IS PREVENTIVE DETENTION STILL NECESSARY? A CASE FOR REDUCING EXCESS

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I Introduction

The availability of the sentence of preventive detention has been justified with little more than passing reference to the right to the public to be protected from harm. Meanwhile, there has been consistent expansion of the state's powers to restrain and detain offenders it deems dangerous. In light of this expansion, this dissertation queries whether or not we still need preventive detention.

When the law seeks to protect the public through imposition of various restrictions, it necessarily engages with conceptions of the appropriate use of coercive state powers, individual rights to liberty and individual rights to protection from serious harm. Detaining an individual or restricting their movements in the community to protect other individuals limits the right to liberty for the individual in order to uphold the public's right to protection from harm. The law must strike a balance. This dissertation uses the paradigm of penal minimalism to locate this balance and assesses preventive detention from that standpoint.

On multiple points, preventive detention strikes this balance poorly. Its ongoing use in the penal system constitutes excessive use of state power and represents a general inclination towards unnecessary coercion. I argue that the answer to the dissertation's central question is therefore negative. Preventive detention is no longer necessary. This argument runs through four chapters.

Chapter II outlines the working paradigm of penal minimalism and introduces the ever-expanding protective measures that warrant investigation under that paradigm. It concludes that the ad hoc addition of preventive measures has resulted in penal excess and warrants a principled consideration.

Chapter III then begins to substantively address the question of whether we still need preventive detention. It argues that ESOs and PPOs are able to protect the public such that preventive detention exceeds what is necessary to protect the public.

Chapter IV presents another ground on which preventive detention exceeds the protective goal. It argues that the criteria for the more recent measures, ESOs and PPOs, reflect a more modern and restrained approach to risk management. This approach highlights features of preventive detention that are unjustified and excessive.

Chapter V looks to the fundamental expressions of preventive detention's excess. As a criminal penalty, it is problematic at its core. This argument is supported by a comparison to the sentence of life imprisonment and an exploration of preventive detention's contradictory attitude towards rehabilitation.

II Applying Penal Minimalism to Preventive Measures

A Introduction

This chapter outlines the dissertation's working paradigm of penal minimalism and how its application to protective measures calls into question the ongoing relevance of preventive detention. It begins by defining penal minimalism and expressing the important principles it seeks to protect, like individual autonomy, proportionality and the presumption of innocence. It then considers the legislative development of the three measures used to constraint the offenders deemed to pose the greatest danger to society: preventive detention, ESOs and PPOs. The emerging trend is continual increase in state interference that does not properly demonstrate necessity or appropriateness. It is instead substantiated by specious claims that additions and expansions 'plug gaps' in the existing scheme. The product is penal excess, which prompts a reconsideration of the scheme under penal minimalism.

B Defining penal minimalism

Penal minimalism advocates that the state should interfere no more than is necessary and holds that any restriction of liberty by the state beyond necessity constitutes penal excess.[1] As a paradigm which prescribes restraint, penal minimalism applies distinctively to protective measures, and is particularly useful in determining where boundaries ought to lie. In David Hayes' recent account of penal minimalism, he acknowledges that any definition of 'excess' in a given system has to take into account the specific goals that the system has.[2] In the big picture, such goals could include achieving retribution, deterrence, or rehabilitation,[3] but when applied to measures which purport to pursue the sole goal of public protection, it can more clearly hold the state accountable for penal excess.

In this context, the express purpose of preventive detention is "to protect the community from those who pose a significant and ongoing risk to the safety of its members"[4], and on the High Court's account is emphatically "not punitive"[5]. The purpose of ESOs is to protect members of the community from offenders who, after receiving a determinate sentence,

[1] David Hayes *Confronting Penal Excess* (Hart Publishing, London, 2019) at 14

[2] Ibid.

[3] Ibid.

[4] Sentencing Act 2002, s 87

[5] *R v Tepania* [2014] NZHC 2230 at [27]

pose "a real and ongoing risk of committing serious sexual or violent offences."[6] In s 4 of the Public Safety (Public Protection Orders) Act 2014, the Act's objective is "to protect members of the public from the almost certain harm that would be inflicted by the commission of serious sexual or violent offences", and expressly is not to punish persons against whom orders are made. Any of these measures will be excessive if they go beyond what is strictly necessary for public protection.

