IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2020-409-000229
[2021] NZHC 2305

BETWEEN	CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIONS Applicant
AND	TOMMY APERA PORI Respondent

Hearing:	5 – 6 and 16 July 2021 (Final submissions filed 13 August 2021)
Appearances:	C J Boshier for Applicant M Starling and N R Wham for Respondent K H Cook as Litigation Guardian for Respondent
Judgment:	3 September 2021

JUDGMENT OF DUNNINGHAM J

This judgment was delivered by me on 3 September 2021 at 11 am, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] The Chief Executive of the Department of Corrections (the Chief Executive) has applied under s 104 of the Public Safety (Public Protection Orders) Act 2014 (the Public Safety Act) for a public protection order (PPO) in respect of Mr Pori.

[2] Mr Pori is currently subject to an interim detention order (IDO) which was imposed on 25 June 2020. He has resided at Matawhāiti since September 2020, when he was released from his most recent prison sentence. Matawhāiti is located on the grounds of Christchurch Men's Prison and is a purpose-built facility designed to house individuals who are subject to a PPO.

[3] Mr Pori is also subject to an extended supervision order (ESO) with intensive monitoring (IM). The ESO is currently set to expire on 5 February 2027. If a PPO was declined, Mr Pori would revert to being supervised under the ESO with the IM component of the ESO expiring on 10 December 2021.[1]

[4] Prior to the imposition of the IDO, and while he was subject to an ESO, Mr Pori received 17 convictions for breaching his ESO. These include for putting himself in contact with children without the presence of an approved adult, sending sexualised letters and text messages to female staff, and absconding from his residence. He has also amassed 20 other convictions while subject to the ESO, including for threatening to kill, wilful damage, using offensive language, assault with a weapon, behaving threateningly, unlawfully being in an enclosed yard, and offensive/disturbing use of a telephone.

[5] It is because of this record of offending while on an ESO that the Chief Executive has sought a PPO in respect of Mr Pori.

Mr Pori's background

[6] Mr Pori is approximately 59 years old. He was born in the Cook Islands and raised by his grandparents. Little is known about his personal history because, as the psychologist Mr Metoui notes, "Mr Pori has never been a reliable informant about that aspect of his life". However, it is accepted that he suffered a head injury when he was approximately 18-20 years old. He was subsequently convicted of a number of criminal offences in the Cook Islands, including; rape in 1993 when he entered a house during the night and raped a sleeping woman; unlawfully found on premises and

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[1] Although noting the query, discussed later in this judgment, as to whether the IM condition was suspended while Mr Pori was on an IDO. If it was not, then the IM condition will have expired.

assault on a child in 1988 (a sexually motivated break-in to a house at night); and rape in 1993 where he continued despite a third party intervening. He has also sexually offended in New Zealand. In 2006 he entered a nine-year-old girl's bedroom and sexually offended against her by digitally penetrating her.

[7] Following completion of a five year sentence for this offending, an ESO was imposed in 2011. When it was imposed, he initially resided at Kaainga Taupua on the grounds of Spring Hill Corrections Facility in the Waikato, but was moved to another residence, Tōruatanga, managed by the Department of Corrections, for safety reasons, as his offending was escalating. In 2017, although the ESO had not expired, the Chief Executive sought a new ESO with a direction for IM for the maximum statutory period of 12 months. The new ESO was made for seven years so as not to extend the total time that he was subject to an ESO.[2] However, Mr Pori has spent significant time in prison for offending while on the ESO, and during those periods the ESO was suspended.[3]

[8] At the same time as making the application for a PPO, the Chief Executive sought an order pursuant to s 107 of the Public Safety Act that Mr Pori be subject to an interim detention order (IDO), to have effect until the application for a PPO could be heard.

[9] I heard the application for an IDO last year and issued a judgment on 25 June 2020.[4] In that decision I found that Mr Pori met the jurisdictional threshold for the imposition of a PPO (and therefore an IDO) set out in s 7(1)(b) of the Public Safety Act. I was also satisfied, at least on a provisional basis, that he met the threshold for such an order because he was at very high risk of imminent serious sexual offending, having regard to the four behavioural characteristics set out at s 13(2) of the Public Safety Act.

[10] Having considered the evidence provided in support of the application, I concluded:[5]

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2 *Department of Corrections v Pori* [2017] NZHC 3082.
3 Pursuant to s 107P(1) Parole Act 2002.
4 *Chief Executive of the Department of Corrections v Pori* [2020] NZHC 1446.
5 At [33].

> … the evidence paints a picture of an individual who views most or all interactions with females through the lens of his sexual desires and he is incapable of exercising any empathy or self-control that might prevent him from acting on those desires in intrusive, aggressive and ultimately violent ways. He is at very high risk of imminent serious sexual offending if left unsupervised.

[11] However, although the Chief Executive sought that Mr Pori should serve the IDO in prison, I was not prepared to make that order. Mr Burger, who was, at the time, the manager of both Matawhāiti and Tōruatanga, considered Mr Pori's behaviour would "have the potential to severely disrupt the Matawhāiti operations, and compromise the welfare of Mr Pori and other residents, staff and visitors".[6] However, I considered Mr Pori should not be denied the opportunity to serve the IDO under that less restrictive option first.

[12] Accordingly, I made an IDO and ordered it be served at the Matawhāiti residence. Happily, this arrangement has been relatively successful. The Chief Executive now seeks the substantive PPO be made on terms that include Mr Pori residing at the Matawhāiti residence.

