be "further qualifying offences" for the purpose of the application of the legislative tests under the new Act, with the exception of:

(a) imprisonable Films, Videos, and Publications Classification Act 1993 offences;

(b) attempts and conspiracies to commit qualifying offences; and

(c) Prostitution Reform Act 2013 offences.

9.5 The Law Society agrees with this proposal. In particular, the restriction on the use of FVPC Act offences being further qualifying offences ensures that the courts' focus is correctly on future contact offending.

10 Chapter 9: Overseas offending

P18: The new Act should provide that a person convicted of an offence overseas is eligible for a preventive measure if the offence would come within the meaning of a qualifying offence as defined under the new Act had it been committed in Aotearoa New Zealand and the person:

(a) has arrived in Aotearoa New Zealand within six months of ceasing to be subject to any sentence, supervision conditions, or order imposed on the person for that offence by an overseas court; and

(i) since that arrival, has been in Aotearoa New Zealand for less than six months; and

(ii) resides or intends to reside in Aotearoa New Zealand; or

(b) has been determined to be a returning prisoner and is subject to release conditions under the Returning Offenders (Management and Information) Act 2015; or

(c) is a returning offender to whom subpart 3 of Part 2 of the Returning Offenders (Management and Information) Act 2015 applies and who is subject to release conditions under that Act.

10.1 The Law Society shares concerns as raised in the discussion paper about relying upon overseas convictions that may have resulted from a justice system with very different processes and protections than New Zealand. Whilst in practice at present most returning offenders' orders are made in respect of Australian offenders – this will not necessarily continue to remain the case.

11 Chapter 10: Legislative tests for imposing preventive measures

P19: Under the new Act, the chief executive of Ara Poutama Aotearoa | Department of Corrections should be responsible for applying to the court for an order imposing a preventive measure on an eligible person.

11.1 The Law Society agrees with this proposal.

P20: Te Kōti Matua | High Court should have first instance jurisdiction to determine applications for secure preventive detention and residential preventive supervision under the new Act. Te Kōti-ā-Rohe | District Court should have first instance jurisdiction to determine applications for community preventive supervision. Where the chief executive of Ara Poutama Aotearoa | Department of Corrections applies for preventive measures in the alternative, they should apply to the court having first instance jurisdiction to determine the most restrictive preventive measure sought.

11.2 The Law Society agrees with this proposal. Given the significant restrictions on liberty, the High Court should maintain jurisdiction in respect of residential preventive supervision and secure preventive detention. In addition, the new Act should require that, if the matter is dealt with in the District Court, the judge must be a 'trial Judge', as is required at present for an extended supervision order.[10] This ensures that a judge dealing with these matters has sufficient expertise in serious sexual offending and violence cases to be able to assess the apparent seriousness of the underlying offending.

P21: The new Act should provide that the court may impose a preventive measure on an eligible person if it is satisfied that:

(a) the person is at high risk of committing a further qualifying offence in the next three years if the preventive measure is not imposed on them;

(b) having regard to the nature and extent of that risk, the preventive measure is the least restrictive measure adequate to address that risk; and

(c) the nature and extent of any limits the preventive measure would place on the person's rights and freedoms affirmed under the New Zealand Bill of Rights Act 1990 are justified by the nature and extent of the risk the person poses to the community.

11.3 The Law Society agrees with the proposed approach of requiring an assessment of the likelihood of committing an offence within three years, and with the proposal for a single test.

10 Parole Act 2002, s 107D.

P23: In deciding whether the tests in P21 are met, the new Act should provide that the court:

(a) must take into account:

(i) the health assessor reports provided in support of the application;

(ii) offences disclosed in the person's criminal record;

(iii) any efforts made by the person to address the cause or causes of all or any of those offences;

(iv) whether and, if so, how a preventive measure imposed can be administered by Ara Poutama Aotearoa | Department of Corrections (or on its behalf of Ara Poutama); and

(v) any other possible preventive measure that the court could impose that would comply with those tests; and

(b) may take into account any other information relevant to whether the tests in P21 are met.

11.4 The replacement of specific criteria with a single requirement that a person be 'high risk' creates a risk that judges simply defer to actuarial risk assessment tools. These tools result in offenders being labelled at a certain risk of reoffending. While we acknowledge this is not the intention, the new Act could make explicit that an actuarial assessment is just one matter to be considered amongst all criteria, by including 'the results from any actuarial risk assessment' within the mandatory considerations.

11.5 The current proposal is that the court must take into account "the health assessor reports provided in support of the application". The court should also be required to take into account any reports submitted by the respondent, in other words, not just those submitted in support of the application. Given the current difficulties often encountered in obtaining timely expert health assessor reports in Aotearoa, the Law Society suggests that the Act should build in fair opportunity for the obtaining and preparation of such reports by respondents, either by way rules/regulations or Court timetabling orders.

11.6 The Law Society is concerned about the requirement that the Court take into account "whether and, if so, how a preventive measure imposed can be administered by Ara Poutama Aotearoa | Department of Corrections". This raises the concern that an offender may be made subject to more strict conditions, where insufficient resourcing means the Department of Corrections cannot administer less restrictive conditions. Such issues currently arise in the context of electronically monitored bail. Some addresses more than two hours away are ruled inappropriate, due to resourcing issues meaning that police could not respond to a breach in a reasonable time. Conditions need to be realistic, however an offender should not be punished and subjected to a more restrictive form of sentence because of resource limitations. It is easy to see how this could occur: for example, an offender may be liable for secure preventive detention rather than

residential preventive supervision, due to there being no appropriate residence for them to be detained at.

P24: If the court is not satisfied the tests in P21 are met, the new Act should confer on the court the power in the same proceeding to impose a less restrictive measure if satisfied the tests are met in respect of that less restrictive measure.

11.7 The Law Society agrees the current section 107GAA procedure is inappropriate and that the court should have the power to impose a less restrictive measure. A current risk with this provision is identifying what to do when an order is not appropriate due to it being disproportionate.[11] For example, an offender may be at a high risk of committing a low-level indecent assault, where a community supervision order is insufficient, but a residential preventive supervision order is disproportionate. The way the current test is written suggests this offender may be liable for any preventive sentence, as a community order would not be "adequate to address" the risk.

P25: Before an application for a preventive measure is finally determined under the new Act, the court should have power to impose any preventive measure on an interim basis if one or more of the following events occur:

(a) An eligible person is released from detention;

(b) An eligible person who is a returning offender arrives in Aotearoa New Zealand;

(c) The court directs the chief executive of Ara Poutama Aotearoa | Department of Corrections to consider an application in respect of the person under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; or

(d) The chief executive of Ara Poutama Aotearoa | Department of Corrections makes an application to escalate the person to a more restrictive preventive measure.

11.8 The Law Society agrees as a matter of principle. However, any new legislation should explicitly provide that a respondent has a right to be heard in respect of any application. This is not currently the fact for returning offenders orders, which are dealt with without notice.

P26: To impose an interim preventive measure under the new Act, the court should be satisfied the primary legislative tests are made out on the available evidence in support of the application for the interim measure.

11.9 The Law Society agrees with this proposal.

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11 PAP at [10.83].

