

**SENTENCING SEX OFFENDERS:
A THERAPEUTIC JURISPRUDENCE INQUIRY INTO THE
CURRENT LEGAL FRAMEWORK.**

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Introduction

The law pertaining to sexual violation has long been the subject of persistent and resonant calls for reform. The most recent calls come in the wake of a number of high-profile cases of sexual offending that have failed to receive an adequate legal response in the eyes of the public.¹ Anomalous statistics amplify this public outcry. Acts of sexual violation are highly unlikely to be reported to the police, with as few as 7% of victims choosing to report their experiences.² Where police do become aware of sex offending, they frequently choose not to go ahead with prosecution.³ Finally, where prosecution does proceed, as few as 13% of alleged offenders will be convicted.⁴

These statistics have been attributed to a number of factors. Police practices, biases and assumptions have been said to result in the dropping of many initial charges.⁵ Links have been drawn between victim unwillingness to report sexual violation and the ‘re-victimising’ trial processes that they are required to undergo in order to secure a conviction.⁶ The very nature of the offence has also been contended as a relevant factor in the low rates of conviction, with political parties recently discussing the possibility of reversing the burden of proof for sexual violence due to the evidential difficulties that arise in proving its incidence.⁷ Social attitudes are also deemed to be hugely relevant to the poor justice outcomes in this area: thousands

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¹ I refer here to prominent cases covered in the media over the past twelve months including the Malaysian Diplomat allegations (see Bryce Edwards ‘Does New Zealand have a ‘rape culture’?’ *The New Zealand Herald* (online ed, 11 July 2014), the ‘Roast Busters’ revelations (see Patrice Dougan ‘Roast busters report released’ *The New Zealand Herald* (online ed, 22 May 2014) and the recent controversy involving the name suppression granted to a high-profile New Zealander who was discharged without conviction for an indecent act (see Kirsty Wynn ‘Indecent act man calls in lawyers’ *The New Zealand Herald* (online ed, 20 July 2014).

² See Ministry of Justice *The New Zealand Crime & Safety Survey 2009: Main Findings Report* (2010) at 45. Although the report contains a disclaimer as to the reliability of the figures, it is worthy of mention that the figure from the previous survey, conducted in 2006, sat at 9%.

³ According to the Ministry of Women’s Affairs, the prosecution rate for all sexual violence complaints made to the police was 31%. If ‘no offence’ cases were excluded from this initial complaint number, the prosecution rate was 46%. See Ministry of Women’s Affairs *Responding to sexual violence: Attrition in the New Zealand Criminal Justice System* (2009) at viii.

⁴ Ministry of Women’s Affairs, above n 3 at vii. This 13% figure is based on all recorded cases of sexual violence. If ‘no offence’ cases are excluded from the equation, the conviction rate is 20%.

⁵ Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 41-42 and 120-126.

⁶ McDonald and Tinsley above n 5 at 279.

⁷ See Derek Cheng ‘Rape accused would have to prove consent under Labour plan’ *The New Zealand Herald* (online ed, 8 July 2014).

marched in New Zealand streets in 2013 demanding an end to New Zealand's purported 'rape culture' in which sexual violence is accepted and condoned.⁸

Whether or not such a 'rape culture' exists is hotly contested. Some oppose this notion, contending instead that society engenders a 'moral panic' in relation to sexual violence.⁹ This 'panic' is said to be the response to exaggerated claims regarding the extent to which sexual violence actually occurs, and results in a society that tends to actively stigmatise, penalise and publicly shame those who sexually offend, far more so than any other group of offenders. Indeed, it is not inconceivable that this 'moral panic' could in fact *perpetuate* a rape culture, in the sense that the panic and stigma associated with sex offending blinds the public and legislators to the ways in which we can combat its incidence and impact. Moral panic also tends to reinforce 'rape myths'; ongoing stereotypes and misconceptions about who it is that actually commits these crimes.¹⁰ Indeed, statistics have repeatedly shown that rape is far more frequently committed by an acquaintance, a family member, or an intimate partner than it is by the paradigmatic 'stranger in a dark alleyway'.¹¹

In considering the ways in which the law can be altered to better reflect, target and resolve the problems of sexual violence within our society, comparatively little attention has been given to the laws pertaining to sentencing. This is a significant oversight. Whether or not the law acts to contribute to or mitigate a 'rape culture' or a 'moral panic' may be able to be ascertained from considering these laws. Although a very small proportion of alleged offenders reach the sentencing stage of the criminal justice process, sentencing laws are both symbolic and expressive of social attitudes and perceptions of the seriousness of this kind of offending. Most importantly, these laws shape ongoing social outcomes, in the sense that they determine the way in which the offender, victim and community will be treated in the wake of serious crime.

⁸ Katie Kenny 'Thousands march against rape culture' *The Dominion Post* (online ed, 16 November 2013).

⁹ See Cathy Cobley *Sex Offenders: Law, Policy and Practice* (2nd ed, Jordan Publishing, Bristol, 2005) at 25 and B Radford "Predator Panic: Reality Check on Sex Offenders" *The Sceptical Inquirer*, 16 May 2006.

¹⁰ For a discussion of 'rape myths', see McDonald and Tinsley, above n 5 at 31 and 40-43.

¹¹ According to Rape Crisis in a submission to a Law Commission discussion paper, between 75-90% of victims are known to their offender prior to the offending. Up to a third of offences are committed by offenders who are, or have been involved in a familial or intimate relationship with the victim. See New Zealand Law Commission *Juries in Criminal Trials Part One: A Discussion Paper* (NZLC PP32, 1998) at 194.

This dissertation is therefore focused upon the law that governs the sentencing of those convicted of sexual violation in New Zealand. Therapeutic jurisprudence is employed as the lens through which this legal framework is scrutinised. Consideration is given to the various components of the sentencing framework for sex offenders, as well as its wider ‘therapeutic’ impact upon victims, offenders and the community. Consideration is also given as to whether the Law Commission’s recent proposals in this area provide a targeted and viable solution to some of the problems identified.¹²

The rationale for employing a therapeutic jurisprudence lens is threefold. First, therapeutic considerations appear to inform the recent discussion and recommendations made by the Law Commission in this area. As the effects of the current laws upon the well-being of victims and offenders appear to be the driving impetus for change for the Law Commission, it is appropriate to give explicit consideration to the law, and the proposals, in the light of this philosophy. Second, therapeutic jurisprudence is being increasingly and successfully employed in similarly nuanced, complex areas of law that do not appear to respond well to ‘conventional solutions’.¹³ Third, it is contended that the aims of therapeutic jurisprudence are largely aligned with general policies and principles that are beginning to predominate within the criminal justice arena in New Zealand. Accordingly, therapeutic jurisprudence provides a useful tool in assessing whether or not the framework that applies to sex offenders is in fact congruent with wider criminal justice policy, and in establishing the extent to which the framework operates in furtherance of the goals of the criminal justice system.

Chapter One of this dissertation is largely descriptive, explaining the elements of the sentencing framework for sexual violation, the role of therapeutic jurisprudence in this discussion and its growing relationship with general sentencing policy in New Zealand. Chapter Two outlines and examines the claims made regarding the ‘anti-therapeutic’ nature of this framework, concluding that the framework operates anti-therapeutically upon offender, victim and community well-being for a number of reasons. Tentative links are also drawn between these

¹² New Zealand Law Commission *Alternative Trial Processes* (NZLC IP30, 2012).

¹³ See G Berman and J Feinblatt *Problem-Solving Courts: A Brief Primer* (2001) New York Centre for Court Innovation <www.courtinnovation.org> as quoted by the New Zealand Law Commission in *Delivering Justice for All* (NZLC R85, 2004) at 83. The Law Commission encouraged therapeutic jurisprudence as a consideration as, in the words of Berman and Feinblatt, it enables courts to “forge new responses to chronic social, human and legal problems... that have proven resistant to conventional solutions” and “to broaden the focus of legal proceedings from simply adjudicating past facts and legal issues to changing the future behaviour of litigants and ensuring the well-being of communities.”

anti-therapeutic elements of the law and the justice statistics in this area. Chapter Three goes on to critique the amenity and viability of the Law Commission's recommendations for a specialist sentencing court, ascertaining the extent to which the implementation of a specialist sentencing court would mitigate the anti-therapeutic elements of the current law.

For the purposes of this dissertation, a 'sex offender' is defined as someone who has committed an act of sexual violation under s 128B of the Crimes Act 1961. 'Sexual violence' and 'sexual violation' will be used interchangeably throughout this work, again denoting crimes committed under s 128B. Sexual violation under s 128B is defined in s 128 as the act of a person who (a) rapes another person; or (b) has unlawful sexual connection with another person.¹⁴ Rape amounts to non-consensual penetration of another person's genitalia by the perpetrator's penis. Unlawful sexual connection does not involve penile penetration but includes any other form of non-consensual sexual connection, such as oral sex or digital penetration.¹⁵

This limited definition is due to the limited scope of this research. The umbrella term of 'sex offender' could conceivably cover those who have committed, or attempted to commit, more than ten different offences.¹⁶ Some consider these sexual offences to be morally indistinguishable from sexual violation on the basis that they all offend against a person's right to sexual autonomy, amounting to the 'sheer use of another human being', and 'a denial of the status of subject' and 'its substitution with the status of object.'¹⁷ However, in spite of the commonalities of the character of the *wrongness* of these offences, or their motivations, a purely legal analysis illustrates that this wide category of 'sex offences' comprises offences which differ significantly in terms of the elements that are to be proved and the legal consequences that follow. It is therefore not feasible to conduct a full-scale analysis into all of these offences.

¹⁴ In order for these activities to constitute an offence, the perpetrator must have committed these actions without believing on reasonable grounds that the other person consented to the connection as per Crimes Act 1961, ss 128(2)(b) and 128(3)(b).

¹⁵ See B Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CA128.01].

¹⁶ As found in Parts 7-8 of the Crimes Act 1961: see ss 128B, 129, 129A, 130, 131, 131B, 132, 134, 135, 138, 144A and 144C.

¹⁷ John Gardner "The Wrongness of Rape" in J Gardner (ed) *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, Oxford, 2007) at 16.

Chapter One: The Sentencing Framework for Sex Offenders

“The Criminal law is not simply a series of moral commandments: ‘thou shalt not rape.’ It is a series of legal commandments backed up by the threat of punishment: ‘You must not rape, and if you do, you may be sent to prison for life.’¹⁸

A *Elements of the Framework*

Although sentencing is typically regarded as an exercise of judicial discretion,¹⁹ the sentencing framework for sex offenders comprises of a panoply of legal provisions and processes which guide and constrain the sentencing judge in the performance of his task. This framework is argued to circumscribe judicial discretion in choosing the purposes for which an offender is to be sentenced, and to limit the extent to which judges are able to impose a sentence that is truly proportionate and commensurate with the interests of the victim. This section details the specific considerations of a judge in imposing a sentence upon an offender convicted under s 128B of the Crimes Act 1961, as well as the way in which the sentence is likely to be served.

i) *Statutory fundamentals*

In the first instance, a sentencing judge is bound by a number of fixed considerations when determining the form that an offender’s sentence will take. Section 128B(1) of the Crimes Act 1961 prescribes a maximum penalty of 20 years imprisonment for those convicted of sexual violation by way of rape or unlawful sexual connection.

Section 128B(2) imposes a presumption of imprisonment, which mandates that the person convicted is to be sentenced to imprisonment unless the court, having regard to the circumstances of the offender and the offending, thinks that the person should not be sentenced to imprisonment. This presumption overrides the guiding principle against imprisonment contained within s 16 of the Sentencing Act 2002, which directs the court to have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community. Although it is legitimate for a presumption of imprisonment to override the general rule of s 16, as per s 16(3)(a), one cannot avoid making a *prima facie* assumption that the existence of this presumption, read in the light of s 16, indicates that all

¹⁸ Cathy Cobley, above n 9 at 191.

¹⁹ See Geoff Hall *Hall’s Sentencing* (online looseleaf ed, LexisNexis) at I.

sex offenders are presumed to be inherently dangerous to the community by virtue of their offending.

In accordance with the presumption of imprisonment, offenders are to be sentenced to other penalties only in ‘exceptional’ or ‘special’ cases.²⁰ It is not entirely clear what constitutes such a case, as even the existence of ‘substantial mitigating factors’ has been considered insufficient to rebut the presumption.²¹ However, in *R v Symons*,²² Dobson J considered the offender to have met the ‘proviso’ to the presumption due to his stable job and relationship and his lack of re-offending behaviour. Due to the supposedly ‘minor’ nature of the sexual violation that had occurred²³ and the short prison sentence that this would attract, the judge decided to sentence the offender to home detention.²⁴ Although previous case law appeared to have set the standard for reversing the presumption at the level of exceptional, or as requiring more than substantial mitigating factors, Dobson J stated, in *obiter*, that the presumption of imprisonment ‘should not be ignored, nor should it necessarily tip the scales in favour of imprisonment.’²⁵ In spite of these varied interpretations, it is clear that the presumption is infrequently reversed. Statistical analysis of sentencing in 2013 indicates that 92% of offenders convicted under s 128B were sentenced to imprisonment.²⁶

²⁰ In *Bayne v Police* HC Timaru AP102/89 1 February 1990, Holland J stated that “Parliament has intervened in the case of sexual violation charges to provide that a person convicted of those offences must be sent to prison unless there are special circumstances.” In *Walsh v R* HC Hamilton CRI-2008-419-77, 6 October 2008, Andrews J held at [34] that a sentence of home detention would only be available for sexual offending against children in ‘exceptional circumstances’. The general rule was that a sentence of imprisonment ought to be imposed. This is consolidated by *R v Edwards* (1994) 12 CRNZ 167 where, in considering a conviction for rape, the judge stated that “in exceptional cases (...) a non-custodial approach is justified.” See also *Adams on Criminal Law*, above n 15 at CAQ128B.01 in which it is said that the reversal of the presumption requires ‘exceptional circumstances’.

²¹ In *R v Symons* HC Wellington CRI-2007-091-424, 11 April 2008, the judge at [23] said that “even substantial mitigating factors will often be insufficient to displace the presumption.”

²² *R v Symons* above n 21.

²³ The offending in question involved one incident of sexual violation by way of unlawful sexual connection. It is unclear whether under the new guideline judgment of *R v AM* [2010] 2 NZLR 750, [2010] NZCA 114 this offending would be considered so ‘minor’, as it involved a very young victim and a breach of trust: two of the ‘culpability assessment factors’, which potentially means the starting point could be between 4 and 10 years imprisonment.

²⁴ Home detention is a sentencing option available under s 15A(1) of the Sentencing Act.

²⁵ *R v Symons* above n 21 at [25].

²⁶ This figure has been calculated from data obtained through an Official Information Act 1982 Request “Information about sexual assault and related offences” (11 August 2014) (obtained under Official Information Act 1982 Request to the Ministry of Justice). This figure is also consistent with the rate of imprisonment over the preceding 5 years: see Appendix 2.

ii) *Guideline judgments*

As the New Zealand judiciary has moved away from the ‘instinctive synthesis’ approach to sentencing,²⁷ the seemingly huge discretion that exists in imposing a sentence of up to twenty years imprisonment is now tempered by the modern, staged approach found within the guideline judgements of *Taueki*,²⁸ *Hessell*²⁹ and *R v AM*.³⁰

In *R v Taueki*,³¹ the Court of Appeal outlined a three-stage approach by which judges are to determine sentence quantum. The first stage involves the setting of a starting point, through considering the circumstances of the *offending*. The second stage involves consideration of the circumstances of the *offender*, and whether or not his³² particular circumstances involve any aggravating or mitigating factors in accordance with which the starting point should be raised or lowered. These factors are found within s 9 of the Sentencing Act, although the court is not prevented from considering any other matter it thinks fit.³³

Finally, where an offender makes a guilty plea, a sentencing judge is entitled to reduce the sentence by up to 25% of the length decided upon at stage two. This discount is likely to vary depending on when the plea was given and, as a general rule, an earlier plea will attract a greater discount. However, there is no specific ‘sliding scale’ determining how much of the 25% ought to be given: this decision remains within the judge’s discretion.³⁴

In addition to this three stage process, the Court of Appeal in *R v AM* has set out a number of ‘rape bands’ and ‘unlawful sexual connection bands’³⁵ from which a judge is to ascertain a

²⁷ See Hall, above n 19 at I.4.2 and also Grant Hammond “Sentencing: Intuitive Synthesis or Structured Discretion?” [2007] NZ Law Review 211.

²⁸ *R v Taueki* [2005] 3 NZLR 372.