[13] During the hearing for the IDO, concerns were raised about Mr Pori's mental health and intellectual ability raising the possibility, under s 12 of the Public Safety Act, that Mr Pori should be subject to care and supervision under different legislation. For that reason, I directed the Chief Executive to consider the appropriateness of an application in respect of Mr Pori under s 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Mental Health Act), or under s 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the IDCCR Act).[7]

[14] Those options have been considered since the making of the IDO, and evidence prepared on whether Mr Pori met the criteria for being the subject of an order under either Act and, if so, whether that was preferable to him being made subject to a PPO. That evidence concludes that Mr Pori does not have an intellectual disability, as

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6 At [54].
7 At [62].

defined in the IDCCR Act, but is of low average intelligence. However, there is some evidence he suffers from a "mental disorder" as defined in the Mental Health Act.

[15] The key issue for determination in the present hearing is whether it is more appropriate to:

(a) direct the Chief Executive pursuant to s 12 of the Public Safety Act to make an application under s 45 of the Mental Health Act; or

(b) make a PPO which will effectively retain the status quo.

Does Mr Pori meet the criteria for the imposition of the PPO?

[16] Mr Pori meets the threshold test in s 7(1)(b) of the Public Safety Act for a PPO as he is over the age of 18 and is subject to an ESO with IM.

[17] The other statutory requirement is that Mr Pori must pose a very high risk of imminent serious sexual offending if he was released from prison into the community or otherwise left unsupervised.[8] To make such a finding, I must be satisfied that Mr Pori exhibits the following particular behavioural characteristics to a high level as set out in s 13(2):

(a) an intense drive or urge to commit a particular form of offending:

(b) limited self-regulatory capacity, evidenced by general impulsiveness, high emotional reactivity, and inability to cope with, or manage, stress and difficulties:

(c) absence of understanding or concern for the impact of the respondent's offending on actual or potential victims …:

(d) poor interpersonal relationships or social isolation or both.

[18] In this case, all the health assessors, including those called on behalf of Mr Pori, agreed that Mr Pori displayed the characteristics set out at s 13(2) and satisfied the statutory test in s 13(1)(b) in that he was at very high risk of imminent serious sexual offending if left unsupervised or released. Nevertheless, Mr Starling in

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8 Public Safety (Public Protection Orders) Act 2014, s 13(1).

cross-examination, sought to challenge the opinion that Mr Pori exhibited an intense drive or urge to commit sexual offending under s 13(2)(a), suggesting that Mr Pori did not have such a drive, but did have poor self-regulatory capacity. This is not a matter Mr Starling addressed in closing submissions.

[19] Given the consensus between the health assessors, I deal only briefly with whether the statutory test in s 13(1)(b) is met.

Does Mr Pori display an intense drive or urge to sexually offend? - s 13(2)(a)

[20] Ms Waugh, a registered psychologist and neuropsychologist, considers Mr Pori has an intense and persistent drive or urge to actively seek sexualised contact. She points out that Mr Pori demonstrates few inhibitions and this urge to gain sexual gratification is highly likely to result in a sexual offence if he is not adequately supervised.

[21] Dr Mattson, a registered clinical psychologist, considers that Mr Pori demonstrates a repeated pattern of sexualising his interactions with females and these patterns reflect an "intensity that is not curbed by any internal or external factors". She says when Mr Pori experiences sexual or arousal interest, he automatically engages in sexualised behaviour regardless of context. Her conclusion is "Mr Pori demonstrates a long-standing, intense drive to achieve sexual gratification".

[22] Mr Metoui, a consultant forensic psychologist, agrees that Mr Pori has an intense drive and urge to sexually offend. He says his behaviour has:

> … consistently been highly sexualised towards female staff, including fixating on some women and making sexual advances on them … There have also been groping behaviours towards female staff in custody. Mr Pori has approached female children during his time in the community under an ESO.

[23] Although Dr Monasterio did not address this issue directly in his report, in expert conferencing he agreed with the other three health assessors that Mr Pori met this criterion.

[24] In cross-examination Mr Starling queried whether the behaviour was a result of an intense drive but, rather, was as a result of disinhibition or dysregulation.

Dr Mattson responded by saying "drive" and "disinhibition" were "separate but related issues" with "drive being that internal urge to behave in a goal directed manner … [while] … [s]elf regulation or disinhibition are things that either help or hinder our achieving that goal". Thus, while acknowledging his lack of self-regulation she maintained he also demonstrated an intense drive to sexually offend. Similarly, when it was suggested to Dr Monasterio that Mr Pori's behaviour was simply the result of disinhibition, he replied saying "with respect I can't agree with that, because we know that he has a drive, that is obvious", and referred to Mr Pori's repeated convictions for sexual offending as evidence of his intense drive.

[25] I accept that Mr Pori is disinhibited and lacks the ability to regulate his sexual drive. That is a factor which contributes to his problematic behaviour. However, that does not change the fact that he demonstrates an intense drive or urge to engage in inappropriate sexual behaviour. I am readily satisfied that this characteristic is present to a high level.

Does Mr Pori display limited self-regulatory capacity? - s 13(2)(b)

[26] Ms Waugh says that Mr Pori demonstrates a limited self-regulatory capacity both in regard to his sexual behaviour, and his emotions and behaviour more generally.

[27] Dr Mattson agrees with this assessment and says, given Mr Pori's personality profile and cognitive difficulties, it is unlikely he will develop the requisite skills to manage his behaviour without external support and monitoring.