12 Chapter 11: Evidence of reoffending risk

P28: The new Act should require the chief executive of Ara Poutama Aotearoa | Department of Corrections to file with the court:

(a) one health assessor report to accompany an application to impose community preventive supervision on an eligible person; or

(b) two health assessor reports to accompany an application to impose secure preventive detention or residential preventive supervision on an eligible person.

12.1 The Law Society agrees with this proposal.

P29: The new Act should specify that a health assessor's report must provide the assessor's opinion on whether:

(a) the person is at high risk of committing a further qualifying offence in the next three years if the preventive measure is not imposed on them; and

(b) having regard to the nature and extent of the high risk the person will commit a further qualifying offence, the preventive measure is the least restrictive measure adequate to address the high risk that the person will commit a further qualifying offence.

12.2 The Law Society agrees with this proposal.

P30: The new Act should define a health assessor as a health practitioner who:

(a) is, or is deemed to be, registered with Te Kaunihera Rata o Aotearoa | Medical Council of New Zealand specified by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of medicine, and who is a practising psychiatrist; or

(b) is, or is deemed to be, registered with Te Poari Kaimātai Hinengaro o Aotearoa | New Zealand Psychologists Board specified by section 114(1)(a) of the Health Practitioners Act 2003 as a practitioner of the profession of psychology.

12.3 The Law Society agrees with this proposal.

P31: The new Act should provide that the court may, on its own initiative, direct that an additional health assessor report be provided.

12.4 The Law Society agrees with this proposal.

P32: The new Act should provide that the person against whom an application for a preventive measure is made may submit an additional health assessor report prepared by a health assessor they have engaged.

12.5 The Law Society agrees with this proposal and suggests the new Act should also require a court to take this information into account.

P33: The new Act should provide that the court may receive and consider any evidence or information it thinks fit for the purpose of determining an application or appeal whether or not it would otherwise be admissible. The rules applying to privilege and confidentiality under subpart 8 of Part 2 of the Evidence Act 2006, and rules applying to legal professional privilege, should continue to apply.

12.6 The Supreme Court is due to hear argument on the appropriateness of considering non-proven criminal offending in *Seleni v Chief Executive of the Department of Corrections*.[12] In the Law Society's view, the consideration of unproven conduct is potentially problematic and risks a court having to make a factual finding in an inappropriate arena. However, the Law Society acknowledges that judicial reasoning on the basis of allegations that have not resulted in convictions does occur within the criminal justice process, primarily in the consideration of propensity evidence.

13 Chapter 12: Proceedings under the new Act

P34: Te Kōti Matua | High Court and Te Kōti-a-Rohe | District Court should hear and determine applications for preventive measures under the new Act under their criminal jurisdiction.

13.1 The Law Society agrees with this proposal. The current approach of considering PPO applications (for example) as civil matters rather than criminal matters creates unnecessary complications, including problems with legal aid eligibility.

13.2 The PAP suggests that a right of appeal should be available to both the Chief Executive and the respondent. Currently a prosecutor has a limited right of appeal for sentence, as the Solicitor-General's consent must be obtained. The Law Society recommends this should be the position under the new legislation. This ensures that Crown Law independently considers whether an appeal is meritorious, rather than a Crown Solicitor merely acting under instruction from the Department of Corrections. It will enable Crown monitoring of appellate trends within this particular and at times complex area of the criminal law, and it is consistent with Law Officer interest in certain classes of persons that may come before the criminal justice system, e.g. the legal status of special patients under the Criminal Procedure (Mentally Impaired Persons) Act 2003.

12 Leave granted in *Seleni v Chief Executive of the Department of Corrections* [2024] NZSC 58

P35: The new Act should provide for a right of appeal to Te Kōti Pīra | Court of Appeal against decisions by Te Kōti Matua | High Court or Te Kōti-a-Rohe | District Court determining an application to:

(a) impose a preventive measure;

(b) impose a preventive measure on an interim basis;

(c) review a preventive measure;

(d) terminate a preventive measure; and

(e) escalate a person to a more restrictive measure (including to a prison detention order).

13.3 The Law Society agrees with this proposal.

P36: When a court hears and determines applications for the imposition or review of a preventive measure in respect of a person, the new Act should require the court to consider any views expressed by the person's family, whānau, hapū, marae or iwi or anyone holding a shared sense of whānau identity with the person.

13.4 The Law Society agrees with this proposal.

P37: The Government should continue to develop and support ways to facilitate the court to hear views from whānau, hapū, marae, iwi and other people holding a shared sense of whānau identity.

13.5 The Law Society agrees with this proposal. Consideration should be given to providing funding in appropriate circumstances for such views to be obtained, for example through a legal aid disbursement. There will often be a financial cost to gathering views, such as paying for whānau members to travel to attend a court hearing. A respondent's whānau should not be left unable to participate due to a lack of funding.

P39: The new Act should provide that notification to victims regarding special conditions may be withheld if disclosure would unduly interfere with the privacy of any other person.

13.6 The Law Society agrees with this proposal. A person having a stable and supportive environment is important to their rehabilitation. In some circumstances offenders have been forced from communities after their addresses were published. This can be counterproductive, by forcing them away from supports. Given this, in many cases it will be appropriate to withhold the publication of, for example:

(a) the names of persons specified in special conditions (such as the name of a partner or a victim); and

(b) addresses.

P40: The new Act should:

(a) entitle victims to make written submissions and, with leave of the court, oral submissions, when the court is determining an application to impose or review a preventive measure; and

(b) provide that victims may be represented by counsel and/or a support person or people if making an oral submission to the court.

13.7 The PAP endorses the ability for a victim to be legally represented when making submissions. Consideration should be given to victims being eligible for legal aid. Representation should not be reserved for those who are able to afford it. In addition to increasing the likelihood of more focused submissions, it would also mean the victim has a lawyer that can explain to them what a court is assessing when they are making their decision. We acknowledge that this is not presently the case for parole matters. However, a hearing in the District Court or High Court, as the PAP proposes, is necessarily more formal than a hearing before the Parole Board.

P41: For the purposes of the new Act, a victim should be defined as a person who:

(a) is a victim of a qualifying offence committed by a person:

(i) against whom an application for a preventive measure has been made; or

(ii) who is subject to a preventive measure imposed under the Act; and

(b) who has asked for notice or advice of matters or decisions or directions, and copies of orders and conditions, and has given their current address under section 32B of the Victims' Rights Act 2002.

13.8 The Law Society agrees with this proposal.

P42: The new Act should protect information related to victims by:

(a) requiring that a person subject to a preventive measure or against whom an application for a preventive measure has been made:

(i) does not receive any information that discloses the address or contact details of any victim; and

(ii) does not retain any written submissions made by a victim;

(b) providing that the court may, on its own initiative or in response to an application, withhold any part of a victim's submission if, in its opinion, it is necessary to protect the physical safety or security of the victim concerned or others; and

(c) making it an offence for any person to publish information that identifies, or enables the identification of, a victim of a person subject to an application or a preventive measure.

13.9 This proposal reflects and seems to strengthen the position/restriction currently provided under sections 15, 16 and 23-25 of the Victims Rights Act 2002. The wording of the proposal allows to be withheld if it is necessary to protect the "physical safety or security of the victim". In the Law Society's view, it is worth considering if this limitation to physical safety is necessary. This is more restrictive than parole provisions that allow withholding of information for physical or mental safety.[13] The reasons for withholding a victim's submission in the new Act could be further extended to include emotional harm and privacy reasons. There may also be opportunities to further strengthen the privacy protection afforded victims, as noted below.

