NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF APPELLANT(S)/RESPONDENT(S)/ACCUSED/DEFENDANT(S) PROHIBITED BY ORDER MADE IN THE COURT'S INHERENT JURISDICTION. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360347.html

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2015-404-352
[2021] NZHC 2276

UNDER	s 107RA of the Parole Act 2002
IN THE MATTER	of a review of an Extended Supervision Order
BETWEEN	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Applicant
AND	R (CRI-2021-409-11) Respondent

Hearing: 27 July 2021

Appearances: C J Boshier for Applicant
G K Edgeler for Respondent

Judgment: 31 August 2021

JUDGMENT OF OSBORNE J

This judgment was delivered by me on 31 August 2021 at 4.55 pm

Registrar/Deputy Registrar
Date:

Introduction

[1] The Chief Executive of the Department of Corrections (the Chief Executive) has applied for a review of the respondent's (R) extended supervision order (ESO).

R's ESOs

[2] The Parole Act 2002 provides for the making of ESOs to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences.[1]

[3] R has been subject to two ESOs. The first ran from 24 November 2005 to 23 November 2015.[2] The second (current) ESO came into force on 27 March 2017 and is calculated by the Chief Executive to expire on 24 June 2027.[3]

[4] Section 107RA Parole Act requires the sentencing court to review an ESO at specified dates. The determination of the appropriate review date is at issue here, and is addressed below at [40]–[44].

[5] Section 107RA(3) requires that a review must be commenced by the Chief Executive, which may be made at any time within four months before the review date.

[6] Between the first and second ESO, R was subject to an interim supervision order (ISO).[4]

[7] Before the ISO was made, the Chief Executive had applied for a public protection order (PPO) to be made detaining R pursuant to the Public Safety (Public Protection Orders) Act 2014 (Public Safety Act). While the Court found the elements for a PPO were established (in that R has a very high risk of imminent serious sexual offending) the Court, under s 12 of the Public Safety Act, directed the Chief Executive

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1 Parole Act 2002, s 107I.

2 *Chief Executive of the Department of Corrections v [R]* HC Auckland CRI-2005-404-0125, 24 November 2005 [*2005 judgment*].

3 *Chief Executive, New Zealand Department of Corrections v [R]* [2017] NZHC 559. [*2017 judgment*]. Affirmed on appeal *[R] v Chief Executive of the Department of Corrections* [2020] NZCA 126.

4 Section 107FA.

to consider compulsory care pursuant to the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (Intellectual Disability Act).[5]

R's compulsory care order

[8] R is currently detained pursuant to a compulsory care order (CCO) made on 15 April 2019 under the Intellectual Disability Act, with a designation that he be held as a secure care recipient. R's specified term is three years (the maximum available under the legislation).[6] R was initially cared for at Hillmorton Hospital, Christchurch (a secure facility), pursuant to s 63 Intellectual Disability Act. On 10 June 2020, R was moved to, and remains at, a secure facility in the community.

[9] The order for R's detention in a secure facility results in the conditions of his ESO being suspended.[7] Accordingly, for so long as R's present detention continues, the ESO is unlikely to have a practical impact on him.

Chief Executive's application

[10] The Chief Executive, on 23 February 2021, filed this application for the review of R's ESO. Specifically, the Chief Executive sought a review to ascertain whether (under s 107RA(1)(a) Parole Act) there is a high risk that R will commit a relevant sexual offence within the remaining term of the order.

[11] In the application the Chief Executive stated that an updated health assessor's report was being obtained and would be filed when available.

[12] A report of Paul Carlyon (a registered clinical psychologist) dated 17 May 2021 was subsequently filed on 29 June 2021.

[13] The application was adjourned at its first call on 29 March 2021 to this hearing.

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5 *Chief Executive of the Department of Corrections v R (No 2)* [2018] NZHC 3455 at [1], [3] and [52]–[53].
6 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 46(2).
7 Parole Act, s 107P(3).

[14] At the hearing of the application Mr Carlyon was examined in relation to his report.

Chronology

[15] The relevant dates are:

(a) 24 November 2005 — first ESO commences;

(b) 23 November 2015 — first ESO expires;

(c) 23 November 2015–27 March 2017 — ISO in operation;

(d) 27 March 2017 — second ESO commences;

(e) 13 July 2018 — interim detention order (IDO) made and R enters the secure residence of Matawhāiti;

(f) 1 January 2019 — R taken into custody for alleged offending committed at Matawhāiti;

(g) 22 March 2019 — R transferred to Hillmorton Hospital;

(h) 15 April 2019 — CCO made for three years (R having been found unfit to stand trial for the alleged January 2019 offending);

(i) 10 June 2020 — R moved to a secure placement in the community under the CCO;

(j) 23 February 2021 — Chief Executive's application for review filed; and

(k) 29 June 2021 — health assessor's report filed.