[28] Mr Metoui is of the view that Mr Pori has "chronic highly limited self-regulatory capacity in the form of high emotional reactivity, and considerable difficulty in managing stress".

[29] Dr Monasterio notes there is "little doubt that the impact of the traumatic brain injury [suffered when he was 18-20 years old] has been to exacerbate or cause poor impulse control, impaired judgment and to contribute to his subsequent significant offending history".

[30] I accept the unanimous opinion of the health assessors, along with the evidence of those who supervise Mr Pori on a day to day basis, that he has extremely limited self-regulatory capacity.

Does Mr Pori display an absence of understanding or concern for the impact of his offending on actual or potential victims – s 13(2)(c)

[31] As discussed by the Court of Appeal in *McIntosh v Chief Executive of the Department of Corrections*, the focus, when looking at this characteristic, is whether "the acceptance of responsibility, remorse, understanding or concern are material in the given case in the sense that they are present to a sufficient degree to mitigate the relevant risk".[9]

[32] In the present case, Ms Waugh says Mr Pori has shown no comprehension of the effects of his actions on his victims, and rather, has minimised the harm caused.

[33] Dr Mattson noted Mr Pori had very little insight into the impact of his behaviour and she believes Mr Pori lacks the ability to appreciate the impact of the effects of sexual or violent offending on his victims. Dr Mattson explained in cross-examination that Mr Pori has cognitive distortions which "mean that he does not see his behaviour [as] offensive or illegal, and may indeed believe that his behaviour was consensual or wanted by the other party".

[34] Mr Metoui found Mr Pori to have "no insight into his sexual offending behaviour", and an absence of understanding of his offending on actual or potential victims. Mr Metoui concludes "I highly doubt this will ever change".

[35] In my view, the extent of cognitive distortion demonstrated by Mr Pori, where he excuses his behaviour as not criminal or believes it is wanted by the other party, is the very antithesis of showing understanding or concern for the impact of his offending on his victims, and this characteristic is present to a high degree.

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9 *McIntosh v Chief Executive of the Department of Corrections* [2021] NZCA 218 at [23].

Does Mr Pori display poor interpersonal relationships or social isolation or both? – s 13(2)(d)

[36] Ms Waugh notes there was no evidence to suggest Mr Pori has ever formed and maintained appropriate interpersonal relationships. While he purports to have connections to family and other relationships, there is no evidence that any of those people have attempted to initiate contact with him since he has been in New Zealand. His primary social contact is with the staff who care for him. However, even those staff members he purports to like can easily become the victim of his hostility and aggression. In her opinion, Mr Pori has not displayed any motivation to form relationships with others, beyond the sexualised interest he shows in female staff that he has contact with. Mr Pori has no interpersonal support that may assist him manage this risk.

[37] Dr Mattson considers Mr Pori's poor interpersonal relationships and social isolation are factors which are directly relevant to his sexual and violent offending processes. She says during the health assessment Mr Pori demonstrated "rudimentary social skills and an unsophisticated ability to appropriately connect with others". She notes he is able to sustain appropriate social behaviour only "as long as the other person is complying with his wishes or expectations". However, whenever he is not getting what he desires, he "quickly reverts to agitation and aggression or sexualises his behaviour to manipulate the outcome he desires".

[38] Mr Metoui concurs, saying Mr Pori is estranged from his family and has no personal supports or friends.

[39] I am satisfied that this behavioural characteristic is present to a high level.

Is there a very high risk of imminent serious sexual offending?

[40] "**imminent**" is defined in s 3 of the Public Safety Act as follows:

> Imminent, in relation to the commission of serious sexual or violent offences by a person, means that the person is expected to commit such an offence as soon as he or she has a suitable opportunity to do so.

[41] In *Chisnall v Chief Executive of the Department of Corrections*, a decision of the Supreme Court, Elias CJ explained the s 13 test as follows:[10]

> [39] The text of s 13 and the definition of "imminent" links the risk which is to be addressed by the orders to provision of opportunity through removal of restraint. The Judge must be satisfied not only that the risk is a high one but that it is likely to occur if the opportunity arises. Under the definition the person must be expected to commit a serious sexual or violent offence as soon as he or she has suitable opportunity to do so. The criteria in s 13(2) indicate that "imminent" in this context is not a purely temporal assessment, but one linked to opportunity. The order is aimed at preventing the opportunity arising where the Judge is satisfied that an offence of the type is likely to be committed by the respondent when he or she has suitable opportunity.

[42] Again, the health assessors all agree that Mr Pori meets the s 13 test of being at very high risk of imminent serious sexual offending. In preparing her report dated 25 November 2019 Ms Waugh evaluated Mr Pori's risk using a range of actuarial instruments, along with considering noted clinical risk factors.

[43] Mr Pori's risk was scored using the Static-99R which placed him in risk level IVb – Well Above Average Risk for being charged or convicted of another sexual offence. His score was at the 99th percentile compared to routine samples of (Canadian) sexual offenders, with only 0.3 per cent of that population having a higher score than Mr Pori's.

[44] On the Violence Risk Scale: Sexual Offence version (VRS:SO), Mr Pori scored at the 76th percentile for his level of Sexual Deviance; at the 99.6th percentile for Criminality; and at the 98.9th percentile for the Treatment Responsivity factor. These percentiles indicated his scores were higher than the majority of other sex offenders in the normative groups.