13.10 The Law Society recommends:

(a) A provision that empowers the Court to give directions or impose conditions to protect the victim's physical safety or security, emotional welfare, and privacy, equivalent to that under section 27 of the Victims Rights Act 2002.

(b) An equivalent to section 13(5) of the Parole Act 2002, providing that if information is withheld it can be given to the respondent's lawyer.

(c) Reconsideration of the proposed wording to protect victims by "making it an offence for any person to publish information that identifies, or enables the identification of, a victim of a person subject to an application or a preventive measure". There are many cases where victims themselves wish to tell their story and, consequently, ask for their automatic suppression to be removed.

P43: Proceedings under the new Act concerning preventive measures should generally be open to the public.

13.11 The Law Society agrees with this proposal, provided there is the ability to close the court. Given that these are criminal measures that can result in indefinite detention, we accept

[13] Parole Act 2002, s 13(3).

that the public has a right to know how these provisions are being applied. However, many applications consider information that is very private to the offender, such as the fact that they themselves have been sexually abused as a child.

P44: The new Act should allow for the relevant court to make an order forbidding publication of:

(a) the name or any other identifying details of a person who is the subject of an application for, or subject to, a preventive measure; and/or

(b) the whole or any part of the evidence given or submissions made in the proceedings; and/or

(c) any details of the measure imposed.

13.12 The Law Society agrees with this proposal.

P45: The court may make an order forbidding publication only if satisfied that publication would be likely to:

(a) cause undue hardship to the person who is the subject of an application for, or subject to, a preventive measure;

(b) unduly impede the person's ability to engage in rehabilitation and reintegration;

(c) cause undue hardship to any victim of the person's previous offending;

(d) endanger the safety of any person;

(e) lead to the identification of another person whose name is suppressed by order of by law; or

(f) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences.

13.13 The Law Society agrees with this proposal.

14 Chapter 13: Overarching operational matters

P46: Ara Poutama Aotearoa | Department of Corrections should be responsible for the operation of preventive measures under the new Act.

14.1 The Law Society supports this proposal.

P47: The new Act should provide for the appointment of facility managers by the chief executive of Ara Poutama Aotearoa | Department of Corrections or, in case of facilities operated pursuant to a facility management contract, by the contractor.

14.2 The Law Society supports this proposal.

P48: The new Act should require all facility managers to comply with guidelines and/or instructions from the chief executive of Ara Poutama Aotearoa | Department of Corrections.

14.3 The Law Society supports this proposal in principle, however, suggests that there should be an explicit requirement in the new Act for the chief executive to develop such guidelines and/or instructions. That is, it should not be an obligation to comply, which becomes relevant only if the chief executive decides to issue guidelines/instructions.

P49: The new Act should provide that the chief executive of Ara Poutama Aotearoa | Department of Corrections may enter into a contract with an appropriate external entity for the management of a residential facility (under residential preventive supervision) or a secure facility (for secure preventive detention).

14.4 The Law Society is hesitant about this proposal as, historically, concerns have been regularly raised about the management of private prisons such as Auckland South and Mt Eden, which in the past have been managed by companies like Serco.[14]

14.5 However, in the case of managing high-risk prisoners' post-sentence, we note the Salisbury Street Foundation (**SSF**) has established a proven reputation for decreasing recidivism and improving outcomes for those who pass through it.[15] If external entities contracted to manage residential preventive supervision and secure preventive detention facilities were modelled on the success of the SSF this would go some way toward allaying concerns.

P50: The new Act should require that every facility management contract must:

(a) provide for objectives and performance standards no lower than those of Ara Poutama Aotearoa | Department of Corrections;

(b) provide for the appointment of a suitable person as facility manager, whose appointment must be subject to approval by the chief executive of Ara Poutama, as well as suitable staff members; and

(c) impose on the contracted entity a duty to comply with the new Act (including instructions and guidelines issued by the chief executive of Ara Poutama), the New Zealand Bill of Rights Act 1990, the Public Records Act 2005, sections 73 and 74(2) of the Public Service Act 2020 and all relevant international obligations and standards as if the residence were run by Ara Poutama.

14.6 The Law Society agrees with this proposal.

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14 Radio New Zealand "Another Serco prison under fire" (1 October 2015) RNZ < https://www.rnz.co.nz/news/political/285734/another-serco-prison-under-fire >; Radio New Zealand "Minister says Serco's 55 breaches 'fair'" (16 September 2015) RNZ < https://www.rnz.co.nz/news/political/284397/minster-says-serco's-55-breaches-'fair' >

15 Shaun Goldfinch "Expanding Residential Community Care and Services: A policy option for New Zealand?" (2018) 6 Practice: The New Zealand Corrections Journal < https://www.corrections.govt.nz/resources/research/journal/volume_6_issue_2_november_2018/expanding_residential_community_care_and_services_a_policy_option_for_new_zealand >

P51: The new Act should provide for the ability of the chief executive of Ara Poutama Aotearoa | Department of Corrections to take control of externally administered facilities in emergencies.

14.7 The Law Society agrees with this proposal.

P52: The new Act should provide that probation officers, as well as facility managers and their staff, must have regard to the following guiding principles when exercising their powers under the new Act:

(a) People subject to community preventive supervision should not be subjected to any more restrictions of their rights and freedoms than are necessary to ensure the safety of the community.

(b) People subject to residential preventive supervision or secure preventive detention should have as much autonomy and quality of life as is consistent with the safety of the community and the orderly functioning and safety of the facility.

(c) People subject to any preventive measure should, to the extent compatible with the safety of the community, be given appropriate opportunities to demonstrate rehabilitative progress and be prepared for moving to a less restrictive preventive measure or unrestricted life in the community.

14.8 As noted in the PAP at 1.12, New Zealand's management of those subject to preventative orders has been criticised by both international bodies and domestic courts, for the impact the measures have on a person's right to freedom from arbitrary detention and protection against second punishment.[16] The Law Society believes this proposal could be improved by adding a guiding principle that requires probation officers and facility managers to ensure the person subject to the measure is not subjected to a second punishment. This should be taken into account when the probation officers or facility managers are exercising their powers.

P53: The new Act should provide that:

(a) people subject to a preventive measure are entitled to receive rehabilitative treatment and reintegration support; and

(b) Ara Poutama Aotearoa | Department of Corrections must ensure sufficient rehabilitative treatment and reintegration support is available to people subject to a preventive measure in order to keep the duration of the preventive measure as short as possible while protecting the community from serious reoffending.

14.9 The Law Society supports this. However, we note the current constraints on the provision of rehabilitative programmes across the prison estate, and emphasise that the

16 *Miller v New Zealand* (2017) 11 HRNA 400 (UNHRC); *Chisnall v Attorney-General* [2021] NZCA 616 and *Chisnall v Attorney-General* [2022] NZCA 24.

availability of funding and resources is likely to be an issue. We consider that the funding for rehabilitative treatment and reintegration support for those subject to preventive measures should be ring-fenced, and not be funded by the sentenced prisoner allocation of funds. Many sentenced prisoners are already waiting an unreasonable length of time (or are required to transfer) to access rehabilitation programmes. Rehabilitation for those on preventive measures should not be at the expense of those that are currently serving their sentence.