The timing of the filing of the health assessor's report

The issue raised

[16] An issue was raised by Mr Edgeler as to the time of filing of the health assessor's report. Mr Edgeler submits the lack of a timely report had the effect of barring the making of an order confirming the ESO. He accepts that if this argument fails, the substantive issue is whether there is a high risk that R will commit a relevant sexual offence within the remaining term of the ESO.[8]

[17] The Court reviews ESOs under s 107RA Parole Act. The section provides:

> 107RA Review by court
>
> (1) A sentencing court must, on or before the review date specified in subsection (2), commence a review of an extended supervision order in order to ascertain whether there is—
>
> (a) a high risk that the offender will commit a relevant sexual offence within the remaining term of the order; or
>
> (b) a very high risk that the offender will commit a relevant violent offence within the remaining term of the order.
>
> (2) The review date of an extended supervision order is,—
>
> (a) if an offender has not ceased to be subject to an extended supervision order since first becoming subject to an extended supervision order, the date that is 15 years after the date on which the first extended supervision order commenced; and
>
> (b) thereafter, 5 years after the imposition of any and each new extended supervision order.
>
> (3) A review under this section must be commenced by way of an application by the chief executive, which may be made at any time within 4 months before the review date.
>
> (4) For the purpose of a review under this section, sections 107F (except subsection (1)), 107G, 107GA, and 107H apply (with any necessary modification) as if the review were an application for an extended supervision order.
>
> (5) Following the review, the court must either confirm the order or cancel it.
>
> (6) The court may only confirm the order if, on the basis of the matters set out in section 107IAA, it is satisfied that there is—

[8] Parole Act, s 107RA(6)(a).

(a) a high risk that the offender will commit a relevant sexual offence within the remaining term of the order; or

(b) a very high risk that the offender will commit a relevant violent offence within the remaining term of the order.

(7) For any period during which time has ceased to run on an extended supervision order under section 107P, time also ceases to run on the period specified in subsection (2) for the purpose of calculating the review date of an extended supervision order.

[18] Mr Edgeler, for R, invokes s 107F(2) Parole Act. It is under s 107F that the Chief Executive applies to the sentencing court for an ESO. Section 107F(2), relied upon by Mr Edgeler provides:

(2) An application under this section must be accompanied by a report by a health assessor (as defined in section 4 of the Sentencing Act 2002).

[19] Pursuant to s 107RA(4) of the Act, s 107F(2) applies (with any necessary modification) to this review as if it were an application for an ESO.

[20] Mr Edgeler submits the requirement that the Chief Executive's application be *accompanied* by a health assessor's report is mandatory. He says that as a result of that mandatory requirement the Chief Executive should be treated as having elected not to call evidence, with the consequence that the Chief Executive has not established that R meets the required risk level under s 107RA(6)(a) of the Act.

[21] In response, Ms Boshier invokes s 379 Criminal Procedure Act 2011 (CPA) which provides:

379 Proceedings not to be questioned for want of form

No charging document, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding may be dismissed, set aside, or held invalid by any court by reason only of any defect, irregularity, omission, or want of form unless the court is satisfied that there has been a miscarriage of justice.

[22] Under s 107G(7)(c) Parole Act, s 379 CPA applies, with all necessary modifications, to proceedings for an ESO.[9]

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9 Parole Act 2002.

[23] Ms Boshier submits that, were s 107F(2) Parole Act to be construed as requiring the filing of the health assessor's report contemporaneously with the filing of the Chief Executive's application, then s 379 CPA precludes (absent any miscarriage of justice) the Court disregarding the application by reason of such omission or irregularity. The Court's response, consistent with s 379 CPA, would then be to provide the offender with further time for review of the (subsequently filed) report and any other appropriate steps (if the offender reasonably required that).

[24] Ms Boshier submits that a similar type of jurisdictional challenge to that now advanced by Mr Edgeler was dismissed in *McDonnell v Chief Executive of the Department of Corrections*.[10] At the time of Mr McDonnell's sentencing hearing in the High Court, the health assessor who had prepared a report that was filed along with the Chief Executive's application for an ESO was unavailable, with the consequence that a different health assessor considered the original report and gave evidence.[11] The High Court found that this did not create a jurisdictional bar to an ESO, noting that the original report had fulfilled the requirement that an application is to be accompanied by a health assessor's report.