The nature of the state's role in public protection thus inherently limits the scope of its interventions. On the minimalist view, the preventive goal functions to both authorise state invention and also to strictly constrain it.[7] Political theorists widely accept that the state has an obligation to prevent harm to people,[8] and in the context of liberal democracies such as New Zealand this obligation is the result of the value attributed to individual freedom. Penal theorist Andreas von Hirsch posited the "relatively straightforward suggestion that helping to prevent persons from mistreating others is an important and legitimate function of the state"[9], because one of the defining roles of the state is "encouraging peaceable living among citizens and… safeguarding the basic means by which citizens can live good lives."[10]

This characterisation of the state inevitably evokes notions of social contract theory whereby people cede authority to the state so that it can create and maintain peaceful conditions.[11] Liberalism may then accept state coercion in the criminal justice realm, but the value ascribed to individual autonomy is substantial too, and a person must be allowed to exercise that autonomy unless and until it infringes on the capacity of others to do the same.[12] The state's ability to restrict a person's liberty under a preventive measure is therefore limited to what allows the public to exercise autonomy free from harm, and

[6] Parole Act 2002, s 107I(1)

[7] Andrew Ashworth and Lucia Zedner Preventive Justice (Oxford University Press, Oxford, 2014) at 7

[8] Ibid.

[9] Quoted in Andrew Ashworth and Lucia Zedner "Punishment Paradigms and the Role of the Preventive State" in A P Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds) *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing, Oxford, 2014) 3 at 3.

[10] Ibid at 3

[11] David Hayes *Confronting Penal Excess* (Hart Publishing, London, 2019) at 18

[12] Ibid at 20.

nothing more. Interventions ought to be the least restrictive appropriate alternative,[13] a sentiment expressed as a principle of sentencing in New Zealand's own Sentencing Act.[14]

Establishing that any restriction of liberty, through preventive detention, an ESO, or a PPO is necessary for protective purposes is paramount because typical principles of proportionality and the presumption of innocence, which exist to protect liberty in the criminal sphere, are at odds with the protective object.[15] They are directly and unavoidably thwarted when an individual is subject to restrictions past what a court has deemed necessary for retributive purposes, and on account of potential future offending that exists only in the hypothetical. Andrew Ashworth and Lucia Zedner observe that the fact of prosecution can perhaps account for a displacement of the general presumption of harmlessness that citizens enjoy, thus putting the state on notice and potentially justifying further scrutiny of the risk posed by a certain offender.[16]

Restriction of liberty by the state can perhaps then be said to be necessary when an individual has committed a sufficiently serious offence and risk assessment suggests they are a danger to the public. Such a conclusion aligns with the statutory requirements in each measure for an offender to have committed a qualifying offence and to be found to pose a certain level of risk. We can critically analyse how the statutes reflect those requirements, and where and how they strike a balance between individual liberty and public protection. If the line they draw is not principled and adequate under penal minimalism, it exceeds what is necessary for the state to meet its protective obligation.

C Unprincipled legislative expansion of protective measures

1 Preventive Detention

Preventive detention follows the typical pattern of requiring the commission of a qualifying offence followed by risk-assessment that demonstrates that an offender is a danger to the public. The qualifying offences have grown and prerequisites like age and prior offending

[13] Andrew Ashworth and Lucia Zedner *Preventive Justice* (Oxford University Press, Oxford, 2014) at 168.
[14] Sentencing Act 2002, s 8(g) – in sentencing or otherwise dealing with an offender, the court "must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A…".
[15] Andrew Ashworth and Lucia Zedner Preventive Justice (Oxford University Press, Oxford, 2014) at 147.
[16] Ibid at 148.

have been reduced and removed respectively.[17] Risk assessment itself takes place in the judicial process, guided by clinical reports and a series of considerations articulated in statute and in the common law.

To impose the sentence in its current form, the court must be satisfied that the offender is "likely to commit another qualifying sexual or violent offence if… released at the sentence expiry date"[18], and it must consider reports from at least 2 appropriate health assessors about this likelihood[19] and undertake a series of mandatory considerations. Per s 87(4), they must take into account any pattern of offending disclosed by the offender's history, the seriousness of the harm to the community caused by the offending, information indicating a tendency to commit serious offences in future, the absence or failure of efforts by the offender to address the cause or causes of the offending, and the principle that a lengthy determinate sentence is preferable if it provides adequate protection for society.