[45] Mr Pori's high levels of general criminality were highlighted by his results on the Violence Risk Scale (VRS), and the Psychopathy Checklist: Screening Version (PCL:SV). On the VRS, Mr Pori displayed a number of factors contributing to his high risk rating. Mr Pori was assessed to have a PCL:SV total score at the 98th percentile relative to the test developers' normative group of

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[10] *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83.

forensic/non-psychiatric patients. Ms Waugh notes the presence of psychopathic traits in combination with sexual deviance, as here, increases the risk of sexual offending more than either factor in isolation.

[46] Dr Mattson also refers to the very high risk of sexual reoffending posed by Mr Pori based on the actuarial measures. She points out another relevant clinical factor which is not captured in the risk assessment instruments used, is Mr Pori's limited cognitive functioning which is unlikely to be adequately mitigated by intervention. This might mean that he has significant difficulty learning and/or using appropriate self-regulatory skills to manage his impulsivity, sexual thinking and related sexualised behaviour. She considers there is a very high risk that Mr Pori will engage in relevant offending within 10 years of release, and if he does sexually offend, it would be related to him approaching female children or adults in a sexualised manner.

[47] Dr Monasterio explains that Mr Pori "seemingly can only manage in a highly structured environment, with substantial environmental security such that he is not able to either inadvertently leave or abscond". He concludes:

> Without these relational and environmental security structures, it is highly likely that [Mr Pori] will not only fail to provide for his basic care, but will also be at risk of relapse into alcohol use, and to pose a high and imminent risk of physical and sexual violence (as indicated in the psychological assessment reports).

[48] Finally, Mr Metoui concludes that Mr Pori's risks have "proven to be essentially chronic and not successfully ameliorated by his various imprisonments and treatment opportunities". He says the risks have "essentially remained unchanged since his index offending" and, consequently, "[g]iven the opportunity, Mr Pori in my opinion would inevitably sexually reoffend".

[49] Given the unanimity of the expert opinion, supported by evidence of ongoing offence-paralleling behaviour even while in highly supervised environments as described by Dr Mattson in her evidence, I have no hesitation in finding Mr Pori poses a very high risk of imminent serious sexual offending.

Is there an adequate alternative option?

[50] The making of a PPO does not necessarily follow from the s 13 criteria being met. If the public can be protected from the risk of serious sexual or violent offending by some less restrictive option, then this should be imposed.

[51] As the Supreme Court said in *Chisnall v The Chief Executive of the Department of Corrections*:[11]

> The high threshold set by the legislation for public protection orders and the availability of less intrusive means of protecting public safety in orders under the Parole Act indicate a legislative scheme that the "very high risk of imminent serious sexual or violent offending by the respondent" is risk which cannot be acceptably managed by conditions under an extended supervision order or interim supervision order. The Public Safety Act is to be interpreted and applied in the context of human rights obligations protective of liberty and suspicious of retrospective penalty.

[52] Similar sentiments were expressed by the Court of Appeal in *McCorkindale v Deputy Chief Executive of the Department of Corrections*:[12]

> [19] A PPO can only be justified if the court is satisfied that the next most restrictive option is not adequate to mitigate the defined risk. The next step – down option, which the parties agree is the revised ESO ordered by the Parole Board on 30 August 2017, was not addressed in the evidence or in the submissions before the High Court. A PPO cannot be justified unless that option can be excluded.

[53] Consistent with the theme that a PPO should only be made where no less restrictive order is appropriate, s 12 of the Public Safety Act provides:

> **12 Assessment whether respondent mentally disordered or intellectually disabled**
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> (1) This section applies where a court is satisfied that it could make a public protection order against a respondent and it appears to the court that the respondent may be mentally disordered or intellectually disabled.
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> (2) The court may, instead of making a public protection order, direct the chief executive to consider the appropriateness of an application in respect of the respondent under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section

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11 *Chisnall v The Chief Executive of the Department of Corrections*, above n 5, at [38] (footnote omitted).

12 *McCorkindale v Deputy Chief Executive of the Department of Corrections* [2019] NZCA 369.

29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

(3) Where the court gives a direction under subsection (2), the court must, if the respondent is not then detained under section 107, order the interim detention of the respondent under that section.

(4) 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 as a result of the consideration directed under subsection (2) and for any determination arising out of such an application, the respondent is taken to be detained in a prison under an order of committal.

[54] In the present case, the possibility that Mr Pori may be mentally disordered or intellectually disabled was raised at the IDO hearing and I directed the Chief Executive to "consider the appropriateness of an application in respect of the respondent under s 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992, or under s 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003."[13]

[55] In a memorandum to the Court dated 31 July 2020, Ms Boshier, for the Chief Executive, noted that:

(a) Mr Pori had been assessed, a neuropsychiatric report completed by Dr Rudi Kritzinger, and a copy of that provided to counsel for Mr Pori;

(b) an opinion had been obtained from Ms Waugh, a clinical psychologist, regarding whether Mr Pori meets the criteria of the IDCCR;

(c) while Mr Pori had been assessed as not meeting the criteria of the IDCCR Act, the report revealed complex issues.

[56] Dr Kritzinger's report addressed the applicability of the Mental Health Act to Mr Pori's circumstances. In it, he agrees with Ms Waugh's assessment that Mr Pori suffered "significant cognitive impairments", and there was a deterioration in the more recent neuropsychological profile in 2019 compared to the earlier assessment. A recent MRI demonstrated he suffered a number of acquired brain injuries. However,

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13 *Chief Executive of the Department of Corrections v Pori*, above n 4, at [62].

in terms of the possibility that Mr Pori would qualify for an order under the Mental Health Act, Dr Kritzinger considered the cognitive impairments were not indicative of an underlying psychosis or mood disorder and so "there is probably not a role for the Mental Health Act from a treatment perspective". Furthermore, given "the behavioural and cognitive impairments Mr Pori presents with are due to significant previous brain injuries and therefore most likely enduring and not amenable to psychological and psychopharmacological interventions", such an order was not warranted. However, given Mr Pori's cognitive impairment, he agreed with Dr Waugh that Mr Pori "wholly lacks capacity to manage decisions about his person and also property", for the purposes of the Protection of Personal and Property Rights Act 1998.

[57] As a consequence of Dr Kritzinger and Ms Waugh's reports, Mr Kerry Cook, barrister, was appointed to act as litigation guardian for Mr Pori in these proceedings.

[58] In an updating report dated 6 June 2021 Dr Kritzinger said, having reviewed Ms Waugh's second report where she concluded that Mr Pori presented with a Major Neurocognitive Disorder due to traumatic brain injury and cerebrovascular injury, he concurred with her diagnosis. He went on to express the view that the nature and degree of cognitive and neurobehavioral impairment "necessitates that Mr Pori be managed in a highly structured and supported living setting that includes a high degree of supervision as well as capacity to contain risk and aggressive behaviours". He also said the nature of these difficulties meant they were "not amenable to pharmacological or sophisticated psychological strategies".

[59] Dr Monasterio, who was called to give evidence for Mr Pori, concluded that Mr Pori's:

> …recurrent and persistent offence pattern history, his continuous breach of socially acceptable norms, his proneness to impulsivity and alcohol use, lack of engagement in work or pro-social behaviours, and glorification of violence, support a diagnosis of Antisocial Personality Disorder of severe type (as a primary condition or secondary to a traumatic brain injury and within the ambit of a Major Neurocognitive Disorder).

[60] In addition, he considered Mr Pori fulfilled the "diagnostic criteria for a Psychotic Disorder due to a General Medical Condition (secondary to traumatic and vascular brain injuries) as defined in the DSM-V." In terms of the Mental Health Act,

he considered that Mr Pori "presents with evidence of an enduring mental illness with characteristic features of a 'mental disorder' as defined in the Mental Health (Assessment and Treatment) Act 1992". However, he says, although Mr Pori arguably fulfils the two limb requirement of the Mental Health Act, "given that he is in a fairly stable environment and appears to have coped without any significant violence to self or others since September 2020, he is unlikely to be considered for further assessment or treatment under this legislation".

[61] On balance, the expert evidence is that Mr Pori does meet the criteria in the Mental Health Act of having a "mental disorder" and I accept that conclusion. Consequently, I need to consider whether I should direct the Chief Executive to make an application under s 45 of the Mental Health Act, as a more appropriate response to the concerns raised by Mr Pori's behaviour, than making a PPO.

Submissions for the respondent

[62] Mr Starling submits that s 12 exists in the Public Safety Act to comply with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), as a protection to stop mentally unwell individuals from having their behaviour criminalised, resulting in detention apart from the community. He notes s 12 has been applied in the case of *Chief Executive of the Department of Corrections v R*, where the respondent met the criteria under the IDCCR provisions.[14] However, he says this section has not been utilised in relation to the Mental Health Act.

[63] In his submission, it is uncontentious that the respondent has a "mental disorder" pursuant to s 2 of the Mental Health Act, and this went undiagnosed for many years. Dr Monasterio's evidence is that Mr Pori suffers from psychosis, dementia, anti-social personality disorder and a major neurocognitive disorder. Mr Starling points out staff at Tōruatanga had difficulty managing Mr Pori and yet never had him properly assessed. Indeed, this did not happen until he was remanded in custody in 2020. He also points out the Department of Corrections have still not made an application for a welfare guardian to be appointed for Mr Pori.

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[14] *Chief Executive of the Department of Corrections v R* [2018] NZHC 3455.

[64] In Mr Starling's submission, Matawhāiti is not designed for people who have mental health issues and the Department of Corrections should have made some attempt to look for a less restrictive option for Mr Pori in the way that has been arranged for other persons who meet the criteria for a PPO.[15]

[65] Mr Starling takes issue with the applicant's submission that an order detaining Mr Pori under the Mental Health Act would "result in a placement which would be significantly more restrictive for [Mr Pori]". He considers the conditions at Matawhāiti are more restrictive than Mr Pori would be subject to under the Mental Health Act in terms of his movements and his ability to leave the unit. He says the fact Matawhāiti is not sited within the community cannot be ignored. He also points out that if detained under the Mental Health Act, Mr Pori would be managed by qualified people with a health background rather than by custodial staff.

[66] While Mr Starling acknowledges there is no secure or highly specialised neuropsychiatric facility in existence that is able to provide the therapeutic environment required for the treatment of Mr Pori, he says the Court should not decline to pursue s 12 simply because there may be no specialist unit available at the present. In Mr Starling's submission, a direction under s 12 would require the High Risk Team from the Department of Corrections to make arrangements with forensic services to provide a facility for Mr Pori and this would be preferable to putting a person who is mentally disordered in what he describes as "civil detention". In his submission, to make a PPO without investigating s 12 issues would result in the kind of arbitrary detention identified by Mallon J in *Vincent v New Zealand Parole Board*.[16]

[67] Mr Starling rejects the applicant's suggestion that as Mr Pori's disorder is not amenable to treatment, there is no evidential basis for the Court to utilise s 12 of the Public Safety Act to direct an application under the Mental Health Act. In Mr Starling's submission, there does not need to be a nexus between Mr Pori's mental disorder and his sexual reoffending risk. Section 12 and the Mental Health Act still apply despite Mr Pori's mental disorder being incurable. In Mr Starling's submission,

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15 For example, *Deputy Chief Executive of the Department of Corrections v McCorkindale* [2020] NZHC 2484; *Chief Executive of the Department of Corrections v McIntosh* [2017] NZHC 793; and *Chief Executive of the Department of Corrections v Campbell* [2018] NZHC 1280].

16 *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [101].

the least restrictive outcome for Mr Pori, who is suffering from a mental disorder, is to be housed in a facility in the community where he is managed by a combination of medical personnel and Corrections staff.

[68] Mr Starling also points out a direction under s 12 would not prejudice the applicant. While those s 12 enquiries are made, Mr Pori would remain at Matawhāiti and there would be no risk to the community and no effective change to his management.

[69] Finally, in Mr Starling's submission, there will inevitably come a point when staff at Matawhāiti will feel unable to manage Mr Pori due to his mental disorder. At present he will be transferred to prison in those circumstances, in breach of his rights under the UNCRPD. Making a PPO now, without investigating a s 12 option, is to merely put off the issue the applicant will face in due course.

Discussion

Has the applicant considered less restrictive options?

[70] The thrust of the submissions on behalf of Mr Pori is because he suffers from a mental disorder (as I have accepted in [61] above), the Court should direct the least restrictive option for his care and supervision. The starting point, therefore, is whether the applicant has considered less restrictive options.

[71] As Mr Metoui outlined in his evidence, the experts discussed a range of options for Mr Pori. These were:

(a) serving a PPO at Matawhāiti;

(b) living at Tōruatanga under an ESO;

(c) placement in a unit run by Forensic Mental Health Services; or

(d) placement in a rest home.

[72] When discussing these options all the experts agreed that Mr Pori needed "a highly structured and secure environment with high staff ratios". Although they acknowledged the desirability of imposing the least number of restrictions on Mr Pori's freedom there was clear agreement that Mr Pori needed a very high level of supervision.

[73] Ms Waugh said it was external circumstances that regulated Mr Pori's behaviour not any internal ability. In her view, there needed to be a very high level of monitoring, support and supervision in a really structured environment, saying:

> The risk is because of that dysregulated behaviour, that it's really that all of the support and security need to be external, so it would need to be, you know, eyes on all of the time with available intervention because of that – the risk of responding aggressively or of taking advantage of any situations should they arise around the opportunity for sexual behaviour. So, it's hard to imagine a sort of community-based system that would really allow that in a way going forward that keeps the public safe and also Mr Pori safe from his own dysregulated behaviour, that he doesn't necessarily understand the consequences of, that can potentially place him at significant risk of further offending that would have quite serious consequences for him.

[74] Dr Mattson reached similar conclusions, saying:

> So things are concerning for how he would actually manage in the community. Should he be in the community, it would be likely that he would need a high level of structured, consistent, external monitoring, multiple staff, constantly being able to be in a position to observe or intervene. The opportunities for him to maybe move from housing to doctors or a social visit or whatnot would need to be really strictly controlled because they are the opportunities that Mr Pori has taken at earlier times to abscond or demonstrate a lot of aggressive behaviour towards staff so they would be really concerning. I'm not sure actually what environment would be suitable for him and the conditions that would maintain the risk and protect himself and others outside of Matawhāiti.

[75] Dr Monasterio said that Mr Pori fulfilled the criteria for being "high risk" and there were three elements needed for appropriate risk management being; environmental risk management, relational risk management and procedural risk management. He explained these concepts as follows:

> Environmental risk management speaks to the bricks and mortars and fences that you require to keep someone, and in my view he needs security, he needs a fence and a locked door, because without that there is a really high risk he'll either advertently or inadvertently leave the facility. You need procedural elements so which are the rules and regulation and the characteristics that allow units to function, you can't have alcohol, your visitors have to be

> supervised in this way, we assess people this way so that's a procedural component of it, and Matawhāiti seems to have that. And then you have the relational element … and [Mr] Pori requires all three of them and Matawhāiti seems to be providing all three of them. … Take one of them away and you'll have significant difficulties in my view.

[76] When asked about the sufficiency of being placed at Tōruatanga even under an ESO with IM, he said:

> [t]he opportunity to leave probably plays to [Mr Pori's] difficulties with self-control, so knowing that you can go probably means that you'll go, knowing that you can't go, and this is the important thing for [Mr] Pori, he knows he can't go. … [H]e seems to be aware that that barrier stops him from going and therefore it constrains his disinhibition, whereas it would seem … in a less secure facility he will wander away or he'll run away because the opportunity is there.

[77] Mr Metoui agreed with Dr Monasterio, saying that Mr Pori needed a fence and locked doors. He went on to say that "without containment he could just leave at any time and then you've potentially got a real problem with an absconder and he's got that absconding history". In his view, given the risk Mr Pori posed, "the only place that meets the [requirements he] identified, the high-structured secure environment, the high staff ratios, would be Matawhāiti Unit".

[78] Ms Gibling, who had experience managing Mr Pori at Tōruatanga, expressed the view that he needed two fulltime staff all the time, and that they needed to be in line of sight and available to support him and steer him away from any kind of stressors. This was a more intense level of supervision than was required for the other IM people she had been involved with because with them "you wouldn't have to be literally next to them in order to prevent them from harming somebody".

[79] These conclusions explain why Mr Pori had not experienced success under the ESO regime at Tōruatanga. Without physical boundaries to support the procedural boundaries at Tōruatanga, Mr Pori would constantly test the limits and this led to multiple breaches of his ESO.

[80] Complicating the option of relying on an ESO with some form of monitoring and residing somewhere such as Tōruatanga were legal uncertainties raised in Ms Boshier's submissions as to the extent of monitoring which could be imposed

under an ESO. If IM as defined in s 107IAC(2) of the Parole Act 2002 is to be relied on, that may only be imposed for 12 months and authorises "an individual" to accompany and monitor the offender for up to 24 hours a day. Ms Boshier points out that as the section only refers to monitoring by "an individual", the level of monitoring suggested by Ms Gibling would not be permitted. Ms Boshier also points out that the Department of Corrections has no legal powers to physically contain Mr Pori under an ESO. At Tōruatanga the houses and gates are not locked so if a breach were to occur, staff cannot prevent Mr Pori from leaving and can only wait for police to arrest him for a breach of an ESO. Mr Pori has a significant history of absconding under the ESO, so such breaches can be expected.

[81] There is also no legal avenue for Corrections to monitor Mr Pori with 24 hour line of sight monitoring following the expiration of IM, and the Courts, and the Parole Board, have consistently been clear that a programme condition imposed under s 107K(3)(bb), cannot operate as "IM by stealth". Ms Boshier points out that in *McGreevy v Chief Executive of the Department of Corrections*, the Court of Appeal upheld Mr McGreevy's claim he had been unlawfully monitored while subject to a programme condition and, monitoring should be for no longer than was necessary to ensure attendance or participation in programmes.[17] In any event, a programme condition cannot provide the environmental security Mr Pori needs.

[82] Ms Boshier also points out that it is not even clear whether IM is still available on Mr Pori's ESO. Section 107P(1) Parole Act provides that time ceases to run on an ESO, and the conditions are suspended, when the offender is under "legal custody" in accordance with the Corrections Act 2004. Whether s 107P(1) applies to persons detained pursuant to an IDO or PPO has not been determined. The relevance of this issue is that if ESO conditions are suspended during the IDO period, under the Public Safety Act, there will still be some limited time available to Mr Pori on IM. However, if the ESO and conditions continue to run while on an IDO, the IM component will have expired and IM will no longer be available. Even if the former scenario is correct, there is approximately only three months of IM remaining. If this option is relied on,

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[17] *McGreevy v Chief Executive of the Department of Corrections* [2019] NZCA 495 at [39]-[40].

Mr Pori could only be supervised to the extent permissible under the conditions of an ESO and this is clearly insufficient to protect the public.

[83] For all these reasons, there was no dissent that an ESO, either with or without IM (which, at best, only had three months to run in any event), was not an appropriate option to manage Mr Pori's risk of reoffending.

[84] This leaves the alternative proposed on Mr Pori's behalf, of directing the Chief Executive to make an application under s 45 of the Mental Health Act. The Chief Executive submits that a compulsory treatment order under that Act is not available for Mr Pori and would, in any event, result in a placement which would be significantly more restrictive for him.

[85] Dr Monasterio gave evidence that while Mr Pori may meet the test under the Mental Health Act for a mental disorder, there was no secure or highly specialised neuropsychiatric facility that was able to provide the therapeutic environment required for the treatment of his conditions. In Dr Monasterio's opinion:

> … it is unlikely that he would be made subject to a compulsory treatment order of the Act that would detain him in hospital for any substantial period because the facilities that are available for him to be detained to are not going to be substantially beneficial for the management of his condition, that's the difficulty. …he is unlikely to be detained long-term subject to that order. …in my view he is unlikely to be detained subject to the Mental Health Act as he is presenting at the moment.

[86] Dr Monasterio then explained that he did not see an identifiable nexus between the delusions and the sexual behaviours and if Mr Pori was forced to take an antipsychotic medication that may not make a difference in terms of the sexual behaviours.

> The other elements that are part of his mental condition, the neurocognitive disorder, are the volitional problems and the cognitive problems and sadly those elements, those symptoms are not amenable to treatments with medications. They are best managed by the provision of adequately resourced treatment environments to meet that need and sadly, the health services do not have appropriate secure environments for the treatment of neuropsychiatric conditions.

[87] Dr Kritzinger similarly said the disturbed emotional, cognitive and behavioural function of Mr Pori was caused by brain damage and so "the symptoms don't respond in the same way, so mood or effective or psychotic symptoms in the setting of a major neuro-cognitive disorder resemble idiopathic illnesses but they do not, they're not amenable to treatment, …". In his view, for patients, such as Mr Pori, with "very severe brain injuries", the treatment is:

> …structure, a routine, clear feedback, clear consequences. So I would think that the environment Mr Pori finds himself in is probably where the key factor in addressing his well-being but also less risk.

[88] He also, when asked what sort of placement he would recommend for someone with Mr Pori's neurocognitive dysfunction he said:

> … in an ideal world, the type of unit would be not dissimilar to a correctional facility so it will be an access controlled unit with a very high staff ratio and ability to manage and contain aggression and risk behaviour with a very clear routine so in theory conceptually a high risk neuropsychiatric unit will in many aspects look very much like a correctional facility with the exception obviously that the staff … won't be correctional officers … I think what makes Mr Pori particularly problematic is the risk he poses towards staff particularly female staff and potentially also female residents of these facilities. So it would, as things stand in New Zealand, I can't think of any facility that would be able to confidently manage his risk.

Should an order be made under s 12?

[89] In light of this evidence I turn to consider the discretion I have to make a direction under s 12. As noted above, I have accepted that the respondent has a "mental disorder" under the Mental Health Act. However, I consider that I should only make a direction if:

(a) there is some potential benefit for Mr Pori; and

(b) the public safety objectives of the Public Safety Act would not be unduly compromised.

[90] In my view, neither requirement is met. Having regard to the evidence above, it is clear Mr Pori's condition is not amenable to treatment and, as Dr Monasterio explained for that reason, he is unlikely to be detained subject to the Mental Health Act. That opinion was endorsed by Dr Kritzinger.

[91] The specialists also went on to give evidence that Mr Pori was unsuitable for a forensic mental health facility. Dr Monasterio said that the:

> …treatment requirements of Pori make him unsuitable to a forensic service [because they] have a lot of young impulsive males, they have females, and females in prison come to forensic units and they have a lot of female staff as well. So, they have the demographic population of people who are at risk from [Mr] Pori and potentially who can disinhibit [Mr] Pori further, and if that were the case then he may well find himself being managed in a highly restrictive way to be kept away from other vulnerable people. … The only areas within those units that are able to manage people of high risk is often in seclusion and at times people end up being managed in a more restricted environment in a health care facility if the risks are of the kind I have just described for Pori, then they would be prison, …

[92] Mr Metoui also echoed those comments saying that the forensic unit was:

> … a hospital, it's not a prison, and to imagine how Mr Pori would be contained there should he get aroused and get difficult, it's going to be in seclusion and I think there would be significant restrictions for him far more so than the Matawhāiti unit.

[93] When he considered the potential options he concluded "I really struggled to look past Matawhāiti with the available options". Dr Monasterio agreed Matawhāiti was currently the best place for Mr Pori.

[94] Having heard the evidence I accept there is no existing facility which would be able to cope with Mr Pori's needs, while keeping its staff and other patients safe, in particular, the females who reside or work there. In order to achieve that level of security, the facility would need to replicate the conditions at Matawhāiti. In other words, Mr Pori would need to know he could not physically leave the property because there were physical impediments to doing so. It would also have to provide the high staff/resident ratios that are available at Matawhāiti and have the strict and predictable procedural limitations which are in place. This includes limited and supervised access to females who attend there in a professional capacity.

[95] Accordingly, I accept there is no obvious benefit to Mr Pori being considered for an order under the Mental Health Act. Given the inability to provide effective treatment to Mr Pori, I consider it is questionable whether, in fact, an order would be made. In any event, no existing treatment facility would be able to manage his risk of reoffending. If, as Mr Starling suggests, a facility was created with the assistance of

Mental Health Services, to house someone like Mr Pori, I accept it would need to replicate the environment which is provided at Matawhāiti in order to manage Mr Pori's risk of reoffending and to ensure the safety of the community.

Is the possibility of a decline in Mr Pori's functioning relevant?

[96] Finally, Mr Starling submitted that given the likelihood that Mr Pori's cognitive functioning will continue to decline, the Court should anticipate this in making its decision on whether a PPO should be ordered. However, I do not consider this is directly relevant to my decision. The evidence of Dr Monasterio and Dr Kritzinger was consistent in saying there was unlikely to be a rapid decline. Furthermore, Ms Burger said that the ongoing needs assessment process mandated by s 41 of the Public Safety Act would monitor any decline and they could respond by, for example, bringing in a health worker to assist with Mr Pori's day to day needs.

[97] Furthermore, as Ms Boshier pointed out, a PPO is regularly reviewed both annually by the review panel pursuant to s 15, and then by the Courts within five years of the PPO being made, and at five yearly intervals after that.[18] I am satisfied that the appropriateness of Mr Pori being subject to a PPO will be regularly reviewed and I should make my decision based on his current presentation.

[98] I also reject the submission that if staff felt unable to manage Mr Pori due to his mental disorder, then he would be transferred to prison. As Ms Boshier points out, Mr Pori cannot be transferred to prison without a Court order, except in a "security emergency", which can only be for a period of less than 24 hours. I do not consider this is a likely possibility and it has no bearing on my decision.

Conclusion

[99] I decline to direct the Chief Executive to make an application under the Mental Health Act pursuant to s 12 of the Public Safety Act. In reaching this conclusion, I have had regard to the fact compulsory treatment would not lower Mr Pori's offending risk and, for this reason, it is doubtful whether there would be a long-term placement

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[18] Public Safety (Public Protection Orders) Act, s 16.

available for Mr Pori in a forensic mental health facility. In any event, such placement would put Mr Pori and other vulnerable persons at significant risk, and to manage that risk, Mr Pori would need to be placed in a highly restrictive and monitored environment within such a facility. The practical reality is that Mr Pori would be subject to conditions which essentially replicate those he currently lives under at Matawhāiti.

[100] Accordingly, I make a public protection order in respect of Mr Pori pursuant to s 13(1) of the Public Safety (Public Protection Orders) Act 2014.

[101] Mr Pori is currently resident in Matawhāiti, a PPO facility, pursuant to an IDO I made on 25 June 2020. As the order is to be served at Matawhāiti, it is to come into effect immediately upon issue of this judgment.

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