[25] On appeal, the Court of Appeal said, in relation to this matter, that:[12]

> [25] In the High Court, Mr Bott argued that the unavailability of Dr Zuessman for cross-examination was a fatal flaw that provided a jurisdictional bar to the issuing of an ESO. This was because Dr Zuessman's affidavit had accompanied the application for the ESO. Baragwanath J rejected that argument: he found that the provisions of Part 1A must be interpreted to promote rather than defeat the statutory purpose expressed in s 107I(1) (protection of a community) and that the procedures had to accommodate cases where the original assessor died or became too ill to be cross-examined. He said that the availability of Dr Wilson's affidavits, and his availability for cross-examination, meant that the health assessment relied on by the Chief Executive could be properly challenged.
>
> [26] We agree. …

[26] In reply, Mr Edgeler submits that *McDonnell* is distinguishable because the Chief Executive's application there was accompanied by a health assessor's report.

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10 *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352 (2009) 8 HRNZ 770.

11 *Chief Executive of the Department of Corrections v McDonnell* HC Auckland CRI-2005-404-239, 19 May 2008 at [16]–[18].

12 *McDonnell v Chief Executive of the Department of Corrections*, above n 10.

He says the only issue was that the initial report writer, who had authorised an assessment that had accompanied the application for the ESO, was unavailable for cross-examination.

[27] Mr Edgeler submits that a better analogy can be drawn with the approach taken by the Court of Appeal when R appealed against the making of an IDO detaining him at Matawhāiti.[13] The issue was as to the correct interpretation of the Court's powers under s 107 Public Safety Act to make an IDO when the application was not made until after intensive monitoring conditions had ceased?

[28] The Court of Appeal found that "as a matter of common sense and ordinary principles of interpretation" it must be implicit in the requirements under s 107 that there is an application (for a PPO) actually in existence.[14] The Court found that construction supported by surrounding provisions. The Court went on to refer also to the policy reasons underlying the Public Safety Act.[15]

[29] Mr Edgeler submits that the following observations of the Court of Appeal apply by analogy here:

> [38] We therefore consider that Mr Edgeler's interpretation is consistent with the policy reasons underlying the Public Safety Act and does not undermine them. It does not impede the flexibility of the authorities to act in the public interest, but rather reinforces the imperative for them to act promptly. If they do there will be no hiatus, which is beneficial both from public safety and good administration perspectives.
>
> [39] There is of course always the chance of human error and deadlines can be missed. The effect of our decision is that if a mistake is made and the application for a public protection is filed late, the Court cannot make an interim detention order. However, that would not need to mean public safety was put in jeopardy. In such a situation, it would always be open to the Chief Executive to seek an urgent hearing of the public protection order application.

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13 *R (CA464/2018) v Chief Executive of the Department of Corrections* [2019] NZCA 60.
14 At [34].
15 At [37]–[38].

Discussion

[30] I am to construe s 107F(2) Parole Act as it applies to the Court's reviews of ESOs under s 107RA of the Act. For convenience, I repeat the provision:

> (2) An application under this section must be accompanied by a report by a health assessor (as defined in section 4 of the Sentencing Act 2002).

[31] I begin with the text of the section. It does not state in terms that the application *when it is filed* must be accompanied by the health assessor's report.

[32] The wording of s 107F(2) may be contrasted with that adopted in the High Court Rules 2016, in relation to the requirements concerning any affidavit in support of an interlocutory application. Rule 7.20 High Court Rules provides:

> Any affidavit in support of the application must be filed at the same time as the application.[16]

[33] While the use of the verb "accompany" in s 107F(2) conveys the sense of "go with" or "attach to" that does not of itself command a construction that the report must go with or accompany the application *at the very time the application is filed*.

[34] The matter may be tested by considering whether a report filed the day after the application was filed has "accompanied" the application. I do not find any necessary implication in the use of the term "accompanied" to the effect the two filings must take place at the very same time.

[35] On the other hand, I do not consider that a report filed much later than the application, at a time when those acting for the respondent would normally be preparing for the hearing, could be said to be a report which is "accompanying" the application.

[36] Such a later filing would also not fit well with the requirements of s 107G(1)(b) Parole Act, which Ms Boshier responsibly drew to my attention. Under that provision,

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[16] Accordingly, there is no right to file affidavits in support of an interlocutory application at a later stage, although the Court retains a discretion to extend the time for filing a supporting affidavit: See the Commentary in Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR7.20.02] (footnote added).

the Chief Executive must ensure that as soon as practicable after the application for an ESO is made, the offender is served with both a copy of the application and a copy of the health assessor's report (and other identified documents). The drafting of this provision suggests that a health assessor's report will not be filed a significant period after the application itself.