These requirements are essentially a codification of factors the courts considered in determining whether or not to impose preventive detention prior to the 2002 legislation, as acknowledged by the Court of Appeal in *R v Parahi*.[20] More recently, the Court of Appeal in *R v Kumar* characterised the assessment of whether an offender is likely to commit another qualifying offence as "evaluative rather than discretionary", requiring "a value judgement or opinion about future risk, founded on analysis of the facts of the index offending, any pattern of past offending, the seriousness of any harm done, any past efforts at rehabilitation and any tendency to reoffend".[21]

Preventive detention is a long-standing sentence. It was first introduced in the Criminal Justice Act 1954 and it expanded in the 1980s from applying to recidivist sexual offenders to include some violent offending, and then in the 1990s to include first time sexual offending.[22] The Sentencing Act 2002 further expanded eligibility for preventive detention by lowering the minimum age from 21 to 18, expanding the range of qualifying offences, particularly violent crimes, removing the requirement for previous convictions for

[17] Rajesh Chhana, Philip Spier, Susan Roberts and Chris Hurd *The Sentencing Act 2002: Monitoring the First Year* (Ministry of Justice, March 2004) at 19.

[18] Sentencing Act 2002, s 87(2)(c)

[19] Sentencing Act 2002, s 88(1)(b)

[20] [2005] 3 NZLR 356 at [36]

[21] *R v Kumar* [2015] NZCA 460 at [83]

[22] John Meek "The Revival of Preventive Detention in New Zealand 1986-93" (1995) 28 ANZJ of Crim 225 at 227.

qualifying offences and reducing the minimum period of imprisonment a court is able to impose in a sentence of preventive detention from ten years to five years.[23]

The four key expansions under the 2002 Act do not seem to correspond well to any demonstrated but untargeted risk to the public. An early report acknowledged that the youngest of the 14 offenders sentenced to preventive detention in the year following the enactment of the new legislation was 28 years old, and further there were no cases in which the sentence was even considered for an offender under 21 years old.[24] To date, only one offender under the age of 20 has been sentenced to preventive detention.[25] The expansion of qualifying offences affected only one of the 14 offenders sentenced to preventive detention in the following year. The expansion of violent qualifying offences is somewhat misaligned with the predominant use of preventive detention for sexual violation offences. The removal of the requirement to have previous convictions does not seem to target any demonstrable risk that was not previously captured because s 87(4)(c) requires evidence that indicates a tendency to commit serious offences anyway.

Finally, the reduced minimum period of imprisonment a court can impose was not justified with reference to risk, but sentencing flexibility.[26] In the year following the change the Court of Appeal supported that justification. In response to a submission that the lower minimum period actually signals a greater willingness to impose the sentence, the Court declined to state that that was an irrelevant consideration, but it did claim that "it should be seen as providing greater flexibility in sentence administration rather than ground for a reduction in the level of seriousness of the offending as justifying preventive detention"[27]. It was, however, described by in a Ministry of Justice report as one of the "key changes" that "extended the sentence of preventive detention so that it was available for a wider range of offences and offenders".[28]

Even though offenders affected by these changes have had to show a certain level of risk, the expansions reflect a concerning legislative attitude towards preventive detention and

[23] Rajesh Chhana, Philip Spier, Susan Roberts and Chris Hurd *The Sentencing Act 2002: Monitoring the First Year* (Ministry of Justice, March 2004) at 19.
[24] Ibid.
[25] *Offenders on Indeterminate Sentences* (Department of Corrections, 2014) at 2.
[26] Rajesh Chhana, Philip Spier, Susan Roberts and Chris Hurd *The Sentencing Act 2002: Monitoring the First Year* (Ministry of Justice, March 2004) at 21.
[27] *R v Bailey* [2003] NZCA 155 at [19].
[28] Rajesh Chhana, Philip Spier, Susan Roberts and Chris Hurd *The Sentencing Act 2002: Monitoring the First Year* (Ministry of Justice, March 2004) at 19.

protective measures generally. The state's willingness to abandon principled limits on the imposition of indeterminate imprisonment without a thorough and convincing demonstration of risk warrants a reconsideration of the scheme under a penal minimalist framework.