²⁹ *Hessell v R* [2011] 1 NZLR 607.

³⁰ *R v AM*, above n 23.

³¹ As per *R v Taueki*, above n 28, explained by the Court of Appeal in *R v Clifford* at [2011] NZCA 360 at [34].

³² As serious sex offenders are predominantly male, this dissertation will refer to all offenders as such. This is done without prejudice, but so as to reflect reality. Statistics from the Department of Corrections show that between the years of 1964 and 2005, only 62 females had been imprisoned for sexual offending: see Veerle Poels *Risk Assessment of Recidivism of Violent Sexual Female Offenders* (Department of Corrections, 2005) at 12.

³³ Sentencing Act 2002, s 9(4)(a).

³⁴ *Hessell v R* above n 29 at [72]-[77].

³⁵ *R v AM* above n 23 at [65]-[124]. For a list of the ‘bands’, see Appendix 1.

starting point for those found guilty of offences under s 128B Crimes Act. The initial ‘band’ into which an offender will fall is determined by how many ‘culpability assessment factors’ are considered to have been present in his offending. The judgment outlines twelve culpability assessment factors which relate to the overall gravity of the offending. These are comparable to, but more specific than the aggravating and mitigating factors contained within s 9 of the Sentencing Act. The ‘banding’ process is intended to promote consistency between the sentences imposed in similar situations, as a maximum penalty of twenty years leaves the potential for significant variation in decisions as to where a starting point may lie. The ‘banding’ exercise thus forms stage one of the three-stage *Taueki* process.

The bands in their entirety are set out in Appendix 1. It is worth noting that the lowest rape band directs a starting point of between 6-8 years, whilst the highest is between 16-20 years. By way of contrast, the lowest band for unlawful sexual connection is between 2-5 years.

Although the banding exercise enables significant deviation between the penalties imposed upon different offenders, it works to circumscribe a judge’s discretion in determining a starting point. The judicial task becomes one of checking the list as to which culpability assessment factors are present in the particular facts before him. This formulaic application of criteria undoubtedly promotes consistency in approach and ‘reasonable regularity’³⁶ in sentencing sex offenders. Indeed, compelling reason certainly exists for such a circumscription of discretion. As convincingly argued by Justice Hammond, imposing a prison sentence is “one of the most powerful steps that any judge can take”.³⁷ This is even more apparent where the maximum penalty is so high: the retention of unbridled discretion ‘at large’ would be at odds with the need for adequate human rights protections, consistency and social equality.³⁸ However, ensuring consistency comes at the expense of varied sentencing *purposes*: the policy behind the imposition of a sentence is predetermined and the outcomes for offenders already established.

³⁶ A term employed by Karl Llewellyn in *The Common Law Tradition: Deciding Appeals* (W.S. Hein, 1960) at 217, ‘reasonable regularity’ is the idea that ‘no discretion has any business to be truly unique in exercise’.

³⁷ Hammond, above n 27 at 222.

³⁸ Hammond, above n 27 at 222.

iii) *The victim's voice*

In assessing the impact to the victim,³⁹ an undoubtedly crucial consideration in the realm of sex offending, a judge is likely to take into account that which is contained in a Victim Impact Statement (VIS). It is the task of the prosecutor to take 'all reasonable efforts' to obtain the information from the victim of which the statement will comprise.⁴⁰ Although there exists no explicit statutory purpose for a VIS, s 17(1) states that they are able to include information concerning 'any physical injury or emotional harm suffered by the victim', 'any loss of or damage to property suffered by the victim' and 'any other effects of the offence on the victim'. Furthermore, over time, judges have imposed restrictions upon the permissible content of these statements. Pertinent to this discussion is one such restriction disabling victims from including their opinion as to the appropriate or desired sentence that is to be imposed upon an offender.⁴¹ This restriction is argued in Chapter Two to undermine the very purpose of the victim's involvement in the process. There is also no clearly imposed statutory mandate for a sentencing judge to have to consider the content of a VIS, nor for it to have any particular effect upon the sentencing calculus.⁴²

iv) *Protective and punitive sentence additions*

Beyond the statutory maximum, the presumption of imprisonment and the guideline judgment of *R v AM*, a further range of considerations exists for judges in the sentencing of sex offenders.

³⁹ As is relevant under ss 7(1)(c), 8(f) and 9(1)(g)-(h) of the Sentencing Act and under the *R v AM* 'culpability assessment factors, see *R v AM* above n 23 at [34]-[64] and Appendix 1.

⁴⁰ As per Victims Rights' Act 2002, s 17(1). Where information is obtained from the victim, the prosecutor is required to submit the statement under s 21 of the Act unless the victim objects to this under s 19(1).

⁴¹ See *R v Burns* [2001] 2 NZLR 464 (HC) at [21] per Chambers J: "It is well established that victim impact statements should not contain opinions as to penalty." See also *R v Taueki*, above n 28 at [33] in which it is stated that a judicial assessment of the seriousness of an offence should not take into account a victim's plea for leniency. For further discussion on this point, see Danica McGovern "Towards Justice for Victims: A New Role for Victim Impact Statements in Sexual Violence Cases" (LLM Dissertation, Victoria University of Wellington, 2012).

⁴² S 21(3) of the Victims' Rights Act makes it clear that a judge may choose to give no weight to the information contained in a VIS, stating that: 'In determining the weight (if any) to the information given, the judicial officer must have regard to whether or not it was verified in the way stated in section 19(3) or (4). Of interest is a recent and controversial District Court decision on a case of sexual violence involving a Christchurch judge expressing his reluctance in allowing a victim to read out a VIS. Saunders J has since been criticised for contending that an imbalance would arise from enabling the victim to speak without offering the offender a chance to reply, and for suggesting that restorative justice was appropriate in the situation. See David Clarkson "Judge reticent about sex victim reading statement" (10 April 2014) Christchurch Court News <www.courtnews.co.nz>.

Each of these possible sentencing options require the judge to assess the level of risk that the offender poses to society. At the core of each of these schemes lies the notion that the primary response to risk ought to be a further restriction of an offender's liberty.

a) Preventive detention

Preventive detention is a possible sentence option which, if imposed, empowers the Department of Corrections to hold an offender within prison for an indeterminate amount of time.⁴³ An offender subject to a sentence of preventive detention is also subject to a mandatory minimum period of imprisonment of no less than five years,⁴⁴ and, once released on parole, is able to be recalled to prison if the Parole Board believes that the offender poses undue risk to society.⁴⁵

Preventive detention has existed under different guises since the early 20th century,⁴⁶ exemplifying the legislature's ongoing emphasis upon the need for proactive and pre-emptive community protection. The modern-day sentence is able to be imposed under section 87 Sentencing Act where the court is satisfied that the offender, having been convicted of a qualifying sexual or violent offence,⁴⁷ is likely to commit another qualifying offence if they are released at the sentence expiry date. An offender's 'likelihood' of committing another crime is able to be considered by reference to a number of factors, including patterns of serious offending disclosed by the offender's history, the seriousness of the harm to the community, information indicating a tendency to commit serious offences in the future, and the absence or failure of efforts by the offender to address the cause or causes of the offending.⁴⁸

Whilst 'likelihood' to commit another qualifying offence does not denote an entirely clear standard, the intention of the legislature is clear: preventive detention is only to be imposed upon the most serious offenders who pose a significant and ongoing risk to the safety of the

⁴³ Sentencing Act, s 87.

⁴⁴ Sentencing Act, s 89(1).

⁴⁵ Parole Act 2002, s 6(4)(d).

⁴⁶ See John Meek "The Revival of Preventive Detention in New Zealand 1986 – 93" (1995) 28 Australian & New Zealand Journal of Criminology 225 at 229.

⁴⁷ Offences under s 128B Crimes Act are 'qualifying offences' as per s 87(5) Sentencing Act.

⁴⁸ Sentencing Act, s 87(4).

community.⁴⁹ Indeed, only ten of those convicted for “sexual assault and related offences”⁵⁰ were sentenced to preventive detention in 2013.⁵¹ The sentencing court is also bound to take into account the principle that a *lengthy determinate sentence* is preferable, provided society is adequately protected through such a measure.⁵² This principle is grounded in human rights considerations, and is further emphasised by the fact that preventive detention is said not to be imposed for its punitive effect but for community protection.⁵³ In spite of this, the Court of Appeal in *R v T*⁵⁴ accepted that such a sentence *could* be punitive if imposed in the wrong context. Furthermore, the interpretations of such a sentence by the offender and the community may differ from the intention of the legislature in making this sentencing option available.

b) Extended Supervision Orders

An extended supervision order (ESO), unlike preventive detention, is not imposed at the initial sentencing stage but may be applied for by the Chief Executive of the Department of Corrections during an offender’s prison term.⁵⁵ Where granted, an ESO enables the Department of Corrections to monitor a child sex offender⁵⁶ for up to ten years after their release from prison, and for them to be placed upon conditions similar to those which would be made on parole.⁵⁷ The decision to impose an ESO is likely to be made close to the end of the offender’s

⁴⁹ Sentencing Act, s 87(1). See also Hall, above n 19 at SA87.1 and *R v D* [2003] 1 NZLR 41 at [60], where it was said that “the sentence of preventive detention...is undoubtedly one of the most serious punishments that can be imposed.”

⁵⁰ A category adopted by the Australian and New Zealand Society of Criminology Inc (ANZSOC) and subsequently employed by Statistics New Zealand. The category includes sexual violation and other crimes under Part 7 Crimes Act 1961: see “Information about the criminal conviction and sentencing data: Offence categories” (10 January 2014) Statistics New Zealand.

⁵¹ “Adults convicted in court by sentence type – most serious offence” (1 October 2014) Statistics New Zealand <stats.govt.nz>

⁵² Sentencing Act, 87(4)(e).

⁵³ In *R v Bailey* CA 102/03, 22 July 2003 at [19], the Court of Appeal stated that an indeterminate sentence of preventive detention ought not be imposed ‘without first allowing a lengthy finite sentence to serve as a final warning and opportunity to address underlying drivers of offending.’

⁵⁴ *R v T* CA 125/02, 19 July 2002. See also *R v Pairama* CA 216/97, 8 September 1997 in which it was said that imposing preventive detention to achieve a more punitive result than a finite sentence can provide would be an error of principle.

⁵⁵ Parole Act, s 107F.

⁵⁶ The offender must be an ‘eligible offender’ who has committed a ‘relevant offence’. Eligibility is defined in s 107C, requiring an offender to be currently subject to a determinate sentence of imprisonment. Relevant offences are set out in s 107B, comprising of a number of different sexual offences against children under the age of 16. This includes sexual violation under s 128B as per s 107B(2)(a) where the victim of the offence was under 16 years old at the time of the offence.

⁵⁷ There is currently a bill before Parliament, the Parole (Extended Supervision Orders) Amendment Bill, which would see ESOs able to be renewed as often as needed, and able to be made for high risk sex offenders who offend against *adults* as well as children, and high-risk violent offenders.

sentence, and must be done before the sentence expiry date or the date upon which the offender ceases to be subject to any release conditions.⁵⁸

Section 107I sets out the rationale upon which a court may make an extended supervision order. The offender is to be considered by the court, in the light of the health assessor's report,⁵⁹ to be likely to commit a relevant offence⁶⁰ upon release from prison. The term of the order must be the minimum period that is required for community safety, in the light of the level of risk posed by the offender, the seriousness of the harm that could be caused to victims and the likely duration of the risk.⁶¹

The Attorney-General has held that the ESO regime is in fact inconsistent with the rule against 'double jeopardy' and retroactive penalties in the New Zealand Bill of Rights Act 1990,⁶² on the basis that the orders are made in the aftermath or final stages of an offender's sentence.⁶³ Although an ESO is *prima facie* concerned with ongoing community protection, the reality of such an order is that it is an extension or addition to a pre-existing punishment. Through this scheme, an offender is effectively punished twice for the same offence. However, it could be argued to be more effective than a sentence of preventive detention in ascertaining ongoing risk, and in preventing future harm to the community. This is because it is imposed *after* the offender has served time in prison and had the opportunity to reform. Preventive detention, on the other hand, requires an assessment of an offender's risk upon release before his sentence has even begun to be served.

⁵⁸ Parole Act, s 107F(1).

⁵⁹ As per s 107F(2), the health assessor's report is to address the nature of any likely future sexual offending, the offender's ability to control his or her sexual impulses, the offender's predilection and proclivity for sexual offending, their acceptance of responsibility and remorse for past offending, and any other relevant factors.

⁶⁰ See above n 55 for the definition of 'relevant offence'.

⁶¹ Parole Act, s 107I(5).

⁶² New Zealand Bill of Rights Act (NZBORA) 1990, s 26.

⁶³ Christopher Finlayson Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill 2009 (2nd April 2009) at 2.

c) MPIs

Following the determination of the quantum of sentence, the judge has the discretion to impose a minimum period of imprisonment (MPI) under section 86 of the Sentencing Act 2002. MPIs are not exclusive to sex offenders and may be imposed so as to alter the ordinary non-parole period for long-term determinate sentences.⁶⁴ Where the judge is satisfied that a sentence served in accordance with the ordinary parole rules would be *insufficient* in terms of an offender's accountability, denouncement and deterrence of conduct and the community's protection from the offender,⁶⁵ he may choose to impose an MPI within the parameters set by s 86(4) of the Act. The MPI must not exceed two-thirds of the full term of the sentence or ten years; whichever is lesser.⁶⁶

As stated above, and as is made clear under s 86(2) Sentencing Act 2002, an MPI is able to be imposed for both punitive and protective rationales. However, in considering the role of the Parole Board, it could be argued that the real basis for this scheme is predominantly punitive. As the Board's paramount consideration is one of community safety,⁶⁷ it is clear that the Board must ensure that a sentence would be served up until the point at which an offender's reintegration into society poses no foreseeable risks. Accordingly, the imposition of an MPI ought not be necessary to ensure community safety as this is the Parole Board's key task and fundamental consideration. Furthermore, the Parole Board are likely to be in a better position to consider the risk an offender will pose to society upon eligibility for parole than a judge is prior to any sentence having been served. Arguably, the MPI scheme thus circumscribes the role of the Parole Board for no sound protective rationale. Accordingly, whilst MPIs may operate under a protective guise, they are more likely to enhance the punitive character of the sentence, lengthening the time actually spent in prison on the bases of accountability, deterrence and denouncement.

⁶⁴ As per s 84(1) Parole Act. A long-term determinate sentence is any sentence that is longer than two years imprisonment, as defined in s 4.

⁶⁵ Sentencing Act, 86(2).

⁶⁶ In addition to this, and as discussed earlier, s 89(1) Sentencing Act provides that an offender sentenced to preventive detention must be subject to an MPI of no less than 5 years.

⁶⁷ Parole Act, s 7(1).

d) Three strikes

The extent to which an offender's sentence is to be served is ordinarily determined by the decision of the Parole Board. As stated above, an offender is ordinarily eligible for parole after having served one third of his sentence. The Parole Board is able to take into account a number of factors in deciding whether an offender is able to be released. However, community safety is the Board's paramount concern.⁶⁸

A number of additional circumstances may also limit parole eligibility. These include the imposition of an MPI, a sentence of preventive detention or where an offender is on his 'second' or 'third' strike under the 'three strikes' regime.⁶⁹ Under this regime, an offender will receive a warning when sentenced for his first 'qualifying' offence. If he is convicted of a second qualifying offence and sentenced to imprisonment, this sentence must be served in full, without parole.⁷⁰ A third qualifying conviction will result in a sentence of the maximum penalty length without parole, unless this is manifestly unjust.⁷¹ As sexual violation under s 128B is a qualifying offence, sex offenders are subject to the three strikes scheme.

The regime has been argued to create unfair outcomes for offenders and victims, as well as undermining public confidence in the justice system.⁷² The 'fundamental failure' of the three strikes law is said to be its lack of attention to the actual wrong done by a particular offender in a particular incident. Scholars Brookbanks and Ekins convincingly argue that not all offences of the same kind are deserving of the same treatment; the three strikes law, in imposing the maximum penalty upon an offender convicted of his third 'strike', results in the imposition of a penalty that is not necessarily proportionate to the harm done. This is not an outcome consistent with retribution, which is argued by Brookbanks and Ekins to be one of the foundational principles of sentencing.⁷³ Furthermore, Hall demonstrates that 'research is equivocal, at best, as to the effectiveness of deterrence as a sentencing principle', suggesting instead that the harsh regime results in 'little or no incentive to plead guilty.'⁷⁴ This point will

⁶⁸ Above n 67.

⁶⁹ Sentencing Act, s 86A-I.