[37] The report in this case, although dated 17 May 2021, was not filed until 29 June 2021, some four months after the application.

[38] I recognise, in these circumstances, a strong argument that s 107F(2) was not complied with on this review. But I do not need to finally determine that issue as the Chief Executive is entitled to invoke the provisions of s 379 CPA.

[39] It is clear under the review regime of s 107RA (as supplemented by s 107F(2) Parole Act) that before the Court undertakes its review there must be before it a health assessor's report. The consequence of an irregular filing of the health assessor's report as urged by Mr Edgeler — that the Chief Executive should be treated as having elected not to call evidence — does not fit with the statutory regime. The authorities establish that the Court's "satisfaction" in relation to required elements does not rest on traditional notions of burden or standard of proof. Instead the Court is required to make up its mind on reasonable grounds.[17] The Court is required to have before it for the purposes of its review a health assessor's report. Under s 107RA(5) the Court at the end of that review process then either confirms the ESO or cancels it. It must do that in the light of a health assessor's report.

[40] Section 379 CPA addresses the situation in which, for instance, a key document has either been omitted or irregularly provided. The process is not to be held invalid unless the Court is satisfied there has been a miscarriage of justice. Responsibly, Mr Edgeler did not in his submissions suggest that he can point to a consequential miscarriage of justice here. Accordingly, even were it the case that s 107F(2) Parole Act had not been complied with (which I do not determine), the Chief Executive's application is to be treated as valid and the review must proceed. The provisions of s 107RA Parole Act do not reserve to the Court a discretion not to proceed to review.

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[17] *McDonnell v Chief Executive of Department of Corrections*, above n 10, at [71]–[75].

The Court's sole area of discretion (in the event it is satisfied of a risk identified in s 107RA(6) Parole Act) is in relation to whether to confirm the ESO.[18]

The determination of the correct review date

The issue raised

[41] Ms Boshier identifies an issue in relation to the identification of the correct review date in terms of s 107RA(2) Parole Act. Ms Boshier submits that if there were an obstacle to the current review application through the later filing of the report, on one construction of the various threads of legislation, the correct review date may be in August 2021. The consequence would then be that the current application could be withdrawn and a fresh application (with the health assessor's report) filed (both within the period specified under s 107RA(3) that is, within four months before the review date).

[42] Ms Boshier, indicates that there has yet been no authoritative decision in relation to this particular issue as to the determination of the review date. She explains the two possible review dates in this way. The issue is that whether time spent on an IDO (or indeed a PPO, if one is made) under the Public Safety Act is time during which an ESO ceases to run under s 107P Parole Act. If R's ESO continued to run while subject to an IDO, then the Chief Executive calculates that the review date was March 2021. The current application for review, having been filed on 23 February 2021, accordingly was made within the four month period before the review date specified in s 107RA(3) Parole Act. On the other hand, if the ESO was suspended pursuant to S107P, then the Chief Executive says the review date would be August 2021.

[43] Ms Boshier identifies this issue in her submissions as a matter potentially affecting R, and of which the Court should be aware. While she provided more detailed submissions as to how the threads of the various statutory regimes may be taken to work together, she refrained from making a submission as to one approach or the other being correct.

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[18] *McIntosh v Chief Executive of the Department of Corrections* [2021] NZCA 218.

[44] For his part, Mr Edgeler emphasises that the particular focus of the respondent is upon the ESO review taking place so as to enable a determination to be made under s 107RA(5) (whether the ESO should be cancelled). R particularly wants to be free of the (ESO) condition as to electronic monitoring, which is not a part of the requirements under his CCO secure placement in the community. To that extent the respondent's personal interest is in favour of the March 2021 review date. That said, Mr Edgeler notes that in the event of the later review date (August 2021) any order confirming the ESO will have the consequence that R remains under an ESO to a later date (covering a longer period in terms of months elapsed) than would occur in the event of a March 2021 review date.