P54: The new Act should provide that people subject to residential preventive supervision or secure preventive detention are entitled to participate in therapeutic, recreational, cultural and religious activities to the extent compatible with the safety of the community and the orderly functioning and safety of the facility.

14.10 The Law Society supports this proposal.

P55: The new Act should provide that people subject to residential preventive supervision or secure preventive detention are entitled to medical treatment and other healthcare appropriate to their conditions. The standard of healthcare available to them should be reasonably equivalent to the standard of healthcare available to the public.

14.11 The Law Society supports this proposal.

P56: The new Act should require that each person subject to a preventive measure must have their needs assessed as soon as practicable after the measure is imposed. The assessment should identify any:

(a) medical requirements;

(b) mental health needs;

(c) needs related to any disability;

(d) educational needs;

(e) needs related to therapeutic, recreational, cultural and religious activities;

(f) needs related to building relationships with the person's family, whānau, hapū, or iwi or other people with whom the person has a shared sense of whānau identity;

(g) steps to be taken to facilitate the person's rehabilitation and reintegration into the community; and

(h) other matters relating to the person's wellbeing and humane treatment.

14.12 The Law Society supports this proposal, assuming that such an assessment would be informed by the health assessor's report. It may be worth specifying that the health assessor's report will be taken into account when undertaking the assessment.

P57: The new Act should provide that each person subject to a preventive measure should have a treatment and supervision plan developed with them. The treatment and supervision plan should set out:

(a) the reasonable needs of the person based on the completed needs assessment;

(b) the steps to be taken to work towards the person's restoration to safe and unrestricted life in the community;

(c) if applicable, the steps to be taken to work towards the person's transfer to a less restrictive measure;

(d) the rehabilitative treatment and reintegration support a person is to receive;

(e) for people subject to residential preventive supervision or secure preventive detention, opportunities to engage with life in the community;

(f) any matters relating to the nature and extent of the person's supervision required to ensure the safety of the person, other residents of a facility, staff of the facility, and the community; and

(g) any other relevant matters.

14.13 While the Law Society supports this proposal in principle, we note that care needs to be taken with the drafting of (b), so that those who have no real prospect of attaining a free and unrestricted life in the community are not led to expect (or work in futility towards) such an outcome. This is particularly so with subject persons who have significant disabilities. For a small number of people, the goal of unrestricted life is unrealistic. We suggest that consideration is given to re-drafting subsection (b), to include the terms 'if applicable', as per subsection (c).

P58: Under the new Act, the person responsible for assessing the person's needs and developing and administering the treatment and supervision plan should be:

(a) in the case of community preventive supervision, the probation officer responsible for supervising the person; or

(b) in the case of residential preventive supervision and secure preventive detention, the facility manager into whose care the person is placed.

14.14 The Law Society supports this proposal but considers that there should be an expectation that those completing these assessments have training and expertise in creating, developing and administering treatment and supervision plans.

15 Chapter 14: Community preventive supervision

P59: Community preventive supervision should comprise of standard conditions, and any additional special conditions imposed by the court. The new Act should provide that, when Te Kōti-a-Rohe | District Court imposes community preventive supervision, the following standard conditions should automatically apply. The person subject to community preventive supervision must:

(a) report in person to a probation officer in the probation area in which the person resides as soon as practicable, and not later than 72 hours, after commencement of the extended supervision order;

(b) report to a probation officer as and when required to do so by a probation officer, and notify the probation officer of their residential address and the nature and place of their employment when asked to do so;

(c) obtain the prior written consent of a probation officer before moving to a new residential address;

(d) report in person to a probation officer in the new probation area in which the person is to reside as soon as practicable, and not later than 72 hours, after the person's arrival in the new area if consent is given under paragraph (c) and the person is moving to a new probation area;

(e) not reside at any address at which a probation officer has directed the person not to reside;

(f) not leave or attempt to leave Aotearoa New Zealand without the prior written consent of a probation officer;

(g) if a probation officer directs, allow the collection of biometric information;

(h) obtain the prior written consent of a probation officer before changing their employment;

(i) not engage, or continue to engage, in any employment or occupation in which the probation officer has directed the person not to engage or continue to engage;

(j) take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer;

(k) not associate with, or contact, a victim of their offending without the prior written approval of a probation officer; and

(l) not associate with, or contact, any specified person, or with people of any specified class, with whom the probation officer has, in writing, directed the person not to associate, unless the probation officer has defined conditions under which association or contact is permissible.

15.1 The Law Society has some concerns about the drafting of these proposed conditions. As a general point, we note that persons subject to these measures are likely to be disabled and suffer from communication difficulties (whether diagnosed or not). They could therefore be drafted accessibly, and in plain English. For example, what is meant by a 'probation area'? and what is 'practicable'? These terms, whilst known to those who work in the area, are not easily understandable to a person with disabilities or the general public.

15.2 It is recommended that Communication Assistance providers, such as Talking Trouble, or MoreTalk, should be consulted with about redrafting conditions, to ensure that they are written in accessible terms.

15.3 A further concern is how this would apply to a subject person who is, or becomes, unhoused. The requirement for prior written consent in subsection (c) could be an insurmountable barrier when seeking accommodation for a night and it is not practicable to obtain prior written consent. We note that the requirement is different in (a) and (d) for example, which requires reporting to the probation officer 'as soon as practicable'.

15.4 Finally, we suggest specifying that while subsection (j) creates a requirement to take part in a rehabilitative and reintegrative needs assessment, the subject person(s) have a right to refuse to undergo medical treatment.

P60: The new Act should provide for a non-exhaustive list of example special conditions. This list should include conditions:

(a) to reside at a particular place;

(b) to be at the place of residence for up to 12 hours per day;

(c) to take part in a rehabilitative and reintegrative programme if and when directed to do so by a probation officer;

(d) not to use a controlled drug or a psychoactive substance and/or consume alcohol;

(e) not to associate with any person, persons, or class of persons;

(f) to take prescription medication, provided they have given their informed consent;

(g) not to enter, or remain in, specified places or areas at specified times or at all times;

(h) not to associate with, or contact, a person under the age of 16 years except with the prior written approval of a probation officer and in the presence and under the supervision of an adult who has been informed about the relevant offending and has been approved in writing by a probation officer as suitable to undertake the role of supervision;

(i) to submit to the electronic monitoring of compliance with any conditions that relate to the whereabouts of the person; and

(j) not to use any electronic device capable of accessing the internet without supervision.

15.5 The Law Society considers that the requirement to reside at a particular place for twelve hours per day, in subsection (b), would risk the measure in effect imposing detention and essentially be approaching the residential preventive supervision measure. For example – if an offender were required to be present between 7am to 7pm – and the house was located in an area with no night-time public transport – the practical impact could be that an offender could not leave their house. We suggest that care needs to be taken to ensure this does not occur.

15.6 Further, the requirement in subsection (c) to take part in a rehabilitative and reintegrative programme when directed to do so may infringe upon the right to refuse medical treatment, protected by section 11 of the New Zealand Bill of Rights. We query whether this is intended and, if so, whether the proposed limitation on this right is justified.

15.7 There is a class of offenders who refuse to undergo treatment because they are of the view they are innocent of their charges. If they are released, and then refuse to undergo treatment required as a condition of a preventive measure, there is a risk that they could

be indefinitely caught in the justice system. The Law Society recommends that consideration is given to how this class of offenders may be affected by the proposed new Act.

P62: The new Act should provide that special conditions should, by default, be imposed for the same period as the preventive measure itself. Te Kōti-a-Rohe | District Court, may, however, specify a shorter period for individual special conditions where the full period would not be the least restrictive measure.

15.8 The Law Society considers that some conditions would only be appropriate shortly after the release of a person from custody. Further, it may be inappropriate to impose some conditions for the entire period of the preventive measure given the ultimate goal of reintegration in the community. As such, we consider that any special conditions imposed should be subject to regular review.

P63: The new Act should provide that probation officers should be responsible for monitoring people's compliance with community preventive supervision conditions.

15.9 The Law Society agrees with this proposal.

16 Chapter 15: Residential preventive supervision

P64: Residential preventive supervision should comprise of standard conditions and any additional special conditions imposed by the court. The new Act should provide for the following standard conditions of residential preventive supervision. The person subject to residential preventive supervision must:

(a) reside at the residential facility specified by the court;

(b) stay at that facility at all times unless leave is permitted by the facility manager;

(c) be subject to electronic monitoring for ensuring compliance with other standard or special conditions unless the facility manager directs otherwise;

(d) be subject to in-person, line-of-sight monitoring during outings unless the facility manager directs otherwise;

(e) not have in their possession any prohibited items;

(f) submit to rub-down searches and to searches of their room if the facility manager has reasonable grounds to believe that the resident has in their possession a prohibited item;

(g) hand over any prohibited items discovered in their possession;

(h) not associate with, or contact, a victim of the resident's offending without the prior written approval of the facility manager; and

(i) not associate with, or contact, any specified person or people of any specified class, with whom the facility manager has, in writing, directed the resident not to associate, unless the facility manager has defined conditions under which association or contact is permissible.

16.1 The Law Society considers that a standard condition to remain at a facility at all times unless leave is permitted, as described by subsection (b) amounts to detention. We consider that if the intention is for the residential preventive measure to detain an individual at an address unless leave is permitted, then the detention aspect of the measure should be reflected in the name of the measure. That is, community preventive detention, rather than residential preventive supervision.

16.2 If such a standard condition is imposed, it reflects more closely the aspects of a sentence of home detention than of a sentence of community supervision. This is because home detention has both elements of detention and rehabilitation within it, as does the residential preventive measure as it is described here. More generally, the totality of the proposed standard conditions reflects a restrictive detention environment.

16.3 The Law Society also considers it inconsistent to include specific rights for regular outings (per P74(d)) for individuals subjected to secure preventive detention but not for those subject to the residential preventive supervision measure, where there is also a

requirement not to leave. We suggest that minimum entitlements should be expressed in relation to residential preventive supervision as well.

16.4 While the Law Society accepts that some items should be prohibited in some residences (subsection (e)), we consider it is also important to bear in mind the individual rights and autonomy of the subject person as well as others who may be living with them.

16.5 In relation to subsection (f) requiring a subject person to submit to rub-down searches. The Law Society considers two further points should be included in relation to this requirement. Those points are that:

(a) The new legislation should import a requirement, similar to that of the Search and Surveillance Act 2012 section 125(3) that a personal search of a person must be conducted with decency and sensitivity. Section 125(3) of the Search and Surveillance Act 2012 provides:

> "A person who carries out a strip search, rub-down search, or any other personal search must conduct the search with decency and sensitivity and in a manner that affords to the person being searched the degree of privacy and dignity that is consistent with achieving the purpose of the search."

(b) There should be consideration of including a requirement that the searcher be of the same gender as the subject person in a similar way to pat-downs at an airport.

P66: The new Act should set out a procedure for the responsible Minister to designate a residential facility by New Zealand Gazette notice.

16.6 The Law Society considers that this proposal would be better supported by the inclusion of general principles and the minimum acceptable environment regarding residential facilities. For example, we suggest that care would need to be taken to ensure that these facilities are truly centred in the community to avoid the practical effect of a facility becoming an extended part of the prison environment. Without such care, there is a risk that the subject persons would not be able to genuinely reintegrate into the community. This could be drafted as a principle that such residential facilities should be located in areas with particular services and infrastructure.

16.7 An example of a necessary feature of a truly community-centred residential facility would be ensuring the placement of a facility is in an area where access to public transport exists.

16.8 Further, as per paragraph 16.3 above, we also note that there are no prescribed minimum entitlements, and we suggest this should be included. For example, the ability to go into the community, access the internet (unless inappropriate in the particular circumstances of the case), the ability to leave the address to attend cultural and/or religious activities etc.

P67: The new Act should provide for residential facilities to be subject to examination by a National Preventive Mechanism under the Crimes of Torture Act 1989 and to periodic inspections every six months by specialised inspectors.

16.9 The Law Society supports the proposal for residential facilities to be subject to regular inspection by a National Preventive Mechanism.

16.10 We note the proposal currently refers to inclusion of a complaints regime akin to that set out in the PPO Act: independent inspectors would have the power to hear complaints and conduct investigations. However, the right of complaint under section 80 of the PPO Act relates to a 'breach of the resident's rights.' However, the proposal (unlike the PPO Act), does not include specified rights or minimum entitlements. The parameters for complaint therefore need to be considered, including whether a right to complain about only the breach of specified rights or entitlements is sufficient. We would support a broader ability for the subject person to complain about administrative acts, decisions and omissions.[17]

17 Chapter 16: Secure preventive detention

P68: The new Act should provide for the following core features of secure preventive detention:

(a) People subject to secure preventive detention are detained in secure facilities.

(b) Detainees must not leave the facility without permission of the facility manager.

(c) Detainees are in the custody of the chief executive of Ara Poutama Aotearoa | Department of Corrections.

17.1 The Law Society suggests it may be worth considering provision for certain conditions to be put in place, such as not contacting specified persons and specifying prohibited items.

P69: The new Act should provide that secure preventive detention is administered in secure facilities separate from prisons.

17.2 The Law Society supports this proposal. A secure preventive detention facility should be separate from a prison to reinforce the difference in the nature of the detention.

P70: The new Act should set out a procedure for the responsible Minister to designate a secure facility by New Zealand Gazette notice.

17.3 The Law Society supports this proposal in principle but considers that, as with residential facilities, the minimum standards need to be clarified. In particular, the appropriateness of the location of secure facilities.

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17 For example, the Ombudsman Act 1975 jurisdiction exercised in respect of the Department of Corrections. A broader provision would enable complaints about the exercise of discretionary decision making powers.

17.4 An example of the concern is provided by the case of *Chief Executive of the Department of Corrections v Hunia-Rikirangi* where Mr Hunia-Rikirangi was detained in the only current IDO/PPO facility in New Zealand. This is Matawhāiti, in Christchurch. The case raised concerns about Mr Hunia-Rikirangi's ability to maintain his connection to his whānau support network because the location of the secure facility was so far away from them. The Judge stated:[18]

> (a) Finally, it is most unfortunate that the only IDO/PPO residence in New Zealand is based in Christchurch, and thus a significant distance from Mr Hunia-Rikirangi's family/whanau support network. Noting the evidence about the importance of family/whanau contact for residents at Matawhātiti, while Mr Hunia-Rikirangi is detained pursuant to the IDO at that residence, all steps reasonably practicable are to be taken to ensure Mr Hunia-Rikiraingi is able to have regular contact with family/whanau members, including his mother.

P71: The new Act should provide that people subject to secure preventive detention should have rooms or separate, self-contained units to themselves. The rooms or units should be materially different from prison cells and provide the detainee with privacy and a reasonable level of comfort.

17.5 The Law Society agrees with this proposal.

P72: The new Act should state that the detainee's rights are only restricted to the extent they are limited by the new Act.

17.6 The Law Society agrees with this proposal.

P73: The new Act should carry over the rights of detainees affirmed in sections 27–39 of the Public Safety (Public Protection Orders) Act 2014.

17.7 The Law Society agrees with this proposal.

P74: The new Act should clarify that, subject to reasonably necessary restrictions, detainees are entitled to:

(a) cook their own food;

(b) wear their own clothes;

(c) use their own linen;

(d) have regular supervised outings; and

(e) access the internet.

17.8 The Law Society agrees with this proposal and reiterates that, as noted in paragraph 15.3, minimum entitlements should also be specified in the residential preventive supervision measure.

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18 *Chief Executive of the Department of Corrections v Hunia-Rikirangi* [2024] NZHC 2159 at [10].

P75: Under the new Act, to ensure the orderly functioning of the facility, the manager of a secure facility should have powers to:

(a) check and withhold certain written communications;

(b) inspect delivered items;

(c) monitor and restrict phone calls and internet use;

(d) restrict contact with certain people outside a facility;

(e) conduct searches;

(f) inspect and take prohibited items;

(g) carry out drug or alcohol tests;

(h) seclude detainees;

(i) restrain detainees; and

(j) call on corrections officers to use physical force in a security emergency.

17.9 The Law Society agrees that the listed powers are appropriate, provided they are made explicitly subject to the Bill of Rights and a requirement for record keeping of where and when the coercive powers are used.

P76: The new Act should provide for a facility manager to have the power to make appropriate rules for the management of the facility and for the conduct and safe custody of the detainees.

17.10 The Law Society agrees that this proposal is appropriate, provided they are made explicitly subject to the Bill of Rights and a detainee's autonomy (see P52(b)) is upheld by the rules.

P77: Under the new Act, the manager of a secure facility may delegate any of their powers to suitably qualified staff, except the powers to make rules and to delegate.

17.11 The Law Society agrees that this proposal is appropriate, provided they are made explicitly subject to the Bill of Rights and a detainee's autonomy (see P52(b)) is upheld by the delegated staff.

P78: The new Act should provide for secure facilities to be subject to examination by a National Preventive Mechanism under the Crimes of Torture Act 1989 and to periodic inspections at least every six months by specialised inspectors.

17.12 The Law Society supports this proposal. We also query whether a provision should be included that includes the right to communicate with official agencies (for example, the Ombudsman), and members of Parliament without that mail being opened or read or withheld. This could be in the form of a provision similar to section 109 of the Corrections Act 2004 which states:

109 Mail between prisoners, official agencies, and members of Parliament

A staff member must not open any mail and an authorised person must not read any correspondence and a prison manager must not withhold any mail that –

(a) is from a prisoner to an official agency; or

(b) is from a prisoner to a member of Parliament and is addressed to that member at Parliament; or

(c) is from an official agency or member of Parliament to a prisoner, and accompanied by a covering letter addressed to the prison manager stating that the agency or member of Parliament is acting in an official capacity in respect of the prisoner.

17.13 Further, the Law Society considers that the right of detainees to communicate with legal counsel, including access to facilities for confidential communications, must be protected.

18 Chapter 17: Non-compliance and escalation

P79: The new Act should provide that a person subject to a preventive measure who breaches any conditions of that measure without reasonable excuse commits an offence and is liable on conviction to imprisonment for a term not exceeding two years.

18.1 The Law Society considers that a penalty similar to that provided for a breach of conditions in the Parole Act 2002 would be appropriate.[19]

18.2 Further, the Law Society notes that the Solicitor-General's review of the Ara Poutama Aotearoa Prosecution Function found that inadequate consideration is given to warnings for breaches of conditions and that prosecution is the preferred response for many probation officers.[20] Whilst this is not a matter for legislation, we consider it should be reinforced that other methods of managing breaches should be considered, with the view that an assessment of both limbs of the Prosecution Test is undertaken before charges are laid.

P80: Te Kōti Matua | High Court should have power to order that a preventive measure to which a person is subject be terminated and a more restrictive preventive measure be imposed if:

(a) the person would, if they were to remain subject to the preventive measure, pose such an unacceptably high risk to the community, themselves or others that they cannot be safely managed under that preventive measure; and

(b) all less restrictive options for managing the behaviour of the person have been considered and any appropriate options have been tried.

18.3 The PAP discusses the option of escalating the level of preventive measure to which the individual is subject to in response to a breach of a condition and notes that the Chief

19 Parole Act 2002, section 71. A breach of conditions without reasonable excuse is liable for imprisonment for a term not exceeding 1 year or to a fine not exceeding $2,000.

20 David Boldt *Review of the Ara Poutama Aotearoa Prosecution Function* (Te Tari Ture o te Karauna | Crown Law, August 2023) at [8] – [13].

Executive should apply for a more restrictive measure to address the risks the person presents.[21] We consider that escalation of the applicable measure should not be a regular response to a breach of conditions. An escalation should only result where there is an increase in the risk assessment of the subject person, rather than because of non-compliance with conditions.

18.4 The Law Society considers that if a more restrictive measure is intended to be imposed as a result of breaches of conditions, there should be a requirement for an updated health assessor's report. This is because a non-compliance issue in relation to conditions does not necessarily mean that the individual's risk has increased, even if they continue to fail to comply with that condition.

18.5 We note that the inclusion of an updated health assessor's report could identify reasons for the breach, how it relates to the person's risk, and whether or not it does in fact increase the risk profile. For example, repeated breaches of a condition may occur in the situation referred to at paragraph 15.3 above, where a subject person does not have a permanent address to reside at and does not regularly obtain prior written consent of their probation officer prior to changing address.

P81: Te Kōti Matua | High Court should have power to order that a person subject to secure preventive detention be detained in prison if:

(a) the person would, if they were to remain subject to secure preventive detention, pose such an unacceptably high risk to the community, themselves or others that they cannot be safely managed on secure preventive detention; and

(b) all less restrictive options for managing the behaviour of the person have been considered and any appropriate options have been tried.

18.6 The Law Society considers that this proposal is acceptable as a matter of last resort.

P82: A person who Te Kōti Matua | High Court has ordered to be detained in prison should:

(a) be treated in the same way as a prisoner who is committed to prison solely because they are awaiting trial;

(b) have the rights and obligations of such a prisoner; and

(c) have all the rights conferred on that person under the new Act to the extent that those rights are compatible with the provisions of the Corrections Act 2004 that apply to prisoners who are committed to prison solely because they are awaiting trial.

18.7 The Law Society queries whether it is appropriate to treat subject persons in the same way as remand prisoners, when the term of their stay could be in the realm of years. This is, in part, because remand facilities are designed for short-term stays and do not have

21 PAP at 17.41.

the same level of facilities to provide for quality of life as, for example, low-risk prison units.

18.8 It is not clear in this proposal or the PAP whether a detainee subject to a prison detention order would be held within a remand unit, or some other part of the prison environment. We consider this needs clarification.

18.9 To ensure consistency with New Zealand's international obligations[22] and domestic rights protections[23] Regulation 186 of the Corrections Regulations 2005 requires accused prisoners and convicted prisoners to be kept separate in prison, as far as is practicable. The question then arises as to the status of those subject to a prison detention order under this regime. They have already been convicted and are no longer serving a specific sentence, but they are still considered a risk to the public, leading to their detention.

18.10 The intention behind this proposal is commendable, and we support ensuring the rights and obligations of those subject to secure preventive detention by way of clear proscription in legislation. Further, we acknowledge that being a remand prisoner carries access to some privileges such as being able to wear their own clothes. However, we suggest that further consideration is required.

18.11 We agree that – if detained with remand prisoners – it will be essential to ensure that detainees continue to have access to their rehabilitative programmes, despite remand prisoners not currently having this right.[24]

19 Chapter 18: Duration and reviews of preventive measures

P83: The new Act should provide that a preventive measure is indeterminate and remains in force until it is terminated by a court.

19.1 Currently, extended supervision orders (ESOs) are subject to a ten-year period which can be renewed.[25] The provision of an endpoint can serve as a goal for those who can achieve reintegration. Where renewal is proposed, a lawyer can be appointed to advocate for a subject person's rights. The Law Society considers these to be positive measures.

19.2 While not expressing a strong preference, we consider that a determinate period with the right to renew is worth further consideration. This would preferably be in combination with the proposed right of regular review, discussed further below.

19.3 In part, this is because those who are subject to preventive measures are often vulnerable and not aware that they can apply to cancel a preventive order. Many only become aware of the right to apply to cancel an order when they return to court for breaching an order, as they are then able to get advice from a lawyer.

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22 Article 10 of the International Covenant on Civil and Political Rights and Rule 112 the United Nations Standard Minimum Rules for the Treatment of Prisoners, as referred to in section 5(1)(b) of the Corrections Act 2004.

23 Typically understood as a corollary of the presumption of innocence, protected and affirmed by section 25(c) of the New Zealand Bill of Rights Act 1990.

24 PAP at 17.58.

25 Parole Act 2002, section 107A(b).

19.4 We consider this may be problematic as those who comply with an order and thus may be suited to cancellation, might never apply to cancel an order due to a lack of awareness of that right. While there are some provisions proposed for regular rights of review, these do not extend to allowing access to a lawyer or providing advice as to their rights about how and when an order can be terminated.

P84: Under the new Act, a preventive measure to which a person is subject should be suspended while that person is detained in a prison (except under a prison detention order or a sentence of life imprisonment). Community preventive supervision and residential preventive supervision should remain suspended during any period the person is released from prison (if applicable) until the sentence expiry date. Secure preventive detention should reactivate once the person is no longer detained in a prison.

19.5 The Law Society has some concerns about this proposal. First, the proposal effectively means that parole conditions would replace the person's preventive measure conditions, which if they are under a residential preventive supervision order could mean, counterintuitively, that they are under less strict conditions on parole than when they are under the measure.

19.6 For example, a residential restriction condition under the Parole Act 2004 (s 33) cannot be imposed for more than twelve months. However, the comparative residential restriction condition in a residential preventive supervision order does not have a time limit. This is relevant where a person may be subject to a sentence or parole conditions for longer than twelve months.

19.7 Further, we note the PAP considers it should not be possible under the new Act for a person subject to secure preventive detention to be released on parole if serving an intervening long-term prison sentence.[26] However, the Law Society considers it should be possible for a person subject to a measure of secure preventive detention to be eligible for release on parole as they could be released to a secure preventive detention facility. This could occur where a person is able to show that they would be able to comply with the conditions of that measure.

19.8 Lastly, the Law Society considers that resumption of a preventive measure should take effect upon their release from prison rather than upon the sentence expiry.

P86: A preventive measure to which a person is subject should be suspended while an interim preventive measure is in force in relation to that person. If the court declines the application for the substantive preventive measure to which the interim measure relates, the suspended preventive measure should reactivate. If the court grants the application for the new substantive preventive measure, the suspended preventive measure should terminate.

19.9 The Law Society agrees with this proposal.

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26 PAP at 18.61.

P87: A preventive measure to which a person is subject should terminate if a sentence of life imprisonment is imposed on that person.

19.10 The Law Society agrees with this proposal.

P88: Under the new Act, the chief executive of Ara Poutama Aotearoa | Department of Corrections should apply to the court for a review of a preventive measure no later than three years after the court has finally determined the application to impose the measures. For subsequent reviews, the chief executive should apply for a review of the preventive measure no later than three years after the court has finally determined the previous application for review.

19.11 The Law Society supports this proposal and considers there is some merit to a periodic review of preventive measures imposed, and their conditions. We suggest that this proposal should be expanded to clarify that the review includes a review of the special conditions attached to the measure imposed on an individual.[27] We consider including a review of special conditions would be in line with the proposal that the measures imposed be the least restrictive necessary and is supported by other proposals, in particular P93, confirming that the conditions are to be determined in the review process.

19.12 Further, the review process should be conducted in open court as opposed to on the papers. A subject person should be entitled to legal aid and be able to make submissions in respect of the review.

P90: To accompany an application, the chief executive of Ara Poutama Aotearoa | Department of Corrections should submit:

(a) one health assessor report for the review of community preventive supervision or two health assessor reports for the review of residential preventive supervision and secure preventive detention; and

(b) the decisions of the review panel since the last court review.

19.13 The Law Society agrees with this proposal in principle but considers that a progress report from a probation officer/facility manager should also be included with the application.

[27] To avoid, for example, a repeat of *Attorney-General v Grinder* [2023] NZCA 596, relating to the risk assessment under the Parole Act 2002. Currently awaiting an appeal hearing in the Supreme Court, leave to appeal granted 6 May 2024 in *Grinder v Attorney-General* [2024] NZSC 50.

P91: The health assessor reports should address whether:

(a) the eligible person is at high risk of committing a further qualifying offence in the next three years if the person does not remain subject to the preventive measure; and

(b) having regard to the nature and extent of the high risk the person will commit a further qualifying offence, the preventive measure is the least restrictive measure adequate to address the high risk that the eligible person will commit a further qualifying offence.

19.14 The Law Society agrees with this proposal.

P92: When determining an application for review of a preventive measure, the court should review the ongoing justification for the measure by applying the same legislative tests that are used for imposing preventive measures.

19.15 The Law Society agrees with this proposal and adds that, as stated in P88, the determination of the ongoing justification for the measure should also clarify that it will apply to the special conditions attached to the preventive measure.

P93: The court should determine an application for the review of a preventive measure by:

(a) confirming the preventive measure and, if applicable, its conditions;

(b) confirming the preventive measure but varying the special conditions of the preventive measure to make them less restrictive (in the case of community preventive supervision or residential preventive supervision);

(c) terminating the preventive measure and imposing a less restrictive measure; or

(d) terminating the preventive measure without replacement.

19.16 The Law Society supports this proposal in principle. However, we suggest it would be reasonable to consider allowing the court to either:

(i) Make a recommendation to the Chief Executive that an application for a more restrictive measure should be made; or

(ii) Be able to apply a more restrictive measure on its own motion.

P94: If the court confirms the preventive measure, or orders the imposition of a less restrictive measure, it should review the person's treatment and supervision plan. The court should have the power to make recommendations to the person responsible for developing and administering the plan.

19.17 The Law Society supports this proposal.

P95: The new Act should provide for the establishment of a review panel. The review panel should:

(a) be chaired by a judge or former judge;

(b) include other judges or former judges or experienced solicitors or barristers as members and panel convenors;

(c) include psychiatrists and clinical psychologists as members;

(d) include members with Parole Board experience and have at least one member who is also a current member of the Parole Board; and

(e) include members with knowledge of mātauranga Māori (including tikanga Māori).

19.18 The Law Society supports this proposal but queries whether the intention is for the appointment of one review panel or multiple review panels. Depending on expected case numbers there may be a requirement for multiple panels.

P96: The review panel should review the preventive measure annually except in the years during which an application for a court review of a preventive measure is pending.

19.19 The Law Society supports this proposal in principle. However, clarification of whether these hearings will be done on the papers, in private, or in an open forum is required. Further, clarity about whether a subject person can appear and make submissions is required.

19.20 Given the principle of open justice, the Law Society would support the inclusion of clarifying procedural provisions about a review panel, including whether counsel could be appointed to represent the subject person's interests and rights.

P99: The review panel should conclude a review of a preventive measure by issuing a decision:

(a) confirming the ongoing justification for preventive measure and, if applicable, its conditions;

(b) confirming the ongoing justification for the preventive measure but varying the special conditions to make them less restrictive (in the case of community preventive supervision or residential preventive supervision); or

(c) if it considers the preventive measure is no longer justified, directing the chief executive of Ara Poutama Aotearoa | Department of Corrections to apply to the relevant court to terminate the measure.

19.21 The Law Society supports this proposal in principle but queries whether the qualifier in subsection (b) of 'less restrictive' is necessary. At times it is not always evident whether a change to a condition is making it more restrictive or less restrictive. Additionally, as

above at P93, we consider that a review panel should, at minimum, be able to recommend that the Chief Executive apply for a more restrictive condition.

P100: Under the new Act, the chief executive of Ara Poutama Aotearoa | Department of Corrections and, with the leave of the court, the person subject to a preventive measure should be able to apply to the court to terminate the preventive measure. An application concerning community preventive supervision should be submitted to te Kōti-a-Rohe | District Court. An application concerning residential preventive supervision or secure preventive detention should be submitted to te Kōti Matua | High Court.

19.22 In principle, the Law Society supports this proposal. However, we consider that it does not adequately take into account the ability of a subject person to make an application. Some subject persons, by virtue of intellectual or physical disability, may not be able to do this without assistance.

19.23 We also query whether a leave requirement is appropriate. Given the significant restriction on liberty, and the proposed indeterminate nature of all orders, a leave requirement to seek termination of a preventive measure may unnecessarily restrict oversight of the measures, and impede a person's rights to have ongoing restrictions justified and confirmed. If there is a concern about burdening the system with applications to terminate, it may be best to consider whether a requirement that there is a material change in circumstances could address this.

P101: The chief executive of Ara Poutama Aotearoa | Department of Corrections and the person subject to community preventive supervision or residential preventive supervision should be able to apply to the review panel to vary the special conditions of community preventive supervision or residential preventive supervision.

19.24 The Law Society supports this proposal but notes that the above concerns at P100 apply here also.

P102: The new Act should allow the chief executive of Ara Poutama Aotearoa | Department of Corrections and the person subject to a preventive measure to appeal to the relevant court (Te Kōti-a-Rohe | District Court for community preventive supervision or Te Kōti Matua | High Court for residential preventive supervision) against a decision by the review panel to vary special conditions.

19.25 The Law Society supports this proposal in principle, but queries what standard the appeal process would be subject to. The Law Society considers the proposal should be clear that there is a right to appeal rather than a need to apply for leave to appeal, in line with the right to appeal at P35.

19.26 A prosecution sentence appeal would ordinarily require the Solicitor-General's consent. Adding such a requirement here would provide the benefit of a degree of independent oversight about whether an appeal is appropriate.

P103: Under the new Act, prison detention orders should remain in force until terminated by te Kōti Matua | High Court.

19.27 The Law Society agrees with this proposal.

P104: The new Act should provide for the following review procedure for prison detention orders:

(a) The same legislative test for imposing a prison detention order should be applied for reviewing it.

(b) A prison detention order should be reviewed annually by Te Kōti Matua | High Court upon application by the chief executive of Ara Poutama Aotearoa | Department of Corrections.

(c) A prison detention order should be reviewed by the review panel every six months or, if there is an application for a court review pending, within 6 months after the court review is finalised.

(d) The chief executive of Ara Poutama Aotearoa | Department of Corrections and, with leave of the court, a person subject to a prison detention order should be able to apply to the High Court for the termination of a prison detention order.

19.28 The Law Society agrees with this proposal and adds that a review procedure conducted by a court should be done in open court.

105 Ara Poutama Aotearoa | Department of Corrections should consider the appropriate transitional arrangements to bring the new Act into effect.

19.29 The Law Society considers the proposed transitional arrangements for the preventive detention measure are appropriate. However, some concerns arise for subject persons currently on a community order who may be raised to a more restrictive measure that would otherwise not be imposed.

19.30 Finally, the PAP discusses the potential for retrospective application of some parts of the new legislation.[28] The Law Society urges that such a proposal be carefully considered. This raises the prospect of unintended consequences and the potential infringement of the rights against retrospective punishment and double jeopardy.[29] While many cases may result in less strict preventive measures, this may not be the case for all subject persons. We note that this is discussed in the PAP, but consider it so important that it warrants emphasis.

28 PAP at 19.
29 New Zealand Bill of Rights Act 1990, section 26.

20 Other issues

Disclosure

20.1 A respondent should have a right to disclosure of relevant information. Currently, disclosure for ESOs is obtained primarily through the Privacy Act 2020, as the Criminal Disclosure Act 2008 does not apply. The Criminal Disclosure Act is inapt for applications, given that what is likely to be relevant is psychological and behavioural information rather than factual information. It would be preferable for a limited right to disclosure to be included in new legislation, rather than relying on the Privacy Act.

Provision for information to be released to lawyer on conditions

20.2 As noted above (P42), there should be provision in the legislation for information to be released to a defendant's lawyer and/or expert, under the restriction that they do not disclose this to their client. Currently, some health assessors are hesitant to release actuarial assessment scoring, because they are concerned that the release of 'raw scores' could mean an offender may attempt to manipulate certain tests in the future. However, this information can be very useful for counsel, because it helps in understanding why a defendant received a certain actuarial 'score.'

20.3 A lawyer's duty of candour to their client and disclosure obligations a lawyer has under Rule 7 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 can be overridden by statute or by the Court.[30] Accordingly, providing a statutory basis for restricted disclosure to counsel, but not to their client, would be desirable to address any concerns relating to health information.[31]

Nāku noa, nā

Jesse Savage
Vice President

30 Rule 7.3(c) expressly provides that a lawyer is not required to disclose information to a client if disclosure would be in breach of the law or a Court order.

31 See: *Professional Responsibility in New Zealand* online, LexisNexis at para 17.4.2.