⁷⁰ Sentencing Act, s 86C(4)(a).

⁷¹ Sentencing Act, 86D(3).

⁷² See generally Warren Brookbanks and Richard Ekins "The Case Against the "Three Strikes" Sentencing Regime" (2010) NZ L Rev 689.

⁷³ Brookbanks and Ekins, above n 72 at 690.

⁷⁴ Hall, above n 19 at SA 86A.3.

be furthered in Chapter Two as the anti-therapeutic corollaries of the sentencing framework are canvassed.

vii) Serving the sentence

Following the imposition of a sentence of imprisonment, offender outcomes leave the hands of the judiciary and fall into those of the Department of Corrections. Their sentence is then coloured by the treatment they receive in prison. Whilst a judge may take time during sentencing to recommend that an offender takes up all rehabilitative opportunities in prison,⁷⁵ or that the Department of Corrections should make appropriate programmes available for the offender,⁷⁶ the judicial role is very limited in determining what the sentence of imprisonment will truly entail, and to what extent ‘rehabilitation’ will actually occur. Only where an offender has been given a community sentence will a judge be able to impose conditions and restrictions upon the way in which this sentence is served.

All offenders are presented with opportunities to partake in a range of ‘treatment’ or ‘training’ programmes available in prison.⁷⁷ However, there are a number of rehabilitative pathways specifically available for those who have sexually offended. Upon commitment to prison, an offender will be subject to psychological assessment which is said to determine their risk of recidivism. The degree of risk determines which programme is most appropriate for the offender to participate in.

Kia Marama and Te Piriti are two specialist within-prison units for high risk child sex offenders (CSOs). Whilst the efficacy of sex offender treatment continues to be contested,⁷⁸ both of these

⁷⁵ As was the case in *R v A* HC Rotorua, CRI-2009-063-2158 16 September 2009 at [66].

⁷⁶ As was the case in *R v J* HC Auckland, CRI-2006-092-16336, 1 April 2008 at [70].

⁷⁷ Whilst this is not an explicit ‘right’ of offenders, nor something they can be compelled to participate in, Kris Gledhill has construed s 5 of the Corrections Act 2004 as imposing an obligation upon the Department of Corrections to make treatment programmes available to all offenders: see Kris Gledhill ‘Treatment of offending behaviour: Is it a legal right?’ in Ken McMaster & David Riley *Effective Interventions with Offenders: Lessons Learned* (2011, Wellington, Hall McMaster & Associates: Steele Roberts) at 53. Compare this with the Court of Appeal in *Miller v New Zealand Parole Board* [2010] NZCA 600 at [156]: “there are no targeted programmes which have been shown to address successfully the propensity of adult sex offenders to re-offend. Accordingly, the non-provision of such programmes (...) is unremarkable and gives rise to no legal concerns.”

⁷⁸ See Sarah McGregor “Sex Offender Treatment Programs: Effectiveness of Prison and Community Based Programmes in Australia and New Zealand” (Indigenous Justice Clearinghouse, Australian Institute of Criminology and Standing Council on Law and Justice, Research Brief 3, April 2008) at 1. See also Jo Thakker “Public Attitudes to Sex Offenders in New Zealand” in 18(2) *Journal of Sexual Aggression* (2012) 149 at 160 for a discussion of the common attitudes of New Zealanders towards

units boast significant rates of achievement in reducing the likelihood of sexual recidivism.⁷⁹ Low-risk CSOs also have the opportunity to participate in a specifically targeted 12-week programme.

For those who sexually offend against adults, the Department of Corrections also provides ‘high intensity group treatment programmes’ in three of the Special Treatment Units. These programmes are specifically for sex offenders who have been assessed as ‘high risk’.⁸⁰ Other offenders assessed as being at a ‘medium’ or ‘low risk’ of reoffending have the opportunity to undergo individual treatment with psychologists working within the Department and to participate in generalised ‘medium intensity’ programmes that are directed at all types of offending.⁸¹

The general protocol of the Department of Corrections is that offenders imprisoned for longer than 26 weeks are to have an ‘offender plan’ written within 60 days of their entry into prison.⁸² This plan details, amongst other things, the rehabilitative measures that the offender plans to undertake. However, aside from the time-frames surrounding the creation of a plan, it would appear that an offender can enter a number of different programmes at various times during his sentence. This is partially dependent upon programme availability, but may also relate to the Department’s “66% rule”.⁸³ This is a policy that effectively promotes the delaying of

sex offenders. A common belief of the participants in the study was that sex offenders could not be treated. However, for a comprehensive meta-analysis demonstrating the effectiveness of treatment for sex offenders, see Friedrich Losel and Martin Schmucker “The effectiveness of treatment for sexual offenders: A comprehensive meta-analysis.” (2005) 1 *Journal of Experimental Criminology* at 117-146.

⁷⁹ See David Hillman, Lavinia Nathan and Nick Wilson *Te Whakakotahitanga: An evaluation of the Te Piriti Special Treatment Programme for Child Sex Offenders in New Zealand* (Psychological Service, Department of Corrections, 2003) in which it was found that the Te Piriti programme was effective in reducing sexual reconviction. A sample of men who had completed the programme were found to have a 5.47% sexual recidivism rate, as compared with an untreated group of men who had a recidivism rate of 21%. See also L Bakker and others *And Then There Was Light: Evaluating the Kia Marama Treatment Programme for New Zealand Sex Offenders Against Children*. (Department of Corrections, 1998) in which it was found that the Kia Marama treatment unit reduced sexual recidivism rates from 22% to 10%.

⁸⁰ It is worthy of mention that the Court of Appeal in *Miller v New Zealand Parole Board*, above n 77 stated at [147] that whilst the within-prison treatment programmes for child sex offenders had proven effective in the reduction of recidivism, the programmes for adult sex offenders had not.

⁸¹ As ascertained from emails exchanged with Bronwyn Rutherford (Registered Clinical Psychologist from the Office of the Chief Psychologist, Department of Corrections) regarding the within-prison treatment programmes for adult sex offenders in New Zealand (4 August 2014).

⁸² Office of the Auditor-General *Department of Corrections: Managing Offenders to Reduce Re-Offending* (2013) at [3.17].

⁸³ John Belgrave and Mel Smith, *Ombudsmen’s Investigation of the Department of Corrections In Relation to the Detention and Treatment of Prisoners* (December 2005) at 49-52.

rehabilitation programmes so that they will not be completed until an offender has served two thirds of their sentence.

The policy is premised upon the basis that the programmes are likely to be the most effective when employed shortly before an offender's release, enabling the offending to take the full benefits of his learning out into the community.⁸⁴ However, it is contended that this leaves a significant period of time upon entry into prison where he will adopt prison mentalities, share stories with like offenders and diminish any chance of successful rehabilitation. Furthermore, the policy is said to circumvent parole eligibility: parole is unlikely to be granted after one-third of the sentence has been served if none of that sentence has involved rehabilitative measures. If parole *is* granted at this stage to an offender who has not undergone any form of rehabilitation, this is equally problematic. The Ombudsman and Auditor-General have both made recommendations that general Corrections policy is to be modified so as to facilitate more treatment opportunities for offenders earlier on in their sentence, with appropriate and supportive environments available for them to enter into after completing treatment.⁸⁵

B Summary of framework

It is clear that sex offenders are faced with a host of potential punishments which place emphasis upon the paramountcy of community protection and the inherent seriousness of their actions. The conglomerate effect of the various elements of the sentencing framework is one of circumscribing judicial discretion in determining the purpose, form and quantum of the sentence. The presumption of imprisonment, read in the light of the general s 16 presumption against such sentences, indicates that community protection is invariably a major concern where sexual offending has occurred. Community protection is also likely to form the basis of a judge's decision to impose an ESO or preventive detention, becoming the predominant consideration of a sentencing judge. Although this in itself is not objectionable, the framework adverts to a very limited range of ways in which this purpose is to be achieved. Essentially, 'community protection' under the sentencing framework for sex offenders is synonymous with the imposition of a lengthy penal sentence or another form of extensive restriction of offender liberty.

⁸⁴ Above n 82 at [3.43].

⁸⁵ Above n 82 at 7, above n 83 at 77.

Chapter Two will discuss the ways in which the legislature's intent in constructing the framework has been circumscribed by the anti-therapeutic corollaries of the sentencing outcomes. Indeed, as argued by Kathleen Daly, 'elites may delude themselves into thinking that what they *intend* to do (that is, *not* to punish) is in fact experienced by those at the receiving end.'⁸⁶ Whilst a sentence premised upon protection may see an offender incarcerated for a number of years, ostensibly protecting the community from any further harm this offender may cause, an offender's experience is one of a harsh, punitive sentence within an environment which has been demonstrated to be criminogenic.⁸⁷

C *Therapeutic Jurisprudence*

In analysing the impact of the sentencing framework canvassed above, the assumptions and principles of the study of therapeutic jurisprudence (TJ) are invoked. The central premise of TJ is that the law, its process and actors have an impact upon the well-being of those who interact with the system.⁸⁸ A TJ inquiry therefore considers the way in which the law's application may have therapeutic or anti-therapeutic outcomes; the 'therapeutic' content of a law determined by reference to its impact upon well-being.⁸⁹ In New Zealand and overseas, TJ has been discussed and employed by scholars and policy-makers in the fields of youth justice, drug offending,

⁸⁶ See Kathleen Daly "Revisiting the Relationship between Retributive and Restorative Justice" in Heather Strang and John Braithwaite (eds) *Restorative Justice: Philosophy to Practice* (Ashgate, Aldershot, 2000) at 39.

⁸⁷ Statistics from the Department of Corrections indicate that 58.8% of those imprisoned will be reconvicted within 48 months of release. 37.3% of all offenders will be re-imprisoned within 48 months, and 52% of offenders will be re-imprisoned within five years of release: see Office of Auditor-General Report on Reducing Reoffending, above n 81 at 87. Further, as per McMaster and Riley, 'modern research has found that the longer and harsher the prison sentence the worse the outcome' in Ken McMaster and David Riley (eds) *Effective Interventions with Offenders: Lessons Learned* (2011, Wellington, Hall McMaster & Associates: Steele Roberts) at 10. See also Francis Cullen, Cherly Jonson and Daniel Nagin "Prisons do not reduce recidivism: the high cost of ignoring science" (2011) 91 *The Prison Journal* 48S – 65S.

⁸⁸ Astrid Birgden "Therapeutic Jurisprudence and Sex Offenders" (2004) 16(4) *Sexual Abuse: A Journal of Research and Treatment* 351 at 354.

⁸⁹ 'Well-being' is generally regarded as including emotional and psychological well-being. See Michael King "Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice" 32(3) *MULR* 1096 at 1098.

family violence and sexual offending.⁹⁰ Therapeutic jurisprudence in these contexts directs attention towards ‘the potential beneficial and harmful impacts of justice intervention itself.’⁹¹

Looking through the lens of therapeutic jurisprudence, it is possible to consider the ways in which the laws that apply in the sentencing of sex offenders play a role beyond their normative function. Scholars Edwards and Hensley employed TJ in reaching their conclusion that the US criminal justice system, with its emphasis on ‘punishment, retribution and incapacitation’ discourages sex offenders from accepting responsibility and impacts their ability to successfully undergo treatment.⁹² This dissertation weighs similar claims about the sentencing of sex offenders in New Zealand.

Proponents of TJ maintain that a therapeutic agenda is to be promoted only insofar as this is coherent with general principles of justice.⁹³ Furthermore, recent academic discussion has centred upon whether or not the therapeutic jurisprudence scholarship provides us with a normatively-neutral theory, or a value-laden philosophy.⁹⁴ Without wishing to provide unsolicited resolution to this debate, this dissertation proceeds on the basis that the law as a therapeutic agent is desirable insofar as a therapeutic agenda is largely consonant with the general principles of justice in New Zealand. Working towards a realisation of these general principles and policy goals is therefore akin to employing therapeutic jurisprudence as an analytical tool and a guiding philosophy, helping to ‘maximize the overarching aims of the law’.⁹⁵

The TJ-informed thesis of this dissertation is that the therapeutic goals of the system are being served by anti-therapeutic means, resulting in anti-therapeutic outcomes. As the ‘means’ – the

⁹⁰ See Warren Brookbanks “Therapeutic jurisprudence: a new legal paradigm” (November 2011) Rethinking Crime and Punishment <rethinking.org.nz>.

⁹¹ B McKenna, C Meehan, A Mills and K Thom *Evaluating Problem-Solving Courts in New Zealand: A Synopsis Report* (Centre for Medical Health Research, University of Auckland, 2013) at 9.

⁹² William Edwards and Christopher Hensley “Restructuring Sex Offender Sentencing: A Therapeutic Jurisprudence Approach to the Criminal Justice Process” (2001) 45(6) *Int J Offender Ther Comp Criminol* at 656.

⁹³ Astrid Birgden “Applying Therapeutic Jurisprudence Principles in Sentencing: Courts, Corrections and Beyond” (paper presented to Sentencing: Principles, Perspectives & Possibilities Conference, Canberra, February 2006) at 2.

⁹⁴ See generally Astrid Birgden “Therapeutic Jurisprudence and Offender Rights: A Normative Stance is Required” (2009) 78 *Revista Juridica UPR* 43.

⁹⁵ Above n 94 at 52.

sentencing framework – has been detailed above, it is now important to give brief consideration to the ‘ends’ of the justice system, illustrating why TJ is an appropriate lens to adopt.

D Criminal justice and sentencing policy in New Zealand

As the Sentencing Act 2002 provides a list of eight different purposes for which a judge may sentence an offender,⁹⁶ it is clear that criminal justice in New Zealand is no longer ‘univocal in affirming the centrality of retribution and punishment.’⁹⁷ Instead, a therapeutic approach is beginning to percolate through the wider body of criminal law and policy.

Recourse to government policy illustrates that therapeutic goals and ideologies lie within the aims of our government. General policy statements of the Department of Corrections – the main body tasked with overseeing the serving of sentences – indicate that their goal is one of reducing reoffending by 25% by 2017.⁹⁸ The Ministry of Justice, too, cites their primary goal as one of reducing crime.⁹⁹ Furthermore, in 2004 the criminal justice sector agencies in New Zealand adopted a ‘framework of shared sector outcomes’ which included the reduction of crime and its impacts, the accountability of offenders, the accessibility of justice services and a trusted justice system.¹⁰⁰ These goals are inherently therapeutic as they aim to move offenders away from crime and its consequences in an attempt to promote a safer community and lower rates of victimisation. Goals to promote the accessibility of and trust in the justice system are also therapeutic in the sense that victims are encouraged and enabled to receive redress and support for the harm they have suffered.

The overall well-being of the community, victims and offenders has also been a driving force behind the development of specialist courts in New Zealand. Indeed, the Alcohol and Other Drug Treatment Court (AODT) and Family Violence Courts (FVCs), are ‘problem-solving courts’ guided by principles of therapeutic jurisprudence.¹⁰¹ Their establishment has been

⁹⁶ Sentencing Act, s 7. These purposes ranging from utilitarian crime-control goals to retributive, Kantian conceptions of criminal punishment (as per Hall, above n 19 at I.3.2) and are detailed fully in Appendix 3.

⁹⁷ Brookbanks and Ekins, above n 72 at 699.

⁹⁸ Department of Corrections *Statement of Intent: July 2014 – June 2018* (2014) E.61 at 2.

⁹⁹ Ministry of Justice *Statement of Intent: 2012-2015* (2012) E.64 at 6.

¹⁰⁰ Above n 98.

¹⁰¹ Leigh Coombes, Sarah McGray and Mandy Morgan *An Evaluation of the Waitakere Family Violence Court Protocols* (Massey University, 2007) at 9; Claire Meehan, Alice Mills and Katey Thom *A Review of Alcohol and Other Drug Court Evaluations* (Centre for Mental Health Research, University of Auckland, 2013).

predicated on the recognition that a simple ‘offence-consequence’ model of criminal justice is, at times, inappropriate. In areas of criminal activity which are characterised by addiction or complex relationship patterns, the ordinary criminal justice processes and consequences may not reflect, and may even exacerbate, the factors that led to the initial offending. These court initiatives take these additional offending dynamics into account and make provision for them in their procedures and outcomes. Whilst relatively new initiatives, these nuanced approaches to certain kinds of criminal behaviour have had positive reviews, resulting in therapeutic outcomes for offenders, victims and society as a whole.¹⁰²

Therapeutic policy goals are also evident in general sentencing policy. Indeed, the presumption *against* imprisonment and the growing range of community-based sentences¹⁰³ encourage and enable judges to allow offenders to remain a part of society whilst undergoing rehabilitative and reparatory measures. Furthermore, the necessary elements of a successfully therapeutic outcome for offenders are closely aligned with the majority of the statutory sentencing purposes.¹⁰⁴ Offender well-being and capacity for reformation is maximised when rehabilitative measures are able to be undergone,¹⁰⁵ whilst acceptance of responsibility,¹⁰⁶ engagement in processes through which there is able to be accountability¹⁰⁷ and the provision of redress for harm done¹⁰⁸ are viewed as preconditions to therapeutic outcomes for offenders. The inclusion of a restorative justice approach within the Act¹⁰⁹ and the interests of the victim as a purpose of sentencing¹¹⁰ further indicates a policy shift towards sentences that are coherent with the well-being of those who interact with the justice system. By way of comparison, the first ‘purpose’ of sentencing under the UK Criminal Justice Act 2003 is one of ‘punishment’: a word which appears only once in the entirety of the New Zealand Sentencing Act.¹¹¹

¹⁰² See Trish Knaggs and others *The Waitakere and Manukau Family Violence Courts: An evaluation summary* (Ministry of Justice, Research Report, August 2008) at 48-49. See also Lisa Tremewan “The Alcohol and Other Drug Treatment (AODT) Court: Te Whare Whakapiki Wairua” (paper presented at NZLS Criminal Law Symposium, 2013) at 88.

¹⁰³ For community-based sentences, see Sentencing Act, ss 44-80. New community-based sentences were added into the Sentencing Act by the Sentencing Amendment Act 2007. See Hall, above n 19 at SA44.2.

¹⁰⁴ See Edwards and Hensley, above n 92 for a discussion as to what constitutes the necessary elements for a therapeutic outcome.

¹⁰⁵ Sentencing Act, s 7(1)(h).

¹⁰⁶ Sentencing Act, s 7(1)(b).

¹⁰⁷ Sentencing Act, s 7(1)(a).

¹⁰⁸ Sentencing Act, s 7(1)(d).

¹⁰⁹ Sentencing Act, s 8(j), s 25(1)(b)-(c).

¹¹⁰ Sentencing Act, s 7(1)(c).

¹¹¹ See Criminal Justice Act 2003 (UK), s 142(1)(a) and Sentencing Act, s 25.

As per Birgden, ‘when the law purports to promote therapeutic objectives, it needs to be determined whether it actually does so.’¹¹² Accordingly, this dissertation determines the extent to which the sentencing framework for sex offenders actually protects the community and maximises the well-being of offenders and victims. The remainder of this dissertation explores the disjunct between the overarching criminal justice policies of reducing crime and reoffending, outlined above, and their legislative implementation and application in the realm of sex offending. The cumulative operation of statutes premised on protection is argued to lead to anti-therapeutic outcomes for offenders, victims and the community alike.

¹¹² Birgden, above n 88 at 355.

Chapter Two: The Anti-Therapeutic Implications of the Framework

“When it comes to sexual offences... the salient point is that the traditional retributive form of state justice does not seem to be working.”¹¹³

Four main arguments are canvassed within this chapter concerning the anti-therapeutic elements of the sentencing framework and their impact upon the ‘stakeholders’ of the system. These elements are considered to provide important insights into the poor justice outcomes in the realm of sex offending, and are illustrative of the disjunct that exists between general sentencing policy in New Zealand and the laws which apply to sex offenders. The framework, being considered as the conglomerate of its components, is said to deter offender acceptance of guilt, inhibit victim reporting and fail to provide meaningful redress for victims. It also fails to offer significant opportunities and incentives for offenders to engage in restorative justice and meaningful rehabilitation.

Although only 13% of those who have allegedly raped go on to be convicted,¹¹⁴ the sentencing framework is relevant to both those who fall within it and those whose circumstances are on the periphery of its application. Accordingly, in considering the anti-therapeutic implications of the framework, consideration must be given to the messages that it sends to the wider community, which is ultimately comprised of potential victims and offenders.

A *Penalties and offenders*

According to the Ministry of Women’s Affairs, ‘sexual violation is regarded by criminal justice agencies as second only in seriousness to murder.’¹¹⁵ This is reflected in the maximum sentence for sexual violation being the longest maximum finite term of imprisonment available under New Zealand law. This penalty is superseded only by the indefinite penalties of life imprisonment and preventive detention;¹¹⁶ the latter of which is also applicable to some sex offenders. The high penalties also reflect ‘the horror and repugnance of society to the crime of

¹¹³ Anne-Marie McAlinden, ‘The use of shame with sexual offenders’ (2005) 45 *Brit J Criminol* 373 at 373.

¹¹⁴ Ministry of Women’s Affairs, above n 3.

¹¹⁵ Ministry of Women’s Affairs, *Restoring Soul: Effective Interventions for Adult Victim/Survivors of Sexual Violence* (2009) at 2.

¹¹⁶ See Ministry of Justice “The Use of Imprisonment in New Zealand” (1998) <justice.govt.nz> for a discussion of the offences which are subject to maximum penalties of life imprisonment.

rape.¹¹⁷ As offending of this kind is inherently serious, the sentence that is given, and the range of sentences that are available, must reflect this in a proportionate way at policy level. Indeed, the presumption of imprisonment and the ‘rape bands’ outlined in *R v AM* indicate that even the ‘least serious’ sexual violations still ought to have a starting point of six years imprisonment. The three strikes regime and the availability of preventive detention, MPIs and ESOs add further to this framework, increasing the likelihood of a long sentence of imprisonment.

A recurrent claim of therapeutic jurisprudence is that sex offenders may be hugely reluctant to accept their guilt on the basis that doing so is likely to result in such a lengthy, inflexible term of imprisonment.¹¹⁸ Edwards and Hensley in ‘Restructuring Sex Offender Sentencing’ have said that:¹¹⁹

“The trend toward harsher sentences with fewer judicial alternatives, in our opinion, affects defendant motivation to admit to suspected abuse. This in turn forces prosecutors to drop cases with little supporting evidence, whereas the increasing severity of sanctions on conviction may encourage defendants to [...] favour a trial stage that ends in full acquittal due to what is often a lack of evidence in sexual abuse cases.”

These claims are supported by David Wexler, a legal scholar credited with founding the TJ perspective.¹²⁰ According to Wexler, sex offenders in particular engage in ‘denial and minimisation’ of their offending behaviour, which leads to ‘cognitive distortions’.¹²¹ Cognitive distortions effectively preclude offenders from successfully engaging in rehabilitative treatment, on the basis that treatment interventions are reliant upon the identification, discussion and modification of the ‘feelings, thoughts, situations and behaviours that were proximal to [the] sexually aggressive acts’ of the offender.¹²² Not only do ‘denial and minimisation’ processes negatively impact an offender’s ability to receive treatment in this

¹¹⁷ *D v Police* (2000) 17 CRNZ 454 at [16] per Nicholson J.

¹¹⁸ Birgden, above n 88 at 354.

¹¹⁹ See Edwards and Hensley, above n 92 at 653.

¹²⁰ See Warren Brookbanks, above n 90 for a discussion of the genesis of therapeutic jurisprudence. Brookbanks mentions that David Wexler and Bruce Winick were the founders of the TJ perspective, which grew from the context of mental health law and is now applied in a number of different contexts.

¹²¹ David Wexler “Therapeutic Jurisprudence and its Application to Criminal Justice Research and Development” (2010) 7 Irish Probation Journal 94 at 101.

¹²² Edwards and Hensley, above n 92 at 655.

way, they are also likely to result in legal limitations. In New Zealand, acceptance of guilt is a pre-requisite to participation in restorative justice processes¹²³ and certain prison treatment programmes.¹²⁴ Offender denial is therefore likely to lead to anti-therapeutic outcomes for all of the stakeholders in the criminal justice process. This statement is based upon the premise that simple incarceration, without incorporated rehabilitation, is in itself criminogenic, tending to promote, rather than discourage recidivistic behaviours.¹²⁵ Furthermore, where offenders do not plead guilty, victims are unable to receive true recognition of the harm that they have suffered, nor are they able to engage in restorative justice processes if desired.

The relationship between high penalties and the low rates of offender acceptance of guilt has also been discussed by writers within the New Zealand context. The Law Commission,¹²⁶ Fred McElrea¹²⁷ and authors Yvette Tinsley and Elisabeth McDonald¹²⁸ have all indicated that the 'harsh' penalties may operate as a disincentive for sex offenders to accept responsibility for their actions in court. Statistical evidence also exists in support of these claims. Information obtained from the Ministry of Justice indicates that the average rate of guilty pleas for those charged with sexual violation from 2006-2013 has been 24.6%.¹²⁹ This statistic can be compared with the rate of guilty pleas given by those charged with committing offences subject to the three strikes regime. From June 2010 to June 2011, 78% of the 2,952 prosecuted for any

¹²³ Indeed, the very essence of the restorative justice process hinges on an offender accepting responsibility for his actions: see Donald Schmid "Restorative Justice: A New Paradigm for Criminal Justice Policy" (2003) 34 VUWLR 91 at 96.

¹²⁴ A key element of the Kia Marama and Te Piriti sex offender treatment programmes is an offender's acceptance of responsibility for his actions. The focus is then on trying to change the behaviours of the offender. In order for the offender to be able to 'change', it is thus necessary for him to accept that he has done wrong. See also Anna Hoy, A Frost and Jayson Ware "A review of the use of therapeutic communities with sexual offenders" (2010) 54(5) Int J Offender Ther Comp Criminol 721 at 734, in which it is mentioned that Kia Marama is an example of a treatment programme employed 'therapeutic community' methodology. 'Therapeutic communities' are described as requiring acceptance of responsibility and 'ownership' of offending behavior.

¹²⁵ Above n 86. See also Sian Elias "Blameless Babes" (2009) 40 VUWLR 581 at 587 where the Chief Justice stated that "penal policy is largely irrelevant to reduction of crime and to making our communities safest. It is, as one commentator put it, 'the bluntest of society's instruments of control.'"

¹²⁶ New Zealand Law Commission, above n 12 at 44.

¹²⁷ Fred McElrea "Address to inter-disciplinary conference", (paper presented to "RAPE: Ten Years' Progress?" Conference, Wellington, 1996) at 3.

¹²⁸ McDonald and Tinsley above n 5 at 378.

¹²⁹ This figure has been calculated from data obtained from Official Information Act request, above n 26. See Appendix 2.

offence subject to the three strikes regime pled guilty at any stage.¹³⁰ The general rate of guilty pleas for all prosecutions sits at about 76%.¹³¹

The difference in these rates is very significant. Those charged with sexual violation in New Zealand have a dramatically lower rate of guilty pleas than those charged with other kinds of serious offending. Whether this is *directly* attributable to the sentencing framework for sex offending – and the ‘high stakes’ of a conviction – is unable to be conclusively ascertained. Another explanation may be that the particular nature of sexual offending means offenders tend to conceptualize their actions differently, resulting in an unwillingness to accept criminal culpability. The low conviction rates are also considered to encourage offenders to plead not guilty on the basis that nature of the offending makes it very difficult to prove.¹³² The existence of purportedly high rates of “false complaints” is also cited as a further justification for the very low rate of guilty pleas and convictions.¹³³ Judge Fred McElrea has disputed this last justification, contending instead that the ‘horrors of trial’ make it unlikely for a complainant to want to pursue a false complaint.¹³⁴ Furthermore, the police provide a ‘filtering’ process at the initial reporting stage which would presumably remove a number of these false complaints.

Other potential arguments against the claims of therapeutic jurisprudence – that ‘high penalties’ promote offender denial – include the judicial ability to provide sentence discounts for guilty pleas. As discussed above, a guilty plea at the first available opportunity is likely to result in a 25% sentence discount. Such a reduction has the potential to significantly change the nature of a sentence, providing a sharp juxtaposition to the framework that has been outlined. It is conceivable that defence counsel for those charged with sexual violation will advise an offender to plead guilty on this basis, so as to secure the maximum possible discount and the shortest possible sentence.

Furthermore, in spite of the *prima facie* ‘high stakes’ of conviction, the ‘average’ sentence imposed upon offenders is significantly lower than the maximum penalty. The average

¹³⁰ See Ministry of Justice *Sentencing and Parole Reform Act 2010: Quarterly Report for June 2011* (July 2011) at 4.

¹³¹ See Department of Corrections *Over-Representation of Maori in the Criminal Justice System: An Explanatory Report* (September 2007) at 18.

¹³² Elisabeth McDonald and Yvette Tinsley “Is there any other way? Possible alternatives to the current criminal justice process” (2011) 17 *Canterbury L Rev* 194 at 209.

¹³³ See Jan Jordan “Beyond belief? Police, rape and women’s credibility” (2004) 4(1) *Criminology and Criminal Justice* 29 at 30, 53.

¹³⁴ Fred McElrea, above n 127 at 3.

sentence of imprisonment from 2006-2013 has been one of 2508 days, or six years and ten months.¹³⁵ When compared with the maximum penalty, or a sentence of preventive detention, this average may cause some to dispute the reality of the ‘harshness’ of the penalty, particularly as parole eligibility may arise before an offender has served even two and a half years.

In spite of these arguments, a comparison of the average sentences imposed upon all types of violent offending from 1996-2005, excluding murder, indicates that the average custodial sentence imposed upon sex offenders is higher than that for all other offences.¹³⁶ It is thus difficult to dispute the fact that, comparatively, the stakes for those charged with sexual violation are indeed high. Furthermore, although it is not possible to establish direct causation between the ‘high stakes’ of the sentencing framework and the pleas of offenders, it is hard to deny the significance of the incredibly low rate of guilty pleas. This high rate of offender denial is undoubtedly anti-therapeutic on the basis that it precludes proper engagement in treatment processes and does not enable a victim to feel fully acknowledged for the harm they have suffered.

B Penalties, victims and the victim’s voice

In spite of the growing emphasis upon the rights and needs of the victim within the law,¹³⁷ the sentencing framework for sex offenders is argued to operate anti-therapeutically upon this key stakeholder group. The putative penalties are said to discourage victims from reporting the incidence of sexual violation. Moreover, the ‘voice’ given to victims by the Victims’ Rights Act is not invoked by judges in determining the form and quantum of a sentence. This is argued to undermine victim participation in the entire process and to have the potential to result in a sentence that is inconsistent with a victim’s desired outcome.

¹³⁵ This figure has been calculated from data obtained from Official Information Act request: above n 26. See Appendix 2.

¹³⁶ See Jin Chong and Nataliya Soboleva *Conviction and Sentencing of Offenders in New Zealand: 1996-2005* (Ministry of Justice, 2006) at 72.

¹³⁷ Provision for the interests of the victim is one of the purposes of sentencing contained within s 7 of the Sentencing Act. The Victims’ Rights movement has been strong in New Zealand over the past few decades, culminating in the passage of the Victims’ Rights Act and a number of innovative justice initiatives which aim to ‘give voice’ to those who have suffered harm. For a comprehensive discussion of the role of the victim in the New Zealand criminal justice system, see

i) *Putative penalties and victim reporting*

According to Rape Crisis, between 75-90% of all victims of sexual violence have been previously associated with their offender.¹³⁸ Up to a third of all victims are said to know their offender intimately, through close family connections or involvement in an intimate relationship. As adverted to earlier, as few as 7% of victims of sexual offending go on to report their experiences to the police. It is thus difficult to avoid an immediate assumption that there exists a nexus between the predominant context of offending and the extremely low rates of reporting.

Where offending has occurred within the context of a significant familial or close personal relationship, there may be significant reluctance on the part of victims to report the offending behaviour.¹³⁹ This may be due to the potential of the likely sentencing outcomes to factionalize or stigmatise families or social groups. There may also be situations in which the victim wishes to pursue an ongoing relationship with the offender, and would therefore not wish for him to receive a long sentence of imprisonment. The high maximum penalty has also been argued to reinforce ‘real rape’ myths, potentially deterring or discouraging reporting by those who have experienced forms of sexual violence that differ from social expectations or portrayals.¹⁴⁰ This may be the case in situations where abuse is ongoing or normalised within a family context, or where the sexual violation has not resulted in any visible injury.¹⁴¹

The inflexible, high penalties may thus be said to operate anti-therapeutically in the sense that victims will choose not to report and therefore not receive confirmation and support for the harm that they have suffered. A further corollary of a failure to report is that the offending behaviour is likely to continue as there has been no apprehension, acceptance of responsibility nor rehabilitation for the offender.

Although it is difficult to obtain detailed and reliable information in support of these claims, a study of victimisation in cases of sexual violence conducted by the Ministry of Women’s

¹³⁸ Above n 11.

¹³⁹ The following example is given by Cathy Cobley, above n 9: “Although a child victim of intra-familial abuse may well want the abuse to stop, the child may have no wish to see the family torn apart and punishment inflicted on the abuser.”

¹⁴⁰ McDonald and Tinsley, above n 5 at 40-43.

¹⁴¹ See Louise Ellison “A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems” (PhD Thesis, University of Leeds, 1997) at 324: “In the ideal rape the victim is expected to resist vigorously and sustain physical injuries. She is also expected to report an attack immediately.”

Affairs found that 46% of victims surveyed chose not to report their victimisation experiences because of the effect that this would have on their family. 29% of victims said that their relationship with the offender prevented them from reporting. 34% cited shame and fear as further reasons for choosing not to report.¹⁴² Whilst these statistics stem from a small sample size, they provide a degree of support for the claims of therapeutic jurisprudence.¹⁴³

There is certainly an argument to be made that it is not so much the *extent* of the penalties as it is the mere existence of any penalty that deters victims from reporting. Indeed, it has been shown that significant portions of New Zealanders tend to underestimate the maximum penalties, actual sentences given and actual sentences served for sexual offending.¹⁴⁴ However, although the public may not be aware of the particulars, it is highly likely that they are aware of the extent of the social stigma and criminal retribution that exists where convictions are obtained. The sentencing framework provides the basis for this criminal retribution, and can thus be claimed to have an anti-therapeutic effect upon victims and offenders in operating as a deterrent to reporting.¹⁴⁵

ii) *The victim's voice*

Not only do high penalties operate as a deterrent, they are also unable to be mitigated by the wishes of the victim. In assessing the impact to the victim,¹⁴⁶ a judge is to take into account the contents of a Victim Impact Statement (VIS). 'Significant therapeutic benefits', such as the

¹⁴² Jan Jordan and Venezia Kingi *Responding to Sexual Violence: Pathways to Recovery* (Ministry of Women's Affairs, October 2009) at xii.

¹⁴³ The findings in New Zealand regarding victims' reasons for not reporting are mirrored in other research from overseas jurisdictions: for example, see Her Majesty's Crown Prosecution Service Inspectorate and Her Majesty's Inspectorate of Constabulary *Without Consent: A Report on the joint review of the investigation and prosecution of rape offences* (2007) at 34.

¹⁴⁴ See Trish Knaggs, Judy Paulin and Wendy Searle *Attitudes to Crime and Punishment: A New Zealand Study* (Ministry of Justice, December 2003) at 14-17. In this study, 56% of those surveyed underestimated the maximum sentence for rape as being somewhere between 1-14 years. About half of those surveyed underestimated the average sentence given for a rape conviction (8 years) and about half of those surveyed underestimated the average sentence served (5 years) in 1998.

¹⁴⁵ The Law Commission in *Alternative Trial Processes*, above n 12, suggested an alternative process outside the ordinary justice system route so as to enable offenders and families to receive treatment and support without the stigma and shame of a criminal conviction. Although such a process places a large emphasis on the importance of therapeutic considerations, it essentially removes some instances of sexual offending from the criminal domain. This is wholly inconsistent with the fundamental principles of justice, fairness and consistency and is a huge step at odds with the rest of the law in New Zealand. This is thus not seen as a viable solution to the problems posed by the current sentencing framework. A deferred sentencing model, also posited by the Law Commission, is preferable and will be discussed in Chapter Three.

¹⁴⁶ As per the culpability assessment factors in *R v AM*, above n 23 and s 7(1)(c), s 8(f) and s 9(1)(g)-(h) of the Sentencing Act.

amelioration of suffering and increased satisfaction with the criminal justice process have been said to stem from the victim's ability to make a VIS.¹⁴⁷ However, as discussed above, judges have imposed restrictions upon the permissible content of these statements. Recent case law has ultimately meant that 'victims may not include in their victim impact statements (...) their views on the sentence that should be imposed.'¹⁴⁸ Indeed, in *R v Burns*,¹⁴⁹ Chambers J considered it to be 'well-established' that VISs should not involve opinions as to the penalty that ought to be imposed. Furthermore, in *R v Taueki*, the Court of Appeal made it clear that any plea for leniency by a victim is not a relevant consideration in determining the seriousness of the offence.¹⁵⁰ A victim's inability to express themselves about the sentencing outcome is argued to place a significant fetter upon their ability to attain meaningful involvement in the process, and may thus have an anti-therapeutic impact.¹⁵¹

Although judges have no mandate to do anything other than take these statements into account, they are said to use the information provided in victim impact statements in assessing the 'seriousness of the offence'. This level of 'seriousness' or gravity ultimately becomes the determinant of the starting point of the sentence. As a victim is unable to request what they want the offender to receive as a sentence, they are limited to expressing themselves in relation to the *harm* that was done. This limit has led Danica McGovern to conclude that a VIS is employed as a mere 'tool' in the case between state and offender,¹⁵² justifying the imposition of harsh penalties, but not being able to provide a more flexible outcome congruent with the wishes of those involved.

This is not to suggest that all, or even many victims wish for offenders to receive a different penalty than that which the judge determines in accordance with the sentencing framework. However, the involvement of the victim in the process is meant to be therapeutic and healing for the victim. In cases of sex offending, the notion of 'meaningful victim involvement' is somewhat illusory due to the limited penalties available for the multiplicity of offending scenarios, and the victim's inability to have a say on these penalties. Without making

¹⁴⁷ Tyrone Kirchengast "Victim Influence, Therapeutic Jurisprudence and Sentencing Law in the NSW Court of Criminal Appeal" 10(1) Flinders Journal of Law Reform 143 at 155.

¹⁴⁸ See Danica McGovern, above n 41 at 18.

¹⁴⁹ *R v Burns*, above n 40 at [21]

¹⁵⁰ *R v Taueki*, above n 28 at [33].

¹⁵¹ For further discussion, see Danica McGovern, above n 41 at 19: "The failure to meet victims' needs and protect their interests can leave them feeling as if justice has not been done, and result in further physical, emotional and material harm."

¹⁵² McGovern, above n 41 at 34.

assumptions and generalisations as to the needs and wants of victims in cases of sexual violence, it is important to consider the predominant context of offending alongside the likely penal outcomes of a conviction. Justice intervention in these cases may tear families, relationships or social groups apart; a consequence that may discourage victims from reporting and result in anti-therapeutic consequences for all stakeholders.

There is some suggestion that *any* degree of victim involvement in the process is in fact anti-therapeutic, on the basis that the victim's voice 'repersonalizes criminal justice and recasts sentencing not as a finding of law, but as an expression of loyalty.' David Garland, a leading British Criminologist has argued that 'crime victims are [now] led to regard the severity of punishments as a test of this loyalty and a mark of personal respect.'¹⁵³ The Chief Justice of the Supreme Court of New Zealand, Sian Elias, seems to agree with Garland's claims, in questioning the value of placing victims at the 'centre' of the process. Elias contends that 'the detachment and public ownership of the accusatorial system of determining criminal culpability freed victims and their kin from the tyranny of private vengeance.'¹⁵⁴ Indeed, by drawing individual victims back into the criminal justice process, we may be moving away from impartiality, fairness and the like treatment of offenders.

It is not within the scope of this dissertation to address whether victims *ought* to play a significant role in the justice system as a whole. However, in the context of sex offending, it appears that their limited degree of involvement in conjunction with the rigidity of the sentencing framework results in outcomes that are predominantly anti-therapeutic. Judges are not able to impose sentences that are commensurate with the self-described interests and wishes of the victim, but are instead to make an objective assessment of 'harm' suffered and sentence accordingly. This may lead to further disempowerment for a victim, and may in turn discourage future victims from wishing to obtain the vindication of a conviction as they have no control over the penalty that may be given to the offender; who is likely to have been an acquaintance, friend, partner or family member.

¹⁵³ David Garland 'The Cultural Uses of Capital Punishment' (2002) 4(4) *Punishment & Society* at 464 at 464-465.

¹⁵⁴ See Sian Elias, above n 125 at 583.

C *Restorative Justice*

The current manner in which sentencing judges consider the outcomes of restorative justice (RJ) processes is argued to fundamentally undermine their methodology and ideology.¹⁵⁵ This is because the outcomes of RJ processes – typically agreements between offender and victim as to a variety of ways in which the offender can ‘make good’ the harm he has done – are commonly treated by judges as ‘standard mitigating factors’ in the sentencing calculus.¹⁵⁶ Essentially, judges are under a statutory mandate to ‘take into account’ the outcomes of restorative justice processes as per ss 8(j) and 10 of the Sentencing Act.¹⁵⁷ In practice, this means that a judge will award an offender a ‘discount’ on the sentence that would otherwise have been imposed. However, this ‘discount’ is ordinarily a nominal reflection of the offender’s participation in an RJ process and, particularly in cases of sex offending, may only amount to a small reduction in the length of imprisonment imposed upon the offender. This reduction or ‘credit’ is considered to be an insufficient recognition of participation in such a process, as well as an insufficient incentive to encourage the involvement of other offenders. Furthermore, the imposition of a sentence of imprisonment – albeit a ‘reduced’ sentence – may disable the offender from actually fulfilling the therapeutic elements of the agreement that has been reached through the RJ process.

As restorative justice and therapeutic jurisprudence are generally considered to be closely aligned,¹⁵⁸ a failure to ‘take restorative justice seriously’ amounts to a failure to facilitate outcomes that are consistent with the well-being of offenders, victims and the community.

¹⁵⁵ See generally Katherine Basire “Taking Restorative Justice Seriously” (2007) 13(1) *Canterbury L Rev* 31.

¹⁵⁶ Basire, above n 155 at 50.

¹⁵⁷ Furthermore, the Sentencing Amendment Act 2014 has resulted into an amendment to the Sentencing Act 2002: a new s 24A of the Sentencing Act 2002 will come into force at the end of 2014, and *requires* a judge to adjourn sentencing and inquire into the appropriateness of restorative justice in the circumstances. However, this adjournment is contingent on the availability of appropriate RJ processes. In New Zealand, there are currently very few providers of RJ for sexual violence so it is likely that this provision will not apply in many instances of sexual offending.

¹⁵⁸ See Susan Blackwell “Juries, Justice and Therapeutic Jurisprudence: Or Why We Might Well be Concerned About Wrongful Acquittals in Child Sexual Offence Trials” (paper presented at the 2012 International Criminal Law Congress, Queenstown, 12-17 September 2012) at [88]: “Restorative justice and therapeutic jurisprudence stress the need to address underlying issues and completely resolve legal problems.”

i) *Is restorative justice actually 'therapeutic' in cases of sexual violence?*

It is worthy of preliminary consideration that the appropriateness of restorative justice processes for sexual violence cases is controversial. It is claimed that victims of sexual violence may be further victimised by meeting with their offenders,¹⁵⁹ that existing power imbalances may be used to manipulate the process¹⁶⁰ and that the community protection and social retribution obtained through ordinary criminal justice processes cannot and should not be traded for the nebulous notions of 'forgiveness' and 'accountability'.

In spite of these claims, restorative justice plays a significant role in the structure and ideology of our modern justice system. The Sentencing, Parole and Victims' Rights Acts 2002, alongside the Corrections Act 2004, all make provision for these process and encourage them to occur where possible. Furthermore, restorative justice processes in New Zealand have been assessed as having high rates of victim satisfaction and a notable impact upon reoffending rates.¹⁶¹

These positive and largely therapeutic outcomes have led proponents of restorative justice to make compelling arguments in favour of its use in cases of sexual violence.¹⁶² It is suggested that many of the concerns held by critics are able to be allayed by specialist procedures and processes. Indeed, in New Zealand, the Ministry of Justice has developed separate guidelines and standards for the use of restorative justice in cases of sexual offending.¹⁶³ These specialist guidelines are argued to offer a sharp juxtaposition to traditional penal models of justice, and to have 'the potential to encourage victims to report sex crimes and to safeguard communities from sex offenders.'¹⁶⁴

¹⁵⁹ McDonald and Tinsley above n 5 at 419.

¹⁶⁰ Kathleen Daly "Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases" (2006) 46 *Brit J Criminology* 334 at 340.

¹⁶¹ An analysis of reoffending conducted by the Ministry of Justice in 2010 found that restorative justice processes had an 82% rate of victim satisfaction, and reduced reoffending by 20 percent: See Ministry of Justice *Reoffending Analysis for Restorative Justice Cases: 2008-2011* (June 2011).

¹⁶² McDonald and Tinsley above n 5 at 414-423. See also Anne-Marie McAlinden "'Transforming justice': challenges for restorative justice in an era of punishment-based corrections" (2011) 14(4) *Contemporary Justice Review* 386 for a comprehensive argument in favour of adopting restorative justice in the realm of sex offending.

¹⁶³ Ministry of Justice *Restorative Justice Standards for Sexual Offending Cases* (June 2013).

¹⁶⁴ Gabriel Green-Mitchell "Developing a Restorative Justice Framework for Sexual Offenses: Victim Empowerment, Community Protection & Offender Accountability" (16 February 2010) Washington University Law <www.law.wustl.edu>

ii) *RJ as a 'standard mitigating factor'*

Whilst 'significant caution'¹⁶⁵ is required when considering RJ as a possibility in this arena, the therapeutic thesis is that RJ offers an alternative forum that may encourage victims to report and better facilitate the acceptance of responsibility by offenders. However, it is contended that treating the outcomes of restorative justice as a 'standard mitigating factor' in a sentencing decision fundamentally undermines the aims and value of the restorative justice methodology. Accordingly, little incentive exists for offenders to engage in these processes of redress if such engagement will have a very small impact upon their criminal sentence. This in turn undermines the potential therapeutic possibilities of restorative justice for victims and offenders.

Katherine Basire, in "Taking Restorative Justice Seriously", has argued that:¹⁶⁶

"As a standard mitigating factor, the outcomes agreed by offenders and victims will only be taken seriously if they coincide with the state's view of sentencing. Therefore any innovative outcomes will be disregarded in pursuit of consistency. Fundamentally, therefore, the Government's initiatives are incompatible if it wishes to take restorative justice seriously."

As has been made clear by the preceding discussion, the 'state's view of sentencing' in the context of sexual violence is one that favours lengthy terms of imprisonment, premised upon the grounds of 'community protection'. Restorative justice outcomes do not typically align with such sentences, ordinarily requiring opposing conditions for their achievement. This is because restorative justice conferences entail a process of apology and acceptance of responsibility, followed by the development of a plan through which the offender is to make amends for his wrongdoing. This may be through direct reparation to the victim, through engagement in rehabilitation programmes or through other contributions to the community.¹⁶⁷

The plan developed by an offender in a restorative justice conference is highly unlikely to be able to be carried into fruition where an offender's conduct is also subject to a

¹⁶⁵ McDonald and Tinsley above n 5 at 414.

¹⁶⁶ Basire, above n 155 at 57.

¹⁶⁷ See Ministry of Justice *Restorative Justice Standards for Sexual Offending Cases* above n 163 at 10-17.

presumption of imprisonment.¹⁶⁸ Accordingly, the outcomes of such a process are not taken seriously by a judge who, in most cases, has a statutory and common law mandate to impose a sentence of imprisonment. The statutory mandate of a judge as regards restorative justice is much less compelling: a judge is to ‘take into account’ the outcome of a process, and, in some situations, to adjourn sentencing so as to make inquiries as to whether RJ is appropriate.

The best case scenario is that a judge gives an offender ‘credit’ for participation in such a process. Although this may undermine the outcomes agreed upon by victim, offender and family, it recognizes the offender’s participation and acceptance of responsibility for his actions. However, this ‘credit’ is likely to be no more than that given in response to any other mitigating factor.¹⁶⁹

In *R v ST*,¹⁷⁰ Whata J took a restorative justice process into account in sentencing an offender for charges of attempted sexual violation by rape. The key features of the conference, run by Project Restore,¹⁷¹ were said to be the offender’s active participation, his demonstrable sense of shame at his actions, his open description of his conduct and the reasons behind it, ongoing familial support for a non-custodial sentence, his desire to learn and better understand his behaviour and uniform agreement and support that treatment was desirable and appropriate. The conference outcomes were an apology, agreement to enrol in a treatment programme, agreement to continue with a drug and alcohol programme and a request from the family of the offender for consideration of a sentence that would enable him to continue to support his family.

¹⁶⁸ It is worthy of consideration that s 6(1)(d) of the Corrections Act 2004 states that one of the principles to guide the Corrections system is that “offenders must, where appropriate and so far as is reasonable and practicable in the circumstances, be provided with access to any process designed to promote restorative justice between offenders and victims.”

¹⁶⁹ The ‘credit’ may also be conflated with that given for other mitigating factors and not distinctly or clearly given for participation in such a process: see Basire above n 155 at 46.

¹⁷⁰ *R v ST* HC Auckland CRI2010-092-009394 6 December 2011.

¹⁷¹ Project Restore is a restorative justice programme which ‘aims to provide victim-survivors with an experience of a sense of justice, support offenders to understand the impacts of their behaviour and facilitate the development of an action plan which might include reparation to the victim and therapeutic programmes for the offender. Project Restore is a positive example of a programme that takes into account the concerns that are held with regards to restorative justice processes for sexual violence. For further discussion of Project Restore and its development and practice, see Shirley Julich and others “Yes, There Is Another Way!” (2011) 17 Canterbury L Rev 222-228.

Despite these outcomes, the judge imposed a final sentence of imprisonment of three years and ten months. If this sentence is considered in accordance with the sentencing framework and general social and criminal perceptions of offending, it may be viewed as sitting at the lower end of the scale. However, considered through the RJ ideology, it could be said that the innovative and unilateral family decisions were disregarded by the judge in pursuit of consistency. Although it is a judge's mandate to consider consistency as an important element of sentencing, this is likely to limit the efficacy and therapeutic value of the RJ process.

This issue is part of a much larger one: the extent to which the justice system enables and facilitates restorative justice. In the specific context of sex offending, there are many considerations that appear to limit a judge's ability to *actually* take restorative justice processes seriously. The presumption of imprisonment, the heightened judicial scrutiny of the offender's dangerousness and the likelihood of imprisonment essentially means that the outcomes of any processes undertaken are foregone. As the completion of an RJ process is likely to have very little impact upon the sentence that will be given, there is no real incentive to engage in this process of restoration, apology and reparation.

Accordingly, the way in which RJ is employed within the sentencing framework for sexual offending fails to maximize the therapeutic potential of the process. The anti-therapeutic corollary of this is that offenders may have no real reason to participate in restorative justice if a judge is unlikely or unable to take the outcomes of such processes *seriously*. Accordingly, the value and utility of the RJ methodology is undermined for both offender and victim; the positive effects of this process upon recidivism rates and victim satisfaction are bypassed.

D *Rehabilitation*

The rehabilitation of an offender is an inherently therapeutic objective.¹⁷² Offender well-being is maximised through the opportunity to move away from a life of crime and its associated consequences. Where such measures are successful, victims and the community are protected from future harm. In spite of this, therapeutic jurisprudence scholars contend that the way in

¹⁷² 'Rehabilitation' and 'treatment' are used interchangeably in this chapter, and are defined to include any "carefully designed and delivered interventions that focus on offending-related behaviour and attitudes and use recognised psychological methods." See McMaster and Riley, above n 87 at 21.

which rehabilitative programmes are employed within the sentencing framework fetters their therapeutic value. This claim is founded in two separate arguments. The first involves an empirical inquiry as to whether or not rehabilitative programmes can truly yield efficacious results within a penal environment. The second regards the extent to which the sentencing framework promotes and enables the undertaking of rehabilitative measures. Both arguments rest upon an assumption that ‘treatment’ is indeed effective in reducing an offender’s likelihood of reoffending and in lowering overall rates of recidivism.¹⁷³

Section 7(1)(h) of the Sentencing Act 2002 provides that one of the purposes for which a judge may sentence an offender is to assist in the offender’s rehabilitation and reintegration.¹⁷⁴ Although judges have the power to adjourn proceedings and defer sentencing for the purposes of enabling a rehabilitation programme or course of action to be undertaken,¹⁷⁵ the reality is that a sex offender’s ‘rehabilitation’ occurs predominantly within the confines of the Department of Corrections.¹⁷⁶ By offering rehabilitative and treatment programmes within prison, a *prima facie* balance appears to be struck between the multiplicity of sentencing purposes. An offender is able to receive treatment, the community remains ‘protected’ and the general purposes of denouncement and deterrence appear to be served. In theory, this seems like a panacea for a sentencing judge in serving the interests of all stakeholders of the process. In reality, the therapeutic value of such a ‘balance’ is highly disputed.

i) *Can ‘treatment’ be truly effective within prison?*

First, to the claims of ‘efficacy’ of within-prison treatment programmes. Although all of the sentencing purposes are considered to be of equal weight, it is contended that employing

¹⁷³ For a comprehensive meta-analysis demonstrating the effectiveness of treatment for sex offenders, see Friedrich Losel and Martin Schmucker, above n 78. Further, as has been stated earlier in this work, the within-prison treatment programmes in NZ for child sex offenders are assessed as being effective in reducing recidivism, as are community providers of treatment for child sex offenders: see Ian Lambie and Malcolm Stewart “Community Solutions for the Community’s Problem: An Outcome Evaluation of Three New Zealand Community Child Sex Offender Treatment Programmes” (2011) 56 Int J Offender Ther Comp Criminol.

¹⁷⁴ As rehabilitation and reintegration are written together as one sentencing purpose, interpretive questions may arise as to the extent to which this indicates that one is a co-requisite of the other. Gledhill contends that rehabilitation is the means by which reintegration is served: see Kris Gledhill, above n 77 at 55. However, it could also be argued that re-integration weighs in favour of a lesser sentence, or a sentence that does not envisage long-term isolation from society.

¹⁷⁵ Sentencing Act, s 25(1)(d).

¹⁷⁶ See Greg King “A New Kind of Court” (paper presented at NZLS Criminal Law Symposium, 2013): “The problem with our existing sentencing process is that once the Court imposes a sentence it is completely dispossessed of the case, with extremely limited ability to oversee compliance with it.”

treatment programmes within a penal context renders rehabilitation a ‘subordinate element’ of the justice system, impeding the efficacy and preventing the potential of such programmes from being fully realised.¹⁷⁷ One rationale given for these claims is the harassment that sex offenders are said to undergo within prison. This harassment and stigma is said to lead to a denial of their offending and a choice not to engage in specific treatment programmes, or a failure to fully comply with the demands of the rehabilitation on the basis of the ‘cognitive distortions’ that take place during denial of offending. Another rationale disputing treatment efficacy is that the ‘herding’ of like offenders in custody is likely to ‘offer reinforcement in the form of opportunities for further sexual excitement and sharing of their sexual experiences.’¹⁷⁸

It is not within the scope of this dissertation to ascertain the true extent to which treatment can successfully occur within a penal context. This is an empirical inquiry requiring extensive consideration and evaluation of the way in which treatment programmes occur within our prison system, going far beyond the realm of legal analysis. In spite of this, brief consideration ought to be given to recent reports emanating from the specialist units for child sex offenders. These units, Te Piriti in particular, boast a significant reduction in reoffending behaviour.¹⁷⁹ Interestingly, these units employ group therapy strategies; the ‘herding’ of like offenders not impeding efficacy in the way that is claimed above. The programmes in place for adult sex offenders, however, appear to have a lesser degree of success, with the reoffending rate for adult sex offenders sitting slightly above the reoffending rate for the prison population as a whole.¹⁸⁰

ii) *Incentivisation*

In spite of the limits of legal analysis in considering the efficacy of treatment, it is possible to examine the extent to which rehabilitation is promoted by the sentencing framework. As the sentencing judge has very little role in determining the extent to which an offender participates in treatment programmes, it is important to inquire into whether or not participation in these programmes is incentivised or encouraged by any other means. Were rehabilitative

¹⁷⁷ Edwards and Hensley, above n 92 at 646.

¹⁷⁸ Cathy Cobley above n 9 at 199.

¹⁷⁹ Above n 79.

¹⁸⁰ See Arul Nadesu *Reconviction Rates of Sex Offenders: Five year follow-up study: Sex offenders against children vs offenders against adults* (Department of Corrections, January 2011) in which it was found that the reconviction rate for offenders who offend against children (CSOs) was 30% within 6 years of release from prison (ASOs), whilst the reconviction rate for offenders who offend against adults was 54% within 6 years of release from prison.

programmes commonly employed prior to sentencing,¹⁸¹ this in itself could serve as an incentive for offenders to participate fully so as to receive a deduction in their sentence. However, this is not usually the case.¹⁸² A judge may make comments as regards the rehabilitative *potential* of an offender¹⁸³ and sentence him to imprisonment on the explicit basis that this will give him the opportunity to participate in such programmes.¹⁸⁴ However, no sentencing ‘credit’ is given for this, nor could it ever be – an offender’s promise to engage in treatment programmes within prison would be a nebulous ground upon which to shorten the length of a sentence.

When an offender becomes eligible for parole under the Parole Act 2002, a parole hearing is conducted by the Parole Board. The paramount consideration for the Board in determining when an offender is to be released is community safety, as per s 7(1) of the Parole Act. As the main element which goes to ‘community safety’ is an offender’s risk of re-offending, outcomes of rehabilitation programmes are highly relevant on the basis that they are intended to reduce this risk. Accordingly, the Parole Board’s considerations provide an indirect incentive for sex offenders to participate in treatment.

Furthermore, to the extent that an offender’s participation in a rehabilitation programme may form a part of his mandatory ‘individual management plan’,¹⁸⁵ this may incentivise completion of such a programme on the basis that the Parole Board will consider the offender plan and the extent to which it has been completed. Beyond this, however, offenders are not given any direct incentives to receive treatment. Section 7(2) of the Parole Act states that offenders must not be detained any longer than is consistent with community safety, that the rights of victims are to be upheld and that any restorative justice outcomes are given due weight. No specific mention

¹⁸¹ As is possible under the Sentencing Act, s 25(1)(d).

¹⁸² McDonald and Tinsley above n 5 at 389: “Our research has found that rehabilitation of offenders who sexually assault adults indeed takes a ‘back seat’. There is a pressing need for community treatment programmes for these offenders, both in facilitating restorative justice outcomes and also for cases where a restorative process is not appropriate but where the offender would be responsive to treatment. By contrast, all probation areas in England and Wales have implemented one of three accredited treatment programmes for offenders serving a community sentence or who are post-release from prison.” This author’s research using the online databases of LexisNexis NZ and Westlaw NZ found *no* instances where offenders convicted of s 128B charges had their sentences deferred under s 25(1)(d) so as to be able to participate in a community-based rehabilitation programme.

¹⁸³ As per *R v A*, above n 75.

¹⁸⁴ As per *R v J*, above n 76.

¹⁸⁵ Corrections Act, s 51(2).

is made as regards giving ‘due weight’ to the involvement in, or completion of a rehabilitation programme.

It is thus clear that no direct incentives exist for participation in rehabilitation programmes. Certainly they are encouraged, and successful completion of a programme is likely to impact upon the Parole Board’s assessment of an offender’s risk of reoffending and the danger he poses to the community. However, it is arguable that this may be outweighed and disincentivised by the internal policy and practice within the Department of Corrections.

As discussed earlier in this work, within-prison treatment is generally contingent upon an honest disclosure of feelings, sexual tendencies, desires and behaviour. Whilst offender disclosures are important for treatment efficacy, they may also be taken into account by the Parole Board in determining an offender’s risk of re-offending or may form the basis of an application for an ESO. If an offender is aware of the possibilities of such a disclosure, he may be far less inclined to engage in treatment on such a basis.¹⁸⁶

Other treatment ‘disincentives’ have been canvassed in the Auditor-General’s report into the way in which the Department of Corrections manages offenders to reduce reoffending. These include the fact that engagement in rehabilitation programmes may mean that an offender misses out on the opportunity to undergo trade training, and also involves a significant amount of down-time in which offenders are not allowed to engage with other prisoners.

It is worthy of consideration that the notion of ‘incentivisation’ of rehabilitation and restorative justice processes is somewhat controversial. Giving offenders ‘incentives’ to participate in these therapeutic programmes may undermine the intrinsic value of such programmes; promoting engagement in, and giving credit to offenders, for the wrong reasons. Furthermore, the extent to which an offender is able to truly ‘change’ without organic and self-motivated desire can be disputed.

These concerns are able to be allayed, in part, by the fact that mere participation in such programmes is unlikely to result in credit; nor should it. As studies have shown that offenders

¹⁸⁶ See generally Jeslyn Miller “Sex Offender Civil Commitment: The Treatment Paradox” (2010) 98(6) CLR Review in which a similar argument is made in the US context. Miller argues that the “treatment paradox arises because successful treatment and relapse prevention require that an offender discuss his sexual fantasies and past transgressions; yet, unprotected by privilege or confidentiality, these cathartic admissions are utilized in civil commitment proceedings to secure further confinement.”

who drop-out from rehabilitation programmes have a higher risk of recidivism than those who do not participate at all,¹⁸⁷ an ‘incentive’ should only be offered where treatment is assessed to have been a success. Furthermore, an ‘incentive’ may be able to be reconceptualised when considering that a *failure* to give value for participation in treatment programmes is said to undermine the efficacy of this treatment. Although in an ideal world, offender participation in treatment would be based upon an internally-motivated desire to change, the reality is that this motivation may wane in the face of a long sentence of imprisonment. If there is no incentive to bolster this motivation, then offenders may succumb to inertia and general prison mentalities. In spite of this, the value of incentivisation must be weighed against the possibility of impeding treatment efficacy for some by involving unmotivated offenders – who merely seek a sentence reduction – in treatment programmes.¹⁸⁸

E Conclusion

The above analysis illustrates a number of ways in which the sentencing framework for sexual offending in New Zealand operates ‘anti-therapeutically’, impacting negatively upon the well-being of victims, offenders and the community alike. Whilst it is not possible to draw direct and conclusive correlations between the framework and the justice statistics in this area, the TJ assertions are convincing, suggesting a need for significant reform in order to make any kind of significant change to the current statistical realities.

It is apparent that there is no one element of the framework that produces alarming anti-therapeutic results in and of itself. Instead, it is the cumulative effect of a number of elements within this framework that results in a system in which judicial discretion is circumscribed and sentences are lengthy and punitive, imposed without regard to the wishes of victims or the *ongoing* need for community safety.

High penalties – and the multiplicity of penal regimes through which they are determined – are likely to deter offenders from accepting their guilt, as well as promoting reluctance in some victims to report their experiences. Victims are unable to make submissions as to the desired sentence that they believe is appropriate for the offender in question. Restorative justice processes and offender rehabilitation are not incentivised through sentencing, nor is the RJ methodology ‘taken seriously’ by a sentencing scheme that presupposes the need for sex

¹⁸⁷ See Lambie and Stewart above n 173 at 1008; McGregor, above n 78 at 3; Losel and Schmucker, above n 78 at 138.

¹⁸⁸ See Lambie and Stewart above n 173 at 1033.

offenders to be imprisoned. Particularly pertinently, offenders are not required to undergo treatment, nor is the penal context necessarily one in which treatment goals are encouraged or able to be fully actualised.

Not only are these elements of the sentencing scheme anti-therapeutic, they also juxtapose general criminal justice and sentencing policy in New Zealand. This policy places an emphasis upon the *reduction of crime* and the needs of victims. As levels of violent crime – and sex offending in particular – have not decreased over many years, whilst other forms of crime that are subject to ‘softer’ criminal justice policy have,¹⁸⁹ it is possible to make the case that the current sentencing framework is not working in furtherance of the wider system aims.

¹⁸⁹ See Sam Boyer “Police release crime stats: 3.2 drop in recorded offences” *The New Zealand Herald* (online ed, 1 October 2014).

Chapter Three: The Law Commission's Proposed Reform

“In our system the sentencing phase occupies only a very small proportion of the total, both in terms of court time and the commitment of resources. The predominant focus is on proving guilt, rather than making things right. This is because the present system sees punishment of the guilty as the end objective, instead of putting right the wrong for the victim and the community.”¹⁹⁰

The ‘practice of therapeutic jurisprudence at a policy level’ is where ‘changes are made to statutes, court rules and procedures’.¹⁹¹ Accordingly, in adopting a therapeutic lens through which to scrutinise the existing sentencing framework, it is also appropriate to consider the ways in which the status quo could be modified so as to better provide for the well-being of the system stakeholders.

In their 2012 report on *Alternative Trial Processes*, the Law Commission (LC) proposed the establishment of a specialist sentencing court for sexual violence.¹⁹² Although the principles of therapeutic jurisprudence were not explicitly invoked by the LC, the deferred sentencing model appears, *prima facie*, to mitigate many of the anti-therapeutic corollaries of the current sentencing framework. Accordingly, this chapter examines the proposed model so as to ascertain whether it aligns more closely with the therapeutic aims of the criminal justice system than the current sentencing model. Consideration will first be given to the key elements of the proposal and the model’s congruence with the existing legal framework. Second, the apparent benefits of the model will be canvassed, followed by the potential legal, social and practical ramifications.

A *Key elements of the Law Commission’s proposal*

The LC’s proposal suggests the establishment of a deferred sentencing court for sexual offending, entry into which is contingent upon offender ‘suitability’ for the programme, informed victim agreement and a guilty plea. When an offender is accepted into the programme, an individualised ‘intervention plan’ will be created by the presiding judge in conjunction with a number of specialists. This plan is likely to include the undertaking of rehabilitation measures, education and restorative justice processes, as well as the making of

¹⁹⁰ Fred McElrea, above n 127 at 1.

¹⁹¹ Astrid Birgden, above n 88 at 355.

¹⁹² Law Commission above n 12 at 44-47.

apologies and reparation. The offender's task is to complete this plan under judicial and specialist supervision. A failure to do so will result in a reversion back to the ordinary sentencing courts for the imposition of a sentence in accordance with the current sentencing framework. Where an intervention plan is successfully completed, the specialist sentencing judge is able to impose a sentence upon the offender that reflects this; a sentence which 'may or may not' include imprisonment.¹⁹³

The 'high stakes' of a conviction – both for offenders admitting guilt and victims choosing to report – are undoubtedly lowered in a deferred sentencing model, as an offender's sentence is not guaranteed to be one of imprisonment. Offender treatment, restorative justice, education and reparation are more directly incentivised than under the current framework as these processes are not regarded as mere subsidiaries of a lengthy punitive sentence, and are to be undergone before the imposition of the final criminal sanction. Deferment of the final sentence provides symbolic recognition of the importance of these therapeutic considerations, as well as a mechanism through which their aims may be able to be better realised.¹⁹⁴ The requisite guilty plea means that 'cognitive distortions' are likely to be avoided, thus enabling an offender to fully engage in restorative and rehabilitative processes. The model also ensures that denunciation, retribution and deterrence do not fall by the wayside: an offender is still to receive a sentence of some kind following the completion of the intervention plan.

Victim well-being is also large component of the proposed sentencing model. In the LC's proposal, victims are effectively the gate-keepers of the court, determining whether an offender ought to be considered for entry. Victims are also able to make a victim impact statement indicating the impact of the offending upon them as well as the reasons why they support the referral to the specialist court. As discussed in the preceding chapters, more than 75% of offenders are known to their victim, and up to a third of victims have been involved in familial or intimate relationships with their offenders. This element of the LC's proposal addresses these factors, empowering victims to seek redress with less fear of the rigid sentencing options that have the potential to polarise families and social groups. It is also possible that the incentives created for offenders to plead guilty may result in a lower number of cases of sexual

¹⁹³ Above n 12 at 46.

¹⁹⁴ I refer here to the contentions regarding the inefficacy of treatment in a penal environment: above n 78, 79.

violence that reach trial stage, thereby ‘reducing the amount of system trauma incurred by victims’.¹⁹⁵

Unlike the current sentencing framework, the LC’s proposal views the safety of the community as a long-term goal, contending that the incentivisation of treatment increases community protection.¹⁹⁶ Indeed, perhaps what is most striking about this proposal is the fact that certain sex offenders are not automatically assumed to be an immediate danger to society, but are offered a chance to remain within it, fulfilling their intervention plans under intensive supervision. This is in marked contrast to the current legislative approach under which sex offenders are considered to be a danger to society by virtue of the nature of their offending. Concerns regarding short-term community safety are largely allayed by the fact that an offender will be recalled into the ordinary model of sentencing if he fails to comply with any element of his intervention plan.

The LC’s proposal also shares a number of similarities with other specialist courts in New Zealand, such as the Alcohol and Other Drug Treatment Court and the Family Violence Courts. Each of these initiatives is predicated upon the need to prevent reoffending in these areas whilst acknowledging that ordinary criminal sanctions will not achieve this goal. Accordingly, principles of therapeutic jurisprudence are invoked in court procedures and outcomes. The AODT court operates under a deferred sentencing model such as that proposed by the LC for sex offending, supervising offenders in the completion of intervention plans,¹⁹⁷ whilst the FVC takes into account the domestic context within which the offending occurs, making provision for this in the processes and sentences that are handed down. In each of these courts, a careful balance is struck between recognising the seriousness of the offending, making provision for the needs of victims and imposing sentences that will help prevent reoffending.

These problem-solving courts, and the LC’s new proposal, are clearly designed to work in furtherance of the wider, therapeutic aims of the criminal justice system. Reoffending rates are targeted in a nuanced and effective manner, offenders are held accountable in a more holistic

¹⁹⁵ Edwards and Hensley, above n 92 at 659.

¹⁹⁶ Law Commission above n 12 at 46: “This focus on rehabilitation and treatment of the offender increases protection for the community.”

¹⁹⁷ However, the LC proposes that sex offenders would benefit more greatly from extensive *specialist* supervision, as opposed to the extensive *judicial* supervision as occurs within the AODT court: see Law Commission above n 12 at 47.

sense and victim well-being becomes a far greater consideration for judges and offenders alike. The question thus arises: how viable is this scheme in the light of the current legal framework?

B Congruence with current sentencing framework

At first glance, the proposed sentencing model does not deviate significantly from that which is already possible under the Sentencing Act. Section 25 empowers judges to defer sentencing so as to enable a restorative justice process to occur or to enable rehabilitation to be undertaken, whilst s 10 mandates that the court is to take into account offers of amends and agreements between offender and victim, as well as any ‘remedial action’ or measures taken by the offender to compensate, apologise or make good the harm done. However, the LC’s proposal places more emphasis upon the policy that lies behind these provisions, envisaging that they will be invoked as the norm, rather than the exception.

The proposal also indicates that judges will be able to award significantly more ‘credit’ for the engagement in and completion of such processes. Presumably, in order to juxtapose the current model of sentencing, this discount would need to be significant. However, the LC does not specify the extent to which the successful completion of an intervention plan would mitigate an ordinary sentence for sexual violence. Questions arise as to whether the ‘discount’ would amount to a reduction in a sentence of imprisonment, or whether it would involve the imposition of a wholly different kind of sentence. Whilst community-based sentences are the typical outcome for ‘successful’ offenders within the AODT court,¹⁹⁸ it is somewhat more difficult to imagine substituting the current sentencing framework for sex offending with such a model. Indeed, offenders are only eligible for the AODT court when facing charges with a maximum of three years imprisonment.¹⁹⁹ By way of contrast, sex offenders face a maximum sentence of twenty years imprisonment. Furthermore, they are frequently regarded with virulent distaste, having committed actions which are likely to result in serious and indelible harm to another person.²⁰⁰

¹⁹⁸ Lisa Tremewan, above n 102 at 87: “It follows that, if rehabilitation is successful, a community-based sentence would ultimately be available, on a principled basis.”

¹⁹⁹ Above n 102 at 87.

²⁰⁰ For example, consider Talia Shadwell “Rapist a revolting human” *The Dominion Post* (online ed, 30 August 2014).

In spite of this, it is important to note that the average sentence imposed on a sex offender is one of six years and ten months.²⁰¹ Furthermore, in accordance with the current parole rules, such an offender will become eligible for parole – and subsequent release into the community – after serving a mere two years and three months of this sentence. When we consider these sentencing *realities* alongside the proposed sentencing model, the LC’s proposal is perhaps not as radical as it first appears. Furthermore, this dissertation has been focused upon the sentencing of those convicted of sexual violation. There exists a whole host of additional ‘sex crimes’ subject to lower penalties that may also be considered appropriate for the deferred sentencing model.

Indeed, the LC did not outline definitive parameters of ‘suitability’ for entry into the court. However, it is clear that the court would not – or should not – be open to those convicted of the most ‘serious’ instances of sexual violation that would be likely to receive a sentence close to the maximum penalty. Accordingly, the *prima facie* disjunct that arises when considering the current sentencing framework and the putative sentences imposed by the sexual violence court is likely to be mitigated by the restrictions upon eligibility.

This author suggests that the court, whilst retaining an overriding discretion, should generally be open to those convicted of sexual violation who would be judicially assessed as falling within the first ‘rape band’ or ‘USC band’.²⁰² Challenges arise in establishing how this level of eligibility would be assessed, as the specialist court operates prior to sentencing and thus is unlikely to have received submissions pertaining to the ‘banding’ exercise. However, it is suggested that the specialist court should require submissions from counsel concerning an offender’s eligibility. In order to streamline this process with that which would occur in an ordinary sentencing court, these submissions should concern the number of culpability assessment factors present in the offending, and the corresponding ‘band’. In determining an offender’s eligibility for the deferred sentencing model, the judge and specialist panel would then consider these submissions in conjunction with an objective assessment of the offender and the offence. If the offender is deemed to be *ineligible* for the specialist court, the

²⁰¹ Above n 135.

²⁰² I do not suggest that this court should be limited only to those who have committed the act of sexual violation under s 128B. Indeed, in order for the court to be most effective in preventing further victimisation and protecting the community, eligibility should probably extend to those who have attempted to commit sexual violation, and assaulted with intent to commit sexual violation under s 129. However, beyond these inchoate offences, it is not within the scope of this dissertation to determine which of the other sexual offences would be appropriate for the specialist court.

submissions pertaining to his level of offending and ‘band’ would be able to be carried over into the ordinary sentencing exercise.

Questions also arise as to whether such a model should be limited to first-time offenders. However, the operation of the ‘three strikes’ scheme may impose such a limit by virtue of its existence. As offenders convicted and sentenced to imprisonment for a second ‘qualifying offence’ are required to serve their sentence in full with no parole, any sentence ‘discount’ awarded by a judge for completion of an intervention plan would be negated by the offender’s inability to be released on parole. Offenders convicted of a third qualifying offence are bound to be sentenced to the statutory maximum; a rule that is wholly incompatible with the principles of therapeutic jurisprudence and the deferred sentencing model suggested by the LC.

If the Three Strikes scheme was taken out of the equation, therapeutic considerations could certainly form the basis of an argument to allow repeat offenders into the specialist court.²⁰³ Such offenders arguably have the greatest need for effective treatment interventions. However, public confidence in the justice system is another consideration that is to be weighed in determining possible alternatives to the current framework. As social acceptance of a deferred sentencing model is already likely to be highly contentious, it is very unlikely that deferred sentencing and its associated sentence discounts would be regarded by society as an appropriate outcome for repeat sex offenders.

It is also unclear whether the final sentence imposed would remain entirely within the Judge’s discretion or whether there would be a structured system by which sentences are imposed after the completion of an intervention plan. As the entire proposal appears to be premised on the need for flexibility, individual sentencing options and variation between cases,²⁰⁴ it would make sense for a judge to have unfettered discretion in determining this. As has been illustrated, the current sentencing framework is highly structured, constraining judicial discretion in determining the sentence that is to be imposed and the rationales for this. Accordingly, a new model such as that proposed by the LC may be most effective if it lessens this current rigidity. However, in the interests of retaining some degree of sentencing consistency, and in the interests of maximising levels of ‘incentivisation’, one can see how a structured system would provide offenders with a powerful, tangible goal to work towards in completing their plan. The AODT court provides some guidance in this area: whilst offenders within that court are aware

²⁰³ Edwards and Hensley, above n 92 at 657.

²⁰⁴ Law Commission above n 12 at 46.

they may be able to work towards the imposition of a community-based sentence, this is not guaranteed.²⁰⁵ Accordingly, it is suggested that the sexual violence court follows a similar model. Offenders are to be aware that there is the potential for a community-based sentence, but this is not guaranteed, nor is its ambit pre-determined. The specialists who are involved in determining eligibility to the specialist court and devising the offender's intervention plan ought to play a significant role in this sentencing decision, as they will be able to make submissions pertaining to the efficacy of the intervention plan in lowering an offender's risk of recidivism.

The proposal is also *prima facie* inconsistent with the presumption of imprisonment and its underlying protective policy. Although the existence of a presumption does not mandate that a certain amount of offenders must be sentenced in such a way, it undoubtedly creates the general 'rule' to which exceptions may be made. Furthermore, the presumption read in the light of the general presumption *against* imprisonment indicates that judges are to impose such sentences on a protective basis. The deferred sentencing model, on the other hand, incentivises and prioritises treatment and other therapeutic considerations, suggesting that the danger posed to society by sex offenders is able to be mitigated by something other than a sentence of imprisonment. It could even be said that the deferred sentencing model 'presumes' that prison is the least appropriate option in the first instance. Accordingly, in order to legally legitimate the proposal, it is likely that the presumption of imprisonment would be required to be removed or, at the very least, modified.

C 'Just punishment', consistency and the role of the victim

Whilst the proposal is *prima facie* coherent with the broad aims of criminal justice policy, it is clear that it does not align with the existing legal framework. Furthermore, the proposal may come into conflict with a number of other key principles of sentencing.

If an offender completes the majority of an intervention plan, but fails to see it through until the end, therefore receiving an "ordinary" sentence, he will end up undertaking more action in response to his crime than an offender who does not enter the specialist sentencing court. The deferred sentencing model has thus been considered to have the potential to result in 'double

²⁰⁵ This ensures that there is 'sufficient leverage' to keep offenders engaged in the programme. Rehabilitation must be 'successful' in order for the community-based sentence to be available on a principled basis', as per Lisa Tremewan, above n 102 at 87.

jeopardy’ or ‘double punishment’; an undoubtedly anti-therapeutic outcome.²⁰⁶ However, as an intervention plan is not intended to be punitive but rehabilitative, nor is it an element of the offender’s final ‘sentence’, it is inaccurate to consider this to be a ‘punishment’. Further, as entry into the court is contingent upon an offender being informed as to what the process will entail, as well as his willingness to participate, it is less a ‘punishment’ and more a constructive opportunity for an offender to receive a reduced sentence.

The deferred sentencing scheme is *more* likely to result in a perception that sex offenders are receiving more lenient treatment than other serious offenders. The general view in society is that the ‘seriousness’ of an offence is reflected in the extent of the penalties available. Furthermore, social attitudes towards sex offenders often conflate ‘justice’ with the imposition of lengthy, retributive prison sentences. Under the proposed model, however, the penal element of sentencing appears to be secondary to rehabilitative and restorative conceptions of justice. A major concern that flows from this is that society may not believe that ‘just punishment’ will be delivered under such a model, and that public confidence in the law may subsequently decline. Just as an overly punitive scheme may deter victims from bringing forward their stories, so too may a system viewed as ‘soft on crime’ discourage victims and communities from placing any trust in the justice system.²⁰⁷

Not only may sex offenders be viewed as receiving outcomes inconsistent with the serious nature of their offending, the existence of the specialist court is likely to impact upon the consistency of sentences given between like offenders. The difference in penalty is determined, in part, by the victim’s agreement as to the offender’s suitability for the programme. Whilst this element of the court process is undoubtedly intended to promote victim well-being, this leaves the fate of offenders in the hands of their victims. This has the potential to undermine public confidence in the system whilst also bringing issues of fairness sharply into focus. As crime is conceptualised as a wrong done against the rules of the sovereign state,²⁰⁸ it is not

²⁰⁶ McDonald and Tinsley above n 5 at 392. Section 26(2) of the New Zealand Bill of Rights Act 1990 states that “no one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.”

²⁰⁷ The Law Commission made some mention of this consideration, contending that the issue would be able to be addressed through educating the public as to the wider effects of such a sentencing model. Whilst education is a step in the right direction, public attitudes towards sex offenders are long-standing and often extreme.

²⁰⁸ As per Hall, above n 19 at I.3.2, the retributive object of sentencing ‘fulfils that part of the social contract whereby the citizen yields to the state the right to revenge for wrongs done to him or her in return for protection by the state from the dangers inherent in anarchy.’ See also Sian Elias above n 125 at 583.

prima facie ‘fair’ or appropriate for one offender to receive a more lenient sentence than the other on the basis of the victim’s feelings. Furthermore, the ‘desirability of consistency’ is one of the principles by which judges are to sentence offenders under s 8 of the Sentencing Act. It is the Law Commission’s stance that “offenders committing similar offences in similar circumstances should receive roughly the same sentence, unless some relevant factor that distinguishes them can be found.”²⁰⁹ Whilst the victim’s voice is undoubtedly a crucial consideration in ascertaining the harm that has been caused, the victim’s voice should not be the ‘relevant factor’ that becomes determinative of the policy behind the sentence imposed.

Certainly, in the interests of victim well-being, victims need to be able to receive appropriate redress for the serious harm they have suffered. However, this author submits that victims should not be the ultimate gate-keepers of such a court, as is suggested by the Law Commission.²¹⁰ Whilst previous discussion has considered the circumscribed role of victims in the current system, and the anti-therapeutic corollaries that may flow from this, *extensive* victim involvement in the process goes too far in the opposite direction, ‘repersonalising criminal justice.’²¹¹ Instead, victims ought be able to make detailed submissions regarding the harm the offender has caused them, their opinion as to the action the offender should take and the penalty they wish for them to receive.

This degree of involvement in the process is likely to mitigate the anti-therapeutic impact of the current sentencing calculus *without* creating a role for victims that is inconsistent with the fundamental basis of criminal justice in New Zealand. As crime is conceptualised as a wrong against the state, it is incoherent to posit that victims should be able to determine the way in which an offender is to be sentenced. By giving victims determinative power over an offender’s rehabilitation prospects, the model would shoulder responsibility upon them in determining the ongoing safety of wider society. Moreover, significant issues would arise in cases of sex offending against children. Although children are incredibly vulnerable and likely to suffer immense harm from sexual offending, it is not appropriate that they – or their representative –

²⁰⁹ New Zealand Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006) at 21.

²¹⁰ The Law Commission proposal, above n 12 at 47 states that “in order to maximise the potential of the specialist court, it is proposed that it should be available not only for cases involving adult victims, but also in cases where the victim is a child or young person. However, protocols would need to be put in place to ensure that their consent and participation was obtained in a manner that was appropriate to their level of understanding and maturity, and that they were not subject to exploitation or pressure.”

²¹¹ David Garland, above n 153.

should determine whether an offender is able to receive treatment, as appears to be suggested by the Law Commission.

However, even if victims do not play such a role, the deferred sentencing model is still likely to result in inconsistencies and potential ‘unfairness’ between sentences given to like offenders. In spite of the establishment of ‘criteria’ for eligibility, the specialist court must indeed retain discretion as to which offenders enter the deferred sentencing model. Accordingly, offenders who have committed similar crimes may receive very different sentencing outcomes; a result which appears patently unfair. However, it is important to consider that ‘fairness’ is a multidimensional consideration, involving both consistent and *proportionate* responses.²¹²

A commonly adopted view as to the meaning of proportionality is that the sentences that offenders receive are to be proportionate both to the harm they have done and their degree of responsibility.²¹³ Whilst this approach is typically invoked as an element of retribution,²¹⁴ it may also be interpreted as a therapeutic consideration: a truly ‘proportionate’ and ‘fair’ sentence could be one that best enables an offender to take responsibility by making amends, engaging in restorative justice and undergoing rehabilitative measures. Indeed, Judge Lisa Tremewan, of the new AODT court, is of the opinion that “an approach that addresses the core or underlying issues is one which requires much more accountability from the offender anyway.”²¹⁵ It is thus important to note that the variation in outcomes provided for by a deferred sentencing model does not necessarily amount to unfairness, provided that the sentences imposed are proportionate. Furthermore, where proportionality is interpreted as a therapeutic consideration, consistency in purpose is maintained: the overarching sentencing purpose becomes one of achieving broad-brush therapeutic outcomes, in which offenders are supported in moving away from crime so as to protect the community from future victimisation.

²¹² Whilst proportionality is not expressly articulated as a sentencing principle, it is well settled that sentencing judges are to be guided by proportionality. Section 8(g) Sentencing Act provides that the sentencing judges must impose the least restrictive outcome that is appropriate in the circumstances. S 8(h) provides that the judge must take into account any particular circumstances of the offender that mean a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be *disproportionately* severe. Furthermore, s 9 of the NZBORA provides that everyone has the right not to be subjected to torture or to cruel, degrading or *disproportionately severe* treatment or punishment.

²¹³ As per the broad approach of the Canadian Criminal Code, RS C 1985 c 46, s 718.1: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

²¹⁴ Hall, above n 19 at I.4.2.

²¹⁵ Lisa Tremewan, above n 102.

D Conclusion

There is certainly a strong case in favour of the establishment of a court which would address the therapeutic needs of sex offenders, victims and communities. Such a court is likely to work to further the wider aims of the justice system as it is premised upon the need to reduce crime and support victims in a way that the current sentencing framework does not allow. However, whether or not such a court can be ‘readily and effectively incorporated’ into the existing sentencing framework is open to debate.²¹⁶

On the one hand, a sentencing judge is already empowered to defer sentencing in order to inquire into and enable restorative justice processes and rehabilitative measures to be undertaken. Accordingly, encouraging judges to utilise these sections of the Sentencing Act more frequently is not *prima facie* problematic.

On the other hand, sex offenders are subject to a presumption of imprisonment and a host of additional penal schemes premised upon the need for community protection. The body of law that applies to sex offenders assumes that they are inherently dangerous by virtue of their offending, and that the risk they pose to society is only able to be mitigated by imposing a sentence of imprisonment. These assumptions are reflected in statistics and extensive judicial precedent indicating that the vast majority of sex offenders are incarcerated. A specialist deferred sentencing model challenges these assumptions, promoting the possibility that the ‘danger’ posed to society by sex offenders is able to be mitigated by something *other* than a sentence of imprisonment.

As the Law Commission’s proposal would be an option available to some offenders, but not others, it is likely that a significant disjunct could exist between the sentences – and subsequent opportunities – given to offenders who have committed similar offences. This inconsistency contravenes the policy that lay behind the Court of Appeal’s decision to impose a banded system of sentencing in their guideline judgment of *R v AM*, as well as the key sentencing principle of ‘consistency’. Whilst sentencing parity is trumped by therapeutic considerations

²¹⁶ In promoting a deferred ‘treatment track’ model similar to that proposed by the Law Commission, scholars Edwards and Hensley opine that ‘an integrated and prioritised emphasis on addressing the therapeutic needs of [sex] offenders **can** be readily and effectively incorporated into existing criminal justice systems while maintaining their normative values and objectives.’ Above n 92 at 660.

in the AODT Court, Youth Court and FVC, this is not as readily acceptable in an area of offending where the ‘stakes’ are so high. If one offender is considered eligible for entry into such a court and a significantly reduced sentence, whilst another remains subject to the harsh penal framework currently in existence, the potential for unfairness abounds. This unfairness is more acute if victims are given the mandate to determine which offenders are able to enter the deferred sentencing model, as was suggested by the Law Commission. Whilst the victim’s voice – and well-being – ought to be a crucial consideration throughout trial and sentencing processes, caution must also be taken against ‘repersonalising’ criminal justice and bringing notions of private retribution back into the system.

These objections are largely able to be overcome through modification to the LC’s proposal. Victims should not have a determinative say upon whether an offender should be eligible for entry into the court. Instead, they should be afforded rights to make submissions on an offender’s eligibility, the harm they have suffered, and their desired outcomes. This is likely to mitigate the anti-therapeutic effects of the current framework without violating the fundamental conception of crime as a wrong done against the state. Whilst the potential for unfairness between sentences imposed upon like offenders remains, this is not insurmountable: other problem-solving courts sacrifice consistency in favour of ‘the bigger picture’. Furthermore, proportionality, another key element of fairness, is likely to be enhanced under such a model.

A specialist sentencing court provides a sharp juxtaposition to the sentencing framework that applies to sex offenders. Whilst this may mean it poses problems in terms of implementation, it also has the potential to result in significantly different outcomes. It is possible that the court could be established under the existing legal framework, and a significant case exists to suggest that it should indeed be established. However, it is likely that legislative amendment to the presumption of imprisonment would be necessary in order for the model to be truly legitimate, resulting in a significant departure from sentencing precedent.²¹⁷

²¹⁷ Practical problems are also likely to arise in the implementation of the LC’s proposal. There are currently very few community providers of rehabilitation and restorative justice processes for sex offenders, yet the deferred sentencing model relies heavily on their existence and efficacy. However, the community providers that do exist in New Zealand – namely Project Restore and STOP – have proven effective in providing treatment and support to a small number of sex offenders and victims. See Julich above n 172 and Hamish Dixon “The Case for Providing Treatment for People who have Sexually Offended but who have not been convicted by our courts” Wellstop <www.wellstop.org.nz>. It is thus clear that there are models from which further programmes could be developed and implemented. Whilst this may appear costly and time-consuming in the short-term, McDonald and Tinsley argue that the impact upon recidivism and imprisonment rates in the long-term would mitigate

Conclusion

“Any sentencing system – indeed, any particular sentence – will inevitably be evaluated by measuring its success in reaching its goals and serving its purposes. A divorce of sentencing from its purposes threatens the credibility of the (...) criminal justice system. A reconciliation of the two is essential.”²¹⁸

The law pertaining to sexual violation has long been the subject of persistent and resonant calls for reform. In order to truly and effectively address the anomalous justice statistics in the realm of sex offending, reform is indeed necessary. At present, the sentencing of sex offenders does not align with the overarching purposes of the criminal justice system. The therapeutic goals of the system are being served by anti-therapeutic means, resulting in anti-therapeutic outcomes for victims, offenders and communities alike.

It is easy to sympathise with the view that the serious harm inflicted on a victim of sexual violence justifies a lengthy, retributive prison sentence. Indeed, this author does not wish to minimise the seriousness of sexual offending and the magnitude of harm that may flow from its occurrence. However, when consideration is given to the wider effects of such sentences in addressing the incidence of sexual violence in our community, the deficiencies of this approach become clear. Whilst offender accountability is crucial, the threat of a lengthy period of imprisonment is an ineffective route through which this is to be attained. The ‘high stakes’ of conviction undoubtedly discourage offenders from admitting their guilt. Furthermore, given the predominant context of offending, it is likely that the putative penalties deter victims from reporting their victimisation experiences in the first place. Where such penalties are imposed, the motivation and ability of offenders to receive effective treatment, and to engage in restorative justice processes, is adversely affected.

The establishment of a specialist sentencing court for sexual violence, such as that proposed by the Law Commission and expounded upon in Chapter Three, is considered to be a significant step in the right direction towards achieving better criminal justice outcomes. The

this short-term expense. Indeed, by 2003, the Kia Marama treatment programme alone was said to have ‘reaped net savings of more than \$3 million from its treatment of 238 Kia Marama offenders, once programme costs of \$2 million are offset against a gross saving of \$5.6 million.’ See Bakker and others, above n 79 at 2.

²¹⁸ Lawrence Lustberg “The Importance of Purposes in Choosing between Prison and Probation” (1991) 3(6) Federal Sentencing Reported 334 at 335.

deferred sentencing model is premised upon therapeutic considerations and prioritises both the treatment of offenders and the interests of victims. Furthermore, the court is likely to mitigate many of the anti-therapeutic corollaries of the current sentencing framework.

Chapter Three has illustrated the difficulties that may arise in attempting to implement such a court. A deferred sentencing model through which offenders are able to obtain significant sentencing discounts is likely to clash with social conceptions of justice and the crucial sentencing consideration of consistency. A specialist court may be considered to be ‘soft on crime’ as well as creating the potential for unfairness between like offenders. The model is also likely to be inconsistent with the presumption of imprisonment and requires judges to deviate from sentencing precedent. These objections cannot be overlooked: proponents of TJ maintain that a therapeutic agenda is to be promoted only insofar as this is coherent with general principles of justice.

Nevertheless, the TJ approach to sentencing is likely to enable judges to ‘change the future behaviour of litigants’ and ensure the ‘well-being of communities’²¹⁹ in a way that the current framework does not. The Law Commission’s model, amended accordingly, may encourage more victims to report, motivate offenders to plead guilty and incentivise engagement in treatment and restorative justice. In this way, the sentencing of sex offenders could indeed work to ‘maximise the overarching aims of the law’, protecting communities from further crime and victimisation, promoting victim satisfaction and enabling communities to place more trust in the justice system as it responds to this challenging and complex area of criminal activity.

It was suggested to the author during the course of this research that sexual violence is the ‘final frontier’ for the application of therapeutic jurisprudence. The purpose of this discussion has been to illuminate the reasons why this frontier must be overcome, and to point to a conceivable way in which this could – and should – be done. Whilst TJ does not provide a panacea to the problem of sexual violence, nor would its implementation be possible without challenges to existing legal principles, frameworks and social norms, it is hoped that this work will serve as a stimulus for further consideration of the law’s response to sexual violence, as well as providing a strong argument in favour of the establishment of a specialist sentencing court.

²¹⁹ G Berman and J Feinblatt, above n 13 at 3.

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Appendix 1

Culpability Assessment Factors, ‘Rape Bands’ and ‘Unlawful Sexual Connection Bands’ (USC Bands) as outlined in *R v AM* [2010] 2 NZLR 750, [2010] NZCA 114:

Culpability assessment factors: see judgment text at [37]-[64]

- Planning and premeditation
- Violence, detention and home invasion
- Vulnerability of victim
- Harm to the victim
- Multiple offenders
- Scale of offending
- Breach of trust
- Hate crime
- Degree of violation
- Consensual sexual activity immediately before the offending
- Offending against person with who offender is in or has been in a relationship
- The views of the victim

Rape Bands: see judgment text at [90]-[112]

Rape Band One: 6-8 years: No factors that increase seriousness of offending are present.

Rape Band Two: 7-13 years: Two or three of the factors increasing culpability to a moderate degree are present.

Rape Band Three: 12-18 years: Appropriate where offending involves two or more factors increasing culpability to a high degree, or more than three of those factors to a moderate degree.

Rape Band Four: 16-20 years: The presence of the same sorts of factors that place offending towards the higher end of rape band three but it is likely that the offending will involve multiple offending over considerable periods.

USC Bands: see judgment text at [113]-[124]

USC Band One: 2-5 years: Covers offending at the lower end of the spectrum. Where none of the culpability factors that increase the seriousness of the offending is present a starting point at the bottom end of band one is appropriate. Where one or more of these factors is present to a low or moderate degree, a starting point closer to the top of the band is required.

USC Band Two: 4-10 years: Appropriate for cases of relatively moderate seriousness. It encompasses cases that involve two or three of the factors increasing culpability to a moderate degree.

USC Band Three: 9-18 years: Appropriate for the most serious offending of this type. It encompasses cases which involve two or more of the factors increasing culpability to a high degree, for example, a particularly young victim or an extensive period of offending. Similarly, band three is appropriate where more than three of those factors are present to a moderate degree.

Appendix 2

Information obtained from Official Information Act Request to Ministry of Justice, 11 August 2014.

Table 1: *Number of people charged and convicted with offences under s 128B of the Crimes Act 1961, 2006-2013.*

	2006	2007	2008	2009	2010	2011	2012	2013
Charged	598	607	638	659	582	638	680	710
Convicted	217	214	238	258	238	252	246	317

Table 2: *Number of people charged for offences under s 128B of the Crimes Act 1961 who pleaded guilty at any stage, 2006-2013.*

2006	2007	2008	2009	2010	2011	2012	2013
148	147	160	173	155	134	154	183

Table 3: *Most serious sentence received by people convicted of offences under s 128B of the Crimes Act 1961, 2006-2013:*

	2006	2007	2008	2009	2010	2011	2012	2013
Imprisonment	212	206	217	244	220	235	234	293
Home Detention, other custodial	0	0	16	7	13	9	11	14
Community Detention	0	1	2	4	2	1	0	3
Intensive Supervision	0	0	3	3	2	4	1	4
Community Work	0	1	0	0	0	1	0	0
Supervision	3	1	0	0	0	0	0	0
Other	2	5	0	0	0	1	0	3
Discharge	0	0	0	0	1	1	0	0

Table 4: *Average length (days) of sentences of imprisonment received by people convicted of s 128B offences, 2006-2013*

Year	Number of people	Mean (days)	Minimum (days)	Maximum (days)
2006	212	2359	150	6570
2007	206	2271	365	5479
2008	217	2411	300	5840
2009	244	2393	150	6570
2010	220	2658	515	7115
2011	235	2748	545	6385
2012	234	2556	337	6570
2013	293	2665	545	7300

Note: Preventive detention sentences, which have an indefinite length, have been approximated in this data with the value of the minimum non-parole period imposed.

Appendix 3

Sentencing Act 2002, s 7:

7 Purposes of sentencing or otherwise dealing with offenders

- (1) The purposes for which a court may sentence or otherwise deal with an offender are—
- (a) to hold the offender accountable for harm done to the victim and the community; or
 - (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
 - (c) to provide for the interests of the victim of the offence; or
 - (d) to provide reparation for harm done by the offending; or
 - (e) to denounce the conduct in which the offence was involved; or
 - (f) to deter the offender or other persons from committing the same or a similar offence; or
 - (g) to protect the community from the offender; or
 - (h) to assist in the offender's rehabilitation and reintegration; or
 - (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).
- (2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.