Discussion

[45] While recognising the issue raised by Ms Boshier, it is unnecessary on the facts of this case to determine the correct review date. The possibility that the Chief Executive might withdraw the present application and file a fresh application will not eventuate. I have determined that the suggested breach of the timing provisions of s 107RA does not bar the Court from completing the review on the present application. For similar reasons, even were the correct review date August 2021, with the consequence that the Chief Executive's application was filed more than four months before the review date, an effective review may still proceed. If the provision under s 107RA(3) (whereby the Chief Executive's application *may* be made at any time within four months before the review date) were taken as constituting a mandatory rather than permissive timeframe, the early filing of the application would be saved by s 379 CPA (discussed above at [38]–[40]).

The statutory regime — review of ESOs

[46] Section 107RA Parole Act (set out at [17] above provides for the review of ESOs.

[47] Under these provisions, an application for review will largely follow the same processes as an initial application for an ESO. Section 107RA(4) Parole Act sets out the procedural requirements.

[48] Under s 107RA(5) the Court is limited to one of two orders, namely confirmation or cancellation of the ESO.

[49] Under s 107RA(6) the Court may confirm the ESO only if (having regard to the matters set out in s 107IAA) it is satisfied of either of the identified risks within the remaining term of the order.

[50] Nothing in s 107RA requires the Court to make the specific risk assessments required on the initial making of an ESO under s 107I. Thus the Court is not required (in terms of s 107I(2)(a)) to make a fresh assessment as to whether the offender has or has had a pervasive pattern of serious sexual or violent offending.

[51] Here, accordingly, I may make an order confirming the ESO only if satisfied that R will commit a relevant sexual offence within the remaining term of the order.

[52] I may be satisfied that there is a high risk that R will commit a relevant sexual offence only if satisfied that he meets the mandatory criteria in s 107IAA of the Act which relevantly provides:

> **107IAA Matters court must be satisfied of when assessing risk**
>
> (1) A court may determine that there is a high risk that an eligible offender will commit a relevant sexual offence only if it is satisfied that the offender—
>
> (a) displays an intense drive, desire, or urge to commit a relevant sexual offence; and
>
> (b) has a predilection or proclivity for serious sexual offending; and
>
> (c) has limited self-regulatory capacity; and
>
> (d) displays either or both of the following:
>
> (i) a lack of acceptance of responsibility or remorse for past offending:
>
> (ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.

A pervasive pattern of serious sexual offending

[53] This has been established in R's case. The pattern is identified in both the 2005 and 2017 decisions that considered whether R should be subject to an ESO.[19]

A high risk of a future relevant sexual offence within the remaining term of the order (s 107RA(6)(a))

Displaying of intense drive, desire or urge to commit a relevant sexual offence (s 107IAA(1)(a))

[54] In the judgment that ordered the making of the first ESO, Rodney Hansen J summarised R's offending history as follows:[20]

> [8] The health assessor's report under s 107F(2) was prepared by Mr Cecil Weihahn, a senior psychologist with the Department of Corrections, Psychological Service, Auckland. His report records that Mr [R], now 50 years of age, has an extensive history of sexual assaults dating back to when he was 14 years of age. He was then admitted to a mental hospital after allegedly indecently assaulting his sister. Following his discharge, he was admitted a year later after an alleged further sexual assault. Then, at the age of 18 years, he was charged with the rape of a fellow patient in hospital. He was found to be under an intellectual disability, made a special patient and transferred to the secure unit of another hospital.
>
> [9] Soon after his discharge in 1985, he was convicted of two charges of indecent assault and returned to the secure unit of the hospital. In 1986 he absconded and was convicted of charges of attempted sexual violation and indecent assault of a female aged between twelve and sixteen.
>
> [10] In 1994 Mr [R] twice absconded from hospital. On the first occasion he indecently assaulted two girls. On the second he indecently assaulted a woman and was sentenced to nine months imprisonment. In 1995, on the day he was released from prison, he assaulted three women in a lift and was sentenced to 15 months imprisonment. At this time the offending in respect of which he received the nine-year sentence came to light. It emerged that while living with a family member in 1985/1986 following discharge from secure care, Mr [R] had sexually violated and indecently assaulted two girls, then aged eight years and five years. The offending came to light when the complainants, then teenagers, feared he may renew his attacks on them.
>
> [11] The health assessor's report remarks on the pattern of offending soon after release or escape from hospital or prison, quoting an earlier Psychological Service report which observed that:
>
> > Mr [R] appears to reoffend very shortly after institutional constraints are removed, and many of the offences have occurred within days

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19 *2005 judgment*, above n 2; and *2017 judgment*, above n 3, at [34].
20 *2005 judgment*, above n 2.

> after release or escape from an institution. In numerous previous assessments available on file, Mr [R]'s offending behaviour has consistently been described as highly impulsive and follow an opportunistic pattern. The victims of his sexual offences have all been female and included family members, acquaintances and strangers from aged five to adult.