2 Extended Supervision Orders

ESOs are post-sentence orders for community-based supervision provided for in Part 1A of the Parole Act 2002. At present, successive orders may last 10 years at a time "to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences".[29] Offenders are subject to standard conditions and any special conditions the Parole Board additionally imposes.[30] The Chief Executive may also apply for the imposition of an intensive monitoring condition for 12 months maximum, where the offender is accompanied and monitored for up to 24 hours a day.

The statutory requirements for making out an ESO are structurally similar to those set out for preventive detention. An offender must have committed a qualifying offence, provided for in s 107B. They must demonstrate risk at a certain threshold, supported by an accompanying health assessor report.[31] However, the Parole Act provides for different thresholds for sexual offending and violent offending respectively.

To find a high risk that an offender will commit a relevant sexual offence, the court must be satisfied that the offender displays an intense drive, desire, or urge to commit a relevant sexual offence, that they have a predilection or proclivity for serious sexual offending, that they have limited self-regulatory capacity, and that they display a lack of acceptance of responsibility for past offending or an absence of understanding about the impact of their offending on victims.[32]

To find a very high risk that an offender will commit a relevant violent offence, the court must be satisfied that the offender has a severe disturbance in behavioural functioning demonstrated by intense drive to commit acts of violent, extreme aggressive volatility, and

[29] Parole Act 2002, s 107I.

[30] Parole Act 2002, ss 107J and 107JA.

[31] Parole Act 2002, s 107F(2).

[32] Parole Act 2002, s 107IAA(1).

persistent harbouring of vengeful intentions.[33] They must also be satisfied that the offender either displays behavioural evidence of clear and long-term planning of serious violent crimes or has limited self-regulatory capacity, and that they display an absence of understanding of the impact of their violence on victims.[34]

In 2004 ESOs were introduced into the preventive scheme through the Parole (Extended Supervision Amendment) Act 2004. Initially they applied only in relation to sexual offending against children.[35] In 2014 they saw substantial expansion to include violent offences and sexual offending against adults.[36] The amendments also allowed for orders to be renewed beyond the initial ten year maximum.[37]

The Regulatory Impact Statement justified these expansions on the basis of "gaps in the Department's ability to effectively managing the long-term risk of serious harm to the public posed by the highest risk offenders"[38]. They cited gaps in preventive detention, pointing to offenders who did not receive preventive detention at sentence because of age, risk not being fully apparent, or sentencing taking place before the increase in qualifying offences and lowering of age eligibility for preventive detention in 2002.[39] Further, the 10-year maximum period of ESOs was found to be problematic as offenders may continue to pose a high risk after this point.[40]

This justification alone is not satisfying and warrants further investigation. The gaps that, on the state's account, created unacceptable risk are simply not filled by ESOs. As will be discussed further in chapter IV in particular, the same offenders are not consistently targeted. Fewer offences qualify offenders for ESOs, and they inherently involve a less substantial restriction of liberty. ESOs do, however, capture a broad new classes of offenders who have completed finite sentences of imprisonment.

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[33] Parole Act 2002, s 107IAA(2)(a)

[34] Parole Act 2002, s 107IAA(2)(b) and (c)

[35] Department of Corrections *Regulatory Impact Statement: Enhanced Extended Supervision Orders* (21 November 2013) at 2.

[36] Parole (Extended Supervision Orders) Amendment Act 2014

[37] Ibid.

[38] Department of Corrections *Regulatory Impact Statement: Enhanced Extended Supervision Orders* (21 November 2013) at 4.

[39] Ibid.

[40] Ibid at 5.

3 Public Protection Orders

PPOs are the most recent addition to the scheme, enacted through the Public Safety (Public Protection Orders) Act 2014. Like preventive detention, PPOs are indeterminate, but offenders subject to them are detained at a separate facility within prison grounds after completion of a finite prison sentence.[41] The preventive purpose of PPOs is expressed in s 4 of the Act as preventing the public from almost certain harm. Section 4 expressly excludes punishment of persons against whom the orders are made as a purpose of PPOs.

To impose a PPO, the court must be satisfied that there is a very high risk of imminent serious sexual or violent offending if the offender is left unsupervised, and the offender must demonstrate "a severe disturbance in behavioural functioning to a high level" in four separate characteristics: an intense drive or urge to commit a particular form of offending, limited self-regulatory capacity, absence of understanding or concern for the impact on victims, and poor interpersonal relationships or social isolation.[42] The application must be accompanied by at least two health assessor reports.[43]

The legal tests for the imposition of a PPO follow the same general structure as preventive detention and ESOs. However, both the qualifying offences and the threshold for risk represent greater restraint by the state in using restrictive measures in the interests of public protection. The distinct nature of its restrictions justifies its higher threshold in relation to ESOs. ESOs do not involve detaining an offender, and thus do no not require satisfaction of the same level of risk. The different representation of protective necessity does raise further questions in relation to preventive detention, however.

According to the (then) Minister of Justice in her introduction of the Bill, PPOs respond to situations "where an offender presents an unacceptable risk"[44] that cannot be managed through existing measures like parole conditions, ESOs, and preventive detention. The "group of concern" according to the Regulatory Impact Statement was "offenders at the end of a sentence and offenders who have been subject to the most intensive form of

[41] Public Safety (Public Protection Order) Act 2014, s 3.

[42] Public Safety (Public Protection Orders) Act 2014, s 13(2).

[43] Public Safety (Public Protection Orders) Act 2014, s 9.

[44] (17 September 2013) 693 NZPD 13441.

extended supervision", but have not been sentenced to preventive detention for one reason or another.[45]

This target group was stated to be very small, with the Department of Corrections estimating that only 5 to 12 offenders over a 10-year period would be subject to a PPO.[46] These projections have not been met in the six years following the introduction of PPOs. Currently only one offender is subject to a PPO, which was first imposed in 2016.[47] Another application was made in 2017 but was later quashed, and this year on reconsideration of the application the High Court declined to make another, imposing an ESO with special conditions instead.[48]

Considering that a substantial proportion of offenders who may satisfy the threshold for a PPO would also satisfy the statutory test for preventive detention, there may be very few offenders who reach the end of a finite sentence posing enough of a risk to warrant further detention. Additionally, many offenders will have been sentenced to preventive detention before the introduction and expansion of ESOs, leaving fewer high risk offenders serving finite sentences whose risk must be managed upon release.

The Minister at the time stated that PPOs would "complement existing measures such as parole conditions, extended supervision orders, and preventive detention"[49]. This does not seem to have eventuated. Just like ESOs, PPOs are not satisfactorily justified on the basis of filling a gap. The scope of preventive detention certainly reduces its potential role. Additionally, some offences that qualify for preventive detention do not qualify for PPOs, and their risk threshold would not be satisfied by all of those who would satisfy those for preventive detention.

D Conclusion: excessive intrusion under guise of 'filling gaps'

Parliament has tended to expand preventive measures without revisiting preventive detention. The product is excessive intrusion on the liberty of offenders that cannot be

[45] Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (September 2012) at 21.
[46] Ibid at 3.
[47] *Chief Executive of the Department for Corrections v Douglas* [2016] NZHC 3184 at [156].
[48] Ch*ief Executive of Dept of Corrections v McCorkindale* [2020] NZHC 2484 at [1], [108]
[49] (17 September 2013) 693 NZPD 13441.

convincingly characterised as ‘filling gaps’ in the state’s ability to protect the public. The reforms purported to fill certain gaps in protective measures that were necessary for the state to fulfil its protective obligation. Both sides of the House of Representatives shared the view that that broadened ESOs alongside PPOs “do plug some gaps” in the justice system, specifically where “offenders with sentences that are about to come to an end prove to be absolutely not ready to be reintegrated into society… but we have no ability to hold them”[50]. However, they fail to fill these gaps.

ESOs were expanded to target individuals who fell through the cracks of preventive detention, but they do not target all the same offenders and inherently involve a less substantial restriction of liberty. PPOs were justified in Parliamentary and governmental materials as necessary to protect the public from offenders who perhaps ought to have been sentenced to preventive detention but were not for some reason or another. In reality, it applies to a far smaller group of offenders due to different qualifying offences and risk thresholds. In the absence of a convincing justification for the constant expansion of protective measures, what we have is penal excess. What follows is a case that preventive detention is therefore unnecessary to satisfy the demands of public protection.

[50] (26 November 2014) 702 NZPD 860.

III Managing Risk Without Preventive Detention

A Introduction

As a result of excessive state intrusion, preventive detention has become superfluous to the preventive object. ESOs and PPOs work well to manage the risk of reoffending, and an indeterminate sentence of imprisonment has little to contribute to the ongoing preventive goal. This chapter demonstrates preventive's excess by looking at how the availability of ESOs and their later expansion have substantially eroded the legitimate role of preