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Te Kāhui Ture o Aotearoa

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Review of preventive detention and post-sentence orders
Law Commission | Te Aka Matua o te Ture
Wellington

By email: pdr@lawcom.govt.nz

Re: Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu | Public safety and serious offenders: a review of preventive detention and post-sentence orders

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 *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu | Public safety and serious offenders: a review of preventive detention and post-sentence orders Issues Paper 51* (**Issues Paper**).

1.2 This submission has been prepared with the assistance of the Law Society's Criminal Law Committee, and Human Rights and Privacy Committee.

2 Preliminary comments

2.1 At the outset, we acknowledge that the preventive regime's purpose - protecting the community from serious reoffending – is an important one. It is required to address some of the most difficult cases in the criminal justice system, for which there is often not a clear 'right' answer. It is also required to balance a number of competing considerations of significant importance; most predominantly being the safety of the community and the individual's rights under the New Zealand Bill of Rights Act 1990 (the **Bill of Rights**).

2.2 However, as the Issues Paper rightly focuses on, it is important to consider how far our current preventive regimes go for the purposes of meeting that purpose, and whether these limitations on the rights of the individual are justified.

2.3 The Issues Paper has focussed on preventive detention under the Sentencing Act 2002, extended supervision orders (**ESOs**) under the Parole Act 2002, and public protection orders (**PPOs**) under the Public Safety (Public Protection Orders) Act 2014.[1] However, we question

[1] For the Commission's reference, in the Law Society's shadow report to the United Nations Human Rights Council in 2018 (as part of New Zealand's third Universal Periodic Review), we emphasised our concerns that the Public Safety (Public Protections Orders) Act 2014 allowed for indefinite civil detention in a residence on prison grounds for a specific group of serious sexual or violent offenders. When the Bill was first introduced, the Attorney-General concluded the bill was consistent with

whether a full picture of this area can be gathered without also considering the law relating to the detention (at times, indefinitely) in the mental health system of individuals who have committed offences. As the preliminary research noted in the Issues Paper indicates, many offenders subject to indefinite sentences will have some degree of mental disorder, though there is limited research available on this issue.[2]

2.4 In our view, a full analysis of the issues should include this extra dimension. To draw attention to the increased use of indefinite sentences over recent decades (as the Issues Paper correctly does) without looking at whether there have been any changes to the number of people who are found to be mentally disordered and/or affected by intellectual disabilities and placed in the mental health system may risk forming an incomplete picture of the treatment of recidivist violent or sexual offenders. There is also the potential that some violent or sexual offenders who in previous decades would have been regarded as suffering from an untreatable mental illness – and thus moved into the mental health system – are now found to be treatable and stay within the criminal justice system. It may also be relevant to look at how often offenders subject to the preventive regime are transferred into the mental health system during those sentences.

2.5 As noted below, we consider the availability of rehabilitation and regular reviews of the risk posed by individuals under the preventive regime are an important factor in whether the regime is justifiable. If there is indeed an overrepresentation of people with mental health issues within the preventive regime (particularly those who would be close to being dealt with under the Criminal Procedure (Mentally Impaired Persons) Act 2003), this raises questions as to the capability of Corrections' rehabilitation programmes to cater for this. If there are individuals for whom rehabilitative efforts are not effective due to mental disorders, we question whether their indefinite detention can be justified.

3 Te ao Māori and the preventive regimes (chapter 2)

Questions 1-5: Interplay between the preventive regime, tikanga Māori, and Te Tiriti o Waitangi

3.1 We do not consider we are best placed to comment on whether the current preventive regime is consistent with tikanga and Te Tiriti, and what options for reform would best address the needs of Māori. This is clearly an important point, in light of the overrepresentation of Māori in the criminal justice system and the well-identified cultural biases at each stage of the process. We encourage the Commission to consult widely with iwi, specialist cultural advisors, kaupapa Māori service providers, members of Te Hunga Rōia Māori o Aotearoa, and others with expertise in this area who may be better placed to comment on these points.

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sections 22 and 26(2) of the Bill of Rights (arbitrary detention and double jeopardy). However, the Law Society respectfully disagreed, and considered the Act provides for orders that are punitive in effect and consequent on earlier serious offending, thereby infringing the right against double punishment. While we do not intend to re-litigate the appropriateness of those orders in this submission, we provide a link to our previous submission as background information: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/0007-124396-l-United-Nations-NZ-Universal-Periodic-Review-2018-12-7-18.pdf

[2] Issues Paper at [3.63] to [3.66].

4 Key human rights issues (chapter 3)

Question 6: Do you think the law is justified in providing for preventive measures that may breach human rights? If so, what types of measures are justified and why?

4.1 A preventive regime inherently requires balancing the rights of the individual against the interests of the community. Parliament may properly legislate to curtail individual rights provided the curtailing of rights goes no further than is justified by the level of risk/harm sought to be avoided and goes no further than is acceptable in a free and democratic society.

4.2 While preventive regimes are capable of justification, it is difficult to draw a firm line in terms of what specific types of measures would or would not be justified. While the rights impacted by a preventive regime will generally be readily apparent, the justification for this will be dependent on an assessment of the risk of harm posed by the individual subjected to the regime and what evidence is put forward to establish this. The risk to the community posed by the individual can change over time – accordingly, we consider that the availability of rehabilitation and regular, ongoing reviews, where the individual is able to engage counsel to represent them, are a necessary part of any justifiable preventive regime.

Question 7: If the law is to continue to provide for preventive detention, do you agree the law should be reformed to demarcate more clearly the first and second periods of preventive detention to align with human rights law?

4.3 While the jurisprudence that supports the 'two periods' approach to a sentence of preventive detention, we consider that this approach is not beyond challenge. It also raises some practical issues in how this would be applied. For example, what would happen if a person moved from the punitive part of a sentence to the preventive part, but then reoffended? It also raises questions as to when rehabilitative programmes are made available – if the first period of the sentence is purely punitive, should the individual be offered rehabilitation programmes and treatment during this?

4.4 The two-period approach is also potentially inconsistent with the minimum period of imprisonment that is required to be set under a sentence of preventive detention. This must be set to reflect the longer of what is required to either respond to the gravity of the offending or to provide for the safety of the community. This anticipates there may be cases where the gravity of offending (which is clearly part of the punitive aspect of the sentence) requires a period of imprisonment that may go beyond what is required for community safety.

4.5 If the two-period approach is to be confirmed and retained, in principle we agree that the proper application of this should be clarified. This could include formalising the approach by having the sentencing Judge stipulate the punitive period at sentencing.

Question 8: Do you think that people who are detained after completing what may be regarded as their punitive prison sentence should be managed in different conditions to prison?

4.6 This would depend on what suitable alternative facilities are available. However, we agree in principle that having less intrusive options available for managing such individuals would be appropriate, provided public safety is not jeopardised.

Question 9: Do you think the preventive regimes should have a stronger focus on therapeutic and rehabilitative treatment and provide stronger rights to treatment for people detained?

4.7 Yes. Where the state is detaining a person not for what they have done but because of predictions as to how the person may later behave, we consider there is a moral obligation to assist the person to become a lesser risk so that release may be possible.

Question 10: Do you agree with the issues we have identified regarding the fragmentation of the law? Are there other issues we should consider?

4.8 In relation to the first question – yes. Given the common purpose of the separate regimes, we consider that an approach with consistent terminology and coherently-linked tests would be appropriate. We also agree there are clear and obvious good reasons for PPOs to be dealt with in the criminal jurisdiction, rather than civil, for the reasons raised in the Issues Paper.

4.9 In regard to other issues that should be considered, as noted above we consider any analysis of the criminal justice response to the risks of further offending is incomplete without also considering the mental health regime and the interplay between the two.

5 Preventive detention and young adults (chapter 5)

Question 11: Do you agree that preventive detention is not an appropriate measure for responding to risks of serious offending by young adults who have been convicted of serious sexual or violent offending?

5.1 In our view, the Issues Paper makes a good case that preventive detention is generally undesirable for young adults, given the neurological differences between adults and young people can be considered as reducing the latter's culpability for their actions. As Courts have recognised, long sentences of imprisonment can also have a crushing effect on young people.

5.2 However, while it is generally undesirable, it is not clear that preventive detention should never be imposed on a young person. While it is not possible to speculate as to future examples, there may be exceptional cases where there are no less restrictive options that can adequately address the safety risks present.

6 Qualifying offences (chapter 6)

Question 12: Do you think the qualifying offences are serious enough to justify making a person eligible for a preventive regime?

6.1 We consider the current qualifying offences are sufficiently serious for the purposes of determining eligibility. As the Issues Paper notes, this sets a threshold for when the relevant

order can be imposed, with the question of whether it should be involving a wider set of considerations.

6.2 While the Issues Paper notes the concerns about whether an offence like indecent assault should be included, we agree this charge can potentially cover offending that is of sufficient seriousness to justify an order under the preventive regime.

6.3 We also consider that a charge of accessory after the fact to murder does not fit well within the existing preventive regime. By definition, the assistance that is provided as part of this offending must be after a murder is committed. Given this does not involve any actual violence, it is questionable whether this can raise a concern as to an ongoing risk to the safety of the community.

Question 13: Should the same offences be qualifying offences for all preventive regimes? If so, which offences should qualify?

6.4 As noted above, we consider a cohesive approach to preventive detention, PPOs and ESOs is preferable. As a part of this, we consider that the qualifying offences for each of the preventive regimes should be the same, unless there is a special reason for not including an offence for one or more of them. An example of this could be the exclusion of murder from the list of qualifying offences for preventive detention – given that murder attracts a sentence of life imprisonment unless such a sentence is manifestly unjust, there is little utility in including it as a qualifying offence for preventive detention.

6.5 As noted in the Issues Paper, the current preventive regimes do not take a consistent approach to whether inchoate offences are qualifying offences. In our view, there is a good argument for attempts or conspiracies to commit a qualifying offence to also be qualifying offences – while these do not result in the same level of actual harm in the community, as an *indicator* of risk they can be as strong as the full offence.

Question 14: Do you consider any of the offences we discuss that are omitted should be qualifying offences for preventive detention, ESOs and PPOs?

6.6 We consider that the offences identified in paragraphs 6.34(a) to (i) of the Issues Paper are serious and sufficiently linked to the protection of the safety of the community to warrant inclusion.

6.7 We consider that the inclusion of the charge under s 23 of the Prostitution Reform Act 2003 is potentially more problematic. Some forms of this offence are strict liability.[3] As with indecent assault, this charge can have varying levels of seriousness, ranging from situations where a defendant receives commercial sexual services from a person while being unaware that they are under 18, through to far more serious offending involving elements of coercion or violence used against vulnerable victims. Sometimes this offence will be used as part of a resolution that will have a defendant plead guilty to a lesser charge that can cover more serious offending. We agree with the concerns around the inconsistent treatment of people who commit such conduct overseas against those who offend in Aotearoa New Zealand. However, we also have concerns at the prospect of a strict liability offence qualifying a defendant for the most serious penalties available in our criminal justice system.

[3] *Doling v Police* HC Tauranga CRI-2010-470-12, 18 March 2010

Question 15: Do you agree that strangulation should be a qualifying offence for preventive detention, ESOs and PPOs?

6.8 Strangulation is a similar level of seriousness as some of the existing qualifying offences, such as wounding/causing grievous bodily harm with intent to injure. This is also regularly seen as offending that forms part of an ongoing pattern of violence in family relationships. Given this, we consider it is appropriate that this be included as a qualifying offence.

Question 16: Do you agree that incest should be removed as a qualifying offence for preventive detention, ESOs and PPOs?

6.9 In our view, this question is difficult. While it true that incest is usually charged in the case of consensual sexual activity, it is difficult to accept that there really can be genuine consent for certain forms of incest (for example if the incest involves a parent and child). However, we agree that offending of this nature tends not to engage the same community safety concerns as some other forms of sexual offending. Given this, we agree it could be removed as a qualifying offence, but note that arguments could be made in support of its retention.

Question 17: Do you agree that bestiality should be removed as a qualifying offence for preventive detention, ESOs and PPOs?

6.10 On the data provided, it is difficult to see that drastic limitations on the human rights of a sentenced offender can be justified on the basis the offender presents a substantial risk of sexual or violent offending against humans when the offender is sentenced in relation to a charge of bestiality. Risk to animals is not sufficient and can be dealt with in other forms of sentence.

7 Overseas offending (chapter 7)

Question 19: Eligibility for an ESO on the basis of overseas offending

7.1 In our view, the current provisions dealing with eligibility for ESOs on the basis of offending committed overseas raise a number of concerns:

(a) It raises issues of fairness, where individuals who have offended overseas are subject to a wider application of the ESO regime than people who have offended domestically.

(b) The provisions do not take into account differences between how the New Zealand and overseas justice systems operate. Some countries' justice systems lack important safeguards that are a key part of ours, including the protections provided by our Bill of Rights and an independent judiciary. Imposing additional sanctions on people who have been unjustly treated in another country can be impossible to justify.

(c) Even where an overseas country has comparable fair trial protections, the sentencing regimes may result in significantly harsher penalties than would be imposed in Aotearoa New Zealand for similar offending. For example, many US states have very severe mandatory penalty provisions and rigorous post-release conditions.

7.2 As with the qualifying offences, this provides an eligibility threshold, with the question of whether a ESO should be imposed involving a more thorough assessment. However, we consider the use of qualifying offences is preferable to the wider qualification for overseas offending, given the qualifying offences are largely targeted to those that engage community safety concerns.

Question 20: Are there any issues arising with the timing of ESO applications for overseas offenders, or with accessing information that require legislative reform?

7.3 In our view, the current timeframes strike the appropriate balance between allowing for relevant information to be collected from an overseas jurisdiction, while not exposing people returning to Aotearoa New Zealand to an extended period of uncertainty as to the possibility of an ESO application. If the relevant officials are unable to act within the current timeframes, then the potential imposition of an ESO should cease.

8 The legislative test for imposing PD, ESOs and PPOs (chapter 8)

Question 22: Do the legislative tests for preventive detention, ESOs and PPOs focus on the right level of likelihood of possible future reoffending?

8.1 We consider the tests should be better aligned with one another and use the same terminology. In our view, the use of terms 'high/very high risk' are likely to be more transparent and better reflect the standard that should be applied, compared with the 'likely to commit another qualifying offence' phrase used as part of the preventive detention test. 'Likely' has the potential to be interpreted as 'a risk that could happen', which we consider is too low of a threshold to justify such a significant punishment.

Question 23: Do you think there are any issues with the qualifying offences that a person must pose a risk of committing for the court to impose preventive detention, an ESO or a PPO?

8.2 As set out above, we consider there should be some changes to the offences that qualify an individual for the preventive regimes. However, in our view it is preferable that the risk of further offending remains tied to the qualifying offences.

Question 24: Do you think that it is an issue that the human rights considerations the courts apply when imposing a preventive measure are not referred to in the primary legislative tests?

8.3 We do not consider the current approach is likely to cause significant issues in practice. As recognised in the Issues Paper, it is well settled that the Bill of Rights applies to judicial decisions. We do not consider that judges would require guidance as to the relevance of the Bill of Rights to assessments of this nature. Numerous other pieces of legislation are applied appropriately without containing express reference to a need to give effect to the Bill of Rights. However, including a section clarifying the application of the Bill of Rights may make the legislation more understandable to non-lawyers, which is a desirable goal. Given this, we would not have any issue with its inclusion, though do not consider it a necessary change.

Question 25: Do you agree with the issues we have raised concerning the traits and behavioural characteristics in the legislative tests for ESOs and PPOs?

8.4 We agree with the concerns set out in the Issues Paper regarding the use of specific traits and behavioural characteristics in determining whether an ESO or PPO can be made, particularly in relation to the absence of understanding or concern about the effects of the individual's offending, and the presence of persistent vengeful intentions. We also broadly agree that the wording of some of these characteristics is unnecessarily difficult to understand and may lead to difficulties in applying the relevant provisions.

8.5 As discussed in this submission, we consider that the use of such traits and behavioural characteristics highlights the interplay between the preventive regime and the mental health regime. A number of the factors that must be present in order for an ESO or PPO to be made would also be relevant to an assessment of whether a defendant is insane or unfit to stand trial. This also raises questions around the appropriate approach for a person who has relevant traits and behavioural characteristics which are able to be managed or treated (for example, with medication), and what should happen if that individual refuses treatment.

Question 26: Do you agree with the issues we have identified with the legislative tests a court will apply to decide whether to impose preventive detention, an ESO or a PPO?

8.6 Yes. As identified in the Issues Paper, there is an evident lack of clarity in the tests and a disconnect with the research that has been carried out in this area. The more remote a risk is, the less it justifies limitation of the person's rights. From this perspective, it is questionable whether predictions of future behaviour 10 years from now should be sufficient for making an order such as an ESO.

9 Evidence of reoffending risk (chapter 9)

Question 28: Do you agree with the issues we have identified regarding evidential matters and our preliminary conclusion that legislative reform is not generally needed to address these issues?

9.1 We generally agree with the limitations of risk assessment tools identified in the Issues Paper, but there is one area where further consideration may be needed. The Issues Paper correctly identifies the risk that the predictive tools used may not be adequately matched to the culture and ethnicity of the person in respect of whom a preventive sentence is under consideration. This must be a matter of concern when dealing with members of small ethnic minorities. This would also be engaged in situations like those faced by 'returning offenders', who may be a part of a particular ethnic group, but who may have been living in a very different community for some years.

9.2 However, we agree these limitations can be appropriately addressed through non-legislative means.

Question 29: Do you think the possibility that risk assessment tools may be inappropriately used on Māori is an issue requiring reform? If so, why, and what reforms should be implemented?

9.3 As with our response above, we consider this can be addressed through non-legislative means. There has been an increased awareness by the justice sector over a number of years

of the disproportionate representation of Māori. Report writers, counsel and judges should be aware of the issue, with each of those acting as a check in assessing whether a risk assessment may be inaccurate. As noted above, the Law Society urges broad consultation with appropriate groups and individuals.

Question 30: Do you think that the legislation should promote opportunities to address the court or provide information to the court for the person's whānau, hapū or iwi or any person who has a shared sense of whānau identity around a particular kaupapa with the person?

9.4 As noted in the Issues Paper, the existing legislation already provides mechanisms by which cultural factors are able to be put before the decisionmaker. As a matter of practice, only experienced defence counsel and Crown prosecutors are likely to be involved in sentencings where PD is being considered, or in applications for an ESO or PPO. These experienced counsel are likely to be well aware of the potential relevance of cultural factors, and are well placed to ensure that all relevant and reliable information is able to be placed before the decision-maker. Given the proliferation of the use of cultural reports at sentencing, judges are also experienced in receiving and considering these.

9.5 In relation to sentencings where preventive detention is being considered, we also note the importance of ensuring that standard sentencing methodology is followed as much as possible. Courts have expressed the need for cultural reports to be directed to the defendant's particular personal circumstances, and would need to be alert to the risk that allowing this information to come from any person who has a shared sense of whānau identity may open the door to the presentation of information not actually related to the offender's character or circumstances.

10 Conditions and management in the community (chapter 10)

Question 31: Do you think that the law relating to the conditions and management of people subject to release on parole from preventive detention and ESOs appropriately allow for Māori-designed and Māori-led initiatives?

10.1 The Law Society is not well placed to say what options would best address the needs of Māori. It is hoped that specialist cultural advisors have been engaged to provide feedback on this section. However, we agree that programmes that can strengthen an individual's links and engagement with their whānau, hapū and/or iwi can be a positive step and support their rehabilitation.

10.2 As set out in the Issues Paper, this is already possible under the existing legislation. This suggests that the limiting factor is the availability of programmes, rather than the ability to incorporate these into any order. Accordingly, efforts to support the resourcing of Māori designed and lead initiatives are likely to be more effective.

Question 32: Should the legislation build in tests or guidance to ensure that decisions about conditions are made in accordance with the NZ Bill of Rights?

10.3 We agree that the Bill of Rights needs to be taken into account in giving effect to conditions, and any conditions removing or restricting those rights needs to be adequately justified. It is clear the Bill of Rights applies to actions by Corrections and its staff. As noted in the Issues Paper, it appears this is already happening given the guidance given by Corrections to its

staff (though there will always be instances where mistakes are made). Given this, we do not consider there would be much utility in including a requirement in the legislation that any decision must be made in accordance with the Bill of Rights.

Question 33: Do you think the term "residential restrictions" should be defined in the legislation?

10.4 Given the comments of the Supreme Court in *Woods v Police*, we agree this term could usefully be defined.[4]

Question 34: Do you think that the Parole Board should be able to impose residential restrictions as a special release condition on a person subject to preventive detention, whether or not they agree to comply with the condition, where this would allow the person to be managed within the community rather than within prison?

10.5 In reaching its preliminary view in favour of allowing residential restrictions to be imposed without the consent of the subject, the issues paper refers to the principle of imposing the 'least restrictive order'. We note the Sentencing Act also includes a parallel principle in section 8(g), though this is worded as favouring '… the least restrictive outcome *that is appropriate in the circumstances*…'. That is an important distinction.

10.6 On balance, we consider it would be preferable if residential restrictions were only able to be imposed with the agreement of the person who would be subject to them. Residential conditions inherently involve limitations on an individual's right to freedom of association, so should only be imposed where there is sufficient justification. However, where there is sufficient justification for such a condition, we agree with the concerns expressed by the Parole Board that a failure to agree would raise a concern as to the presence of an undue risk to the safety of the community, as it raises clear concerns that the condition will not be complied with. In those circumstances, the additional restrictions that come from declining parole could be justifiable.

10.7 In saying that, we would hope that before declining release the Parole Board would work constructively to try to hear and understand why an individual is unwilling to agree to the condition, as there may be legitimate reasons for this that could be worked through (for example, through the individual supplying an alternative address for the Board to consider).

Question 35: Do you think the guiding principles of the Parole Act should be amended to state that people subject to ESOs must not be subject to conditions that are more onerous, or last longer, than is consistent with the safety of the community?

10.8 Broadly yes – there should be a clear statement in the Parole Act on this point. It may be preferable to word it as "that people subject to ESOs must not be subject to conditions that are more onerous, restrictive or of greater duration than is reasonably necessary to provide for the safety of the community".

[4] *Woods v New Zealand Police* [2020] NZSC 141.

Question 36: Do you think there are any issues arising from the division between the order-making and condition-setting jurisdictions for ESOs that require legislative reform?

10.9 We are unsure how often in practice these problems arise. While the current system does raise some problems, in our view it seems likely the Parole Board is in a better position to design and monitor the conditions, and change them where necessary and desirable, than would the courts. The "split" system may therefore be necessary, even if inconvenient.

Question 37: Do you think the legislation should include a test or guidance on when an IM condition may be imposed?

10.10 It does not seem necessary to have a statutory test, given as noted in the Issues Paper the caselaw in this area has seemingly reached an appropriate approach, but including one may produce greater clarity and transparency.

Question 38: Do you think the legislation should allow an IM condition to be imposed after an ESO has been ordered?

10.11 We agree that doing so may be more efficient than the current process.

Question 39: Do you think that the court should be able to impose an IM condition for longer than 12 months if it would allow a person to be managed in the community rather than be detained?

10.12 The analysis in the Issues Paper suggests that a rights consistent approach necessarily points to a "yes" answer here. However as noted elsewhere, human rights are subject to such restrictions as are reasonable in a free and democratic society. Cost is relevant to that question – IM conditions are expensive, and a wider use of this may cause resourcing issues. While the Issues Paper notes the need to take care that it was not overused, it is difficult to see how this could be done in practice when Courts are making a decision on a case-by-case basis.

Question 40: Do you think the prohibition on requiring a person to reside with a programme provider should be removed?

10.13 Yes. If this prohibition was indeed included to avoid a person from being subject to supervision in a similar manner to what occurs in a custodial environment, this could be addressed by including a provision that the court can make a condition requiring an individual to reside with a programme provider if it is satisfied that this is necessary for the programme to be effective.

Question 41: Do you think that the requirement not to associate with persons under 16 should be removed from the standard ESO conditions?

10.14 We agree with the view expressed in the Issues Paper that it is hard to see how such a condition can be seen to be rationally connected to the risk in all cases. We also note that improving whānau relationships can be a pro-social change and protective against the risk of further offending. Given this, we consider it would be preferable to allow such a condition to be imposed where the court is satisfied it is desirable.

Variation and termination of preventive detention, extended supervision orders and public protection orders (chapter 11)

Question 43: Should the courts have greater responsibilities for reviewing preventive detention instead of leaving the task of determining release on parole to the Parole Board?

10.15 In our view, the current provisions already allow for sufficient appeal and review rights, and the determination of whether an individual serving a sentence of preventive detention should be released should remain with the Parole Board. In regard to whether a sentence of preventive detention has been legally and appropriately imposed, the individual is able to bring an application of habeas corpus or appeal their sentence. Where the challenge relates to the ongoing need for detention, in our view that is appropriately within the Parole Board's area of interest, with that body being suitably experienced in making such risk assessments. The Parole Act 2002 also provides for the ability to review decisions, and any decisions (at the first instance or on review) are capable of judicial review.

10.16 In saying that, we agree with the views expressed elsewhere in Issues Paper that the use of judicial review can pose difficulties in terms of whether an individual's counsel is approved to conduct civil proceedings under legal aid. This can limit the ability for individuals to keep the counsel they have built a relationship with. It may be that an argument could be made for a separate right of appeal for decisions of the Parole Board relating to indeterminate sentences (thus keeping the appeal in the criminal jurisdiction), though this would require further consideration and analysis.

Question 44: Do you think the test for release from detention for people sentenced to preventive detention should expressly recognise their right to liberty except when justified by compelling reasons relating to community safety?

10.17 As noted in the Issues Paper, the case law in this area has seemingly reached an appropriate approach to ensuring the Parole Act is applied in a rights-consistent fashion. This indicates that counsel, the Courts and the Parole Board are properly alive to these issues. However, we agree that the amendments suggested may increase transparency and clarity.

Question 45: Do you think the test for release from detention for people sentenced to preventive detention should require "increasing justification" over time?

10.18 No. A rights-centred approach which remains concerned with a persons' risk should apply in such a way as to ensure that individuals serving a sentence of preventive detention are released on parole at an appropriate time. We do not consider that the level of risk deemed acceptable should reduce over time. That appears inconsistent with the purpose of the regime. However, in cases where there is an extended period of detention, in our view there is a continuing obligation on Corrections to facilitate appropriately targeted treatment and rehabilitation with a view towards assisting the individual to reduce their risk of safety to the community.

Question 46: Do you think that the test for cancelling an ESO should mirror the test for imposing an ESO?

10.19 We are not aware of this causing issues in practice. If an ESO were imposed solely on the basis that there was a high risk that the offender will commit a future relevant sexual

offence, it would be an unusual set of circumstances that would then lead to a Court to decline to cancel an ESO on the basis that the offender is at a high risk of violent offending (given that risk would not have been present at the time the ESO was put in place). In any event, if such a risk developed over the period that the person was on the ESO, it seems that continuation of the order would be appropriate. It would be difficult to argue that the cancellation of the ESO would be justified on the basis that the individual poses a different kind of risk than previously.

Questions 47 and 48: Do you agree that an ESO should be suspended if an interim detention order is made? Do you agree that and ESO should come to an end if a PPO is ordered?

10.20 We agree with both questions. In relation to the first, we agree that this seems to be a legislative oversight (and perhaps a good argument in favour of implementing a cohesive and consistent preventive regime). In relation to the second, we agree that an ESO is unnecessary once a PPO is ordered.

Question 49: Do you think that the law relating to whether the Parole Board can vary an IM condition needs clarification?

10.21 We are not aware of whether this is causing issues in practice. Accordingly, in the absence of a clear need it may be that reform is not necessary.

Question 50: Do you think that breaching an ESO condition should be an offence or that another mechanism should be used for ensuring compliance with ESO conditions?

10.22 We are unsure as to the best approach to this. We agree that for certain high-risk people, the move towards rehabilitation and a life of no offending can be a long journey, and that there may be slip ups along the way. A regime that recognises this is potentially more likely to lead to good outcomes than a more heavy-handed or punitive approach. However, against that, there is a need for an effective way to enforce compliance, given these orders are imposed due to the risk posed by the individual.

10.23 The Issues Paper raises the possibility that a person who breaches an ESO by committing an offence may have the appearance of a disproportionate risk of reoffending (due to being charged both with breaching the ESO and the substantive offence for what was a single incident). However, we consider that Courts are able to identify and take this context into account in making any future assessment of risk.

10.24 On balance, we consider it is worth considering what alternative compliance mechanisms could be put in place. However, we are not fully convinced that the approach based around the bail system proposed in the Issues Paper would adequately ensure compliance.

11 Proposals for reform (chapter 11)

Question 52: What do you think about the proposals for reform in this chapter?

11.1 Our position on most of the reform proposals presented are likely apparent from our views set out above. However, as a brief summary, at this initial stage the Law Society broadly supports the following reform proposals:

(a) *Proposal 1:* Greater availability and use in appropriate cases of Māori designed and led rehabilitation programmes.

(b) *Proposal 2:* The availability of less restrictive forms of detention for suitable individuals serving an indeterminate sentence, and placing rehabilitation and reintegration at the forefront of the regime.

(c) *Proposal 4B and 7:* The implementation of a coherent regime, with consistent terminology, tests and (subject to some exception) consistent qualifying offences. In our view, this is likely best done via enacting a single statutory regime, rather than the current system of being split between three separate pieces of legislation.

(d) *Proposal 5(b)*: The need for regular reviews of the need for ongoing detention for those subject to indeterminate orders.

(e) *Proposal 10*: That the focus of the tests in imposing an option under the preventive regime should be on the risk to the community, rather than the current traits and behavioural characteristics.

(f) *Proposal 15*: permitting intensive monitoring conditions to be imposed after an ESO has been ordered.

(g) *Proposal 16*: Addressing the risks of associating with children and young people via special conditions, rather than having this as a standard condition of all ESOs.

11.2 In regard to the options presented as Proposals 3A-3C, our preliminary view is that Proposal 3A is preferable (though further consideration would be necessary before committing to one of the options). We consider the remaining proposals raise additional issues:

(a) Proposal 3B moves the risk assessment for deciding whether an ESO or PPO is appropriate to the time of sentencing, by making these orders made at the time of sentencing (albeit, ones that are subsequently confirmed once the sentence nears completion). This would not be able to account for a change in risk, particularly an increased risk, that occurs during the course of a sentence.

(b) Proposal 3C would remove preventive detention, and make any further detention or an ESO a post-sentence order. In our view, having an individual finish their determinate sentence, only to find that they are being detained indefinitely risks having a crushing effect. While this is already the case for individuals who are subject to a PPO following sentence, the proposal would extend this to everyone who would be subject to post-sentence detention. To mitigate this, the option suggests that a person eligible for a post-sentence order could be notified of this at the time of sentencing. However, we question whether this notification would be sufficient, given in many cases this would occur many years before a post-sentence order was sought.

12 Conclusion

12.1 We hope this submission is helpful to the Commission in its review of the preventive regime. We would be happy to discuss this feedback further, if that would be helpful. Please feel free to contact me via the Law Society's Law Reform & Advocacy Advisor, Dan Moore (dan.moore@lawsociety.org.nz).

Nāku noa, nā

David Campbell
Vice-President