[55] In the 2017 decision regarding the second ESO, Edwards J dealt with subsequent offending by reference to the health assessor's report:[21]

> [30] Ms Bakker's report details a number of incidents since the ESO has been in place. In 2007, Mr [R] re-offended while in the community by exposing his genitals and masturbating whilst gesturing to his victim to approach him.
>
> [31] From 2009 to 2012, there were seven documented incidences of Mr [R] exposing his genitals to others and watching others whilst masturbating. That included incidences in the toilet and shower, but also during every day activities. They included an incident in 2009 where Mr [R] was caught exposing himself to a member of the public when he came to the house. In 2012, Mr [R] was found by a male staff member with his pants down masturbating whilst watching a female staff member. When Mr [R] was challenged about this behaviour he attacked a staff member and required full restraint. In 2015, a female staff member complained that Mr [R] was watching her in the toilets.
>
> [32] Ms Bakker's report also details concerns relating to Mr [R] appearing to sexualise or romanticise those in his immediate vicinity, including neighbours (in 2009 and 2014), children (in 2013), and staff at his residential facility. Other documented concerns include Mr [R] placing himself in potentially high-risk situations at times of momentary lapse in supervision, for example by approaching and talking to young children.
>
> [33] In addition to the documented incidences, Ms Bakker gave evidence that those she interviewed for the purposes of her assessment spoke of Mr [R] frequently making sexualised comments.

[56] For this review, Mr Carlyon by his report has provided up-to-date information as to R's behaviour within care settings and prison:

> 19 Within care settings and prison, Mr [R] has been reported to have exhibited intermittent sexually harmful behaviours. In 2019 (S Berry, 3 October 2019), Mr [R] was noted to have been suspected of intentionally exposing himself to a female staff member and he was recorded as having made inappropriate sexual comment(s) and gestures. At that time, he acknowledged a high sexual drive and suggested he was open to receiving anti-libidinal medication if it were offered (observing that such medication had previously not had a positive effect). A 2020 assessment (M Dewar, 16 April 2020) referred to a range of voyeuristic and exhibitionistic acts perpetrated by Mr [R]

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21 *2017 judgment*, above n 3.

> while he was in prison or in care; victims included female staff and, less typically, women in public places. Ms Dewar remarked that in 2019, there was an incident of Mr [R] exhibiting a sexualised gesture with his tongue. A Probation Case Note (28 July 2020) referred to Mr [R] "blatantly" masturbating in front of a female residential support worker and remarked that he had previously made sexualised comments about that person's clothing. The Probation Officer stated, "Following this incident, no females are to be left alone at all with [Mr [R]]". In consultation, Mr Mitchell, Care Manager, told this assessor that Mr [R] has not recently engaged in overtly sexually harmful behaviour.[22] However, he explained that support staff are highly vigilant to that risk and were aware of Mr [R]'s capacity to groom and manipulate staff for potentially sexual reasons. Compounding that, his highly impulsive presentation that can vary with fluctuating mood and see Mr [R] rapidly become aggressive and confronting

[57] Mr Carlyon, in his report, recorded that R chose not to engage with him in the preparation of his report. Consequently Mr Carlyon's report is not informed by any contribution made by R to the health assessment. Equally, Mr Carlyon did not view himself as having R's consent to access protected or privileged material, with the consequence that the report is not informed by information that may be contained in such material. Mr Carlyon appropriately set out in his report the areas in which his assessment was to some extent limited by these constraints.[23]

[58] Mr Carlyon opined, based on the evidence, that R has demonstrated an intense drive, desire and urge to commit a relevant sexual offence. Mr Carlyon recognised that on this issue information relevant to the assessment of this domain may be missing.

[59] I am satisfied on the available evidence that R has demonstrated an intense drive, desire and urge to commit a relevant sexual offence.

Having a predilection or proclivity for serious sexual offending (s 107IAA)(1)(b))

[60] Mr Carlyon notes that R's sexual offending has been repeated over many years, in multiple context, following on from ostensibly aversive legal consequence, and

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22 Noting, in contradiction of that, a recent Specialist Assessor's review (L Medlicott, 11 April 2021) remarked about an incident where Mr [R] was angry and threatening and at the same time exposing his flaccid penis to attending staff.

23 See *McDonnell v Chief Executive of the Department of Corrections*, above n 10, at [26]–[53] for discussion on the validity of a health assessor's reports when the subject of the report has not participated.

against approximately 13 victims who were variously aged and variously either known or unknown to him. Mr Carlyon opines that R has a preference to engage in serious sexual offending. Mr Carlyon observes that, while the regularity of sexual offending has been constrained in recent years through various forms of containment and supervision, there has been a persistence of offence-analogous behaviours (including overt sexual behaviours such as exposure) that makes it probable that R would have sought opportunities to commit a serious sexual offence.

[61] Mr Carlyon concludes that R has exhibited a predilection and proclivity to commit serious offences.

[62] I am satisfied on the evidence that R has a predilection and proclivity for serious sexual offending.

Having limited self-regulatory capacity (s 107IAA(1)(c))

[63] Mr Carlyon identifies a pattern in R of poor self-regulation across his lifetime, with some of the sexual offending occurring in a highly impulsive manner. Even in his current care setting, R is reported as rapidly becoming angry, aggressive and short-term focused. Mr Carlyon cites a report of R considering cutting off his electronic monitoring bracelet. Mr Carlyon also notes a recent report of R indicating he required anger-management, suggesting some awareness of this being an area of vulnerability for him.

[64] Mr Carlyon concludes that R exhibits impaired self-regulatory capacity.

[65] I am satisfied that R has limited self-regulatory capacity (including in relation to sexual offending).

Displaying a lack of acceptance of responsibility or remorse and/or an absence of understanding of impact of offending (s 107IAA(1)(d))

[66] Mr Carlyon was not able to conduct an up to date assessment of R within this domain, by reason of R's non-engagement. Mr Carlyon was nevertheless able to identify from past health assessments that R has variably denied or minimised his sexual offending. A Probation Officer has reported that R would not tolerate enquiry

about his sexual offending. Mr Carlyon found no information or evidence to indicate R has taken any stance to consistently take responsibility for his sexual assaults or to express genuine regret for them. Nor has he taken the stance whereby he understands and expresses concern for the impact on victims. Mr Carlyon considers it to be unlikely that R will have experienced a change in these areas of understandings and concern.

[67] Mr Carlyon opines, on balance, that it is very unlikely that R's understanding for all concerned about the impact of sexual offending on victims or potential victims has altered since previously assessed. In short, deficits remain in these areas.

[68] I am satisfied that R does display both of the sets of attributes identified in s 107IAA(d).

A high risk that R will commit a relevant sexual offence within the remaining term of the ESO (s 107RA)

[69] As I am satisfied that R has each of the four attributes identified in s 107IAA(1)(a)–(d) Parole Act, it is open to me to determine that there is a high risk that R will commit a relevant sexual offence. The test under s 107RA(6)(a) is whether that is so in relation to the remaining term of the ESO (to June 2027 on the Chief Executive's calculation).

[70] The Chief Executive submits there is such a risk in R's case and relies both on previous assessments and findings and on the evidence of Mr Carlyon.

[71] Mr Edgeler, in his cross-examination of Mr Carlyon, did not set out to undermine Mr Carlyon's assessment of risk. The matters which Mr Edgeler explored in cross-examination were more focused on a comparison of the risk mitigation advantages which might be identified through compulsory care under the Intellectual Disability Act as against detention under an ESO.

[72] Mr Carlyon conducted his assessment of R by reference to both actuarial instruments and clinical risk factors (including instruments that assess static and dynamic risk factors for sexual recidivism). While performing his assessment in terms

of common risk language labels, Mr Carlyon recognised that for the Court's purposes under the Parole Act it was also necessary to provide evidence adopting the terminology used in the Parole Act ("high risk" or "average risk" and so on).

[73] Mr Carlyon concluded that R poses a high risk of engaging in further relevant sexual offending. He took into account the fact that R has not completed or appeared to take longer term benefit from any treatment provided with the intention of reducing his risk of sexual reoffending. The fact that R's profile is characterised by intellectual impairment means that his challenging and complex personality traits and long-term reliance on external controls and support poses significant and enduring barriers for the provision of offence-focused treatment.

[74] I am satisfied there is a high risk that R will commit a relevant sexual offence within the remaining term of the order.

Exercise of discretion

[75] Following this review, I must either confirm the ESO or cancel it.[24]

[76] Being satisfied there is a high risk that R will commit a relevant sexual offence within the remaining term of the order, I *may* confirm the order (or cancel it).

[77] The thrust of Mr Edgeler's submission is that the Court ought to cancel the ESO because there is a more appropriate regime in place for R.

[78] Mr Edgeler notes R's intellectual disability and the consequence that he is detained under a CCO with a direction that he be held in secure care (the same form of detention under which any other person whose criminal charges were resolved under the Intellectual Disability Act would be kept).

[79] Mr Edgeler observes that had the applications in relation to R being dealt with in a different order, the possibility of an ESO would not have arisen despite the earlier finding of the High Court that R met the test under the Public Safety Act. Had the

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[24] Parole Act, s 107RA(5).

PPO application been made with a contingent application under s 107GAA Parole Act, the High Court's direction under the Public Safety Act (above at [7]) would have ended the application without an ESO being made.

[80] Mr Edgeler submits that it is clear in these circumstances that Parliament considers that system is sufficiently robust to ensure the safety of the community. Even those with a very high risk of offending may be properly cared for in secure care without the additional overlay of the parole legislation.

[81] Mr Edgeler submits that the restrictions that are in place in relation to R under the Intellectual Disability Act are more extensive than could be imposed on him under the Parole Act (save for electronic monitoring). The requirements of the care co-ordinator are effectively conditions of intensive monitoring (which is no longer available for R under his ESO). R has line of sight supervision (or its equivalent) 24 hours a day.

[82] Mr Edgeler cross-examined Mr Carlyon on these matters. In particular Mr Edgeler suggested to Mr Carlyon that a secure care order allows greater level of monitoring than an ESO. Mr Carlyon agreed that in terms of the level of support and oversight, the oversight under a secure care order is greater than that under an ESO in terms of environmental controls, staff being close by, and so on. He identified electronic monitoring as one of the "key differences" (not being aware of any provision under the Intellectual Disability Act for electronic monitoring).

[83] Mr Carlyon stated that in his opinion the risk status of a person in secure care is mitigated more than for a person under an ESO. He compared the management of risk under the two regimes in this way:

> That is, if I can contemplate this for a moment, that is if we were to imagine a scenario where the ESO was removed, do you want me to talk on Sir? If there was no ESO but he remained within the compulsory care framework, then that would provide an adequate level of external control in my opinion based on my appraisal of it and based on the fact there has been no contact sexual offending while he's been subject to that. If on the other hand we looked at it from the other point of view and said, "Remove the compulsory care status and have only the ESO and permit independent living and so on in the wider community, like most people on an ESO are", then I think that that — I don't think that would on its own be enough to manage [R]'s risk.

[84] For the Chief Executive, Ms Boshier submits that the confirmation of the ESO is fundamentally important, once a high risk assessment has been made of R, because there is no assurance that he will for the duration of the term of the ESO be under the compulsory care regime of the Intellectual Disability Act.

[85] The care order in relation to R is due to expire in April 2022.

[86] In his evidence, Mr Carlyon confirmed that there is no certainty as to what will happen at that point. As he observed, there is the possibility of an extension but for that to happen a number of steps would have to occur. A designated specialist assessor would need to come to the opinion that an extension should be applied for; the Co-ordination Service would then need to make a decision as to whether they agree with the recommendation to make such an application; and if that occurred the outcome would be a matter for the Court. As Mr Carlyon observed:

> … from my perspective, of course anything could happen at that point because there will be a number of factors at play. So no, there is no certainty about what will happen from my perspective post current care order expiration.

Discussion

[87] R is currently subject to an ESO pursuant to a determination of the sentencing court under the Parole Act. The decision on a review must primarily have regard to the risk assessment which is at the heart of the processes involved in the making of the initial ESO and in the requirements of review.

[88] It is important to acknowledge in relation to R's care that the standard of care and supervision currently available to R through the compulsory care order is excellent. It is appropriate that I note that R, who asked to speak to me directly at the hearing, also acknowledged his appreciation of the quality of that care. That said, there is no assurance that R will remain under that care regime beyond April 2022. The Court's review of the ESO has to take into account the risks that R might pose (both for himself and for the community) should there not be an ESO in place in the event his compulsory care regime has come to an end.

[89] The only appropriate answer is that the ESO must continue for the time being. There would otherwise be clearly identified risks which need to be addressed but are no longer the subject of an appropriate regime. It would not be possible for the Department of Corrections to lodge a further application for an ESO at a later date to meet a future change in R's status under the Intellectual Disability Act.[25]

[90] In these circumstances, I am satisfied it is appropriate to confirm the ESO.

Order

[91] The extended supervision order made on 27 March 2017 is confirmed.

Osborne J

Solicitor:
Crown Solicitor, Christchurch
Barrister:
G K Edgeler, Blackstone Chambers, Wellington

[25] 2005 judgment, above n 3 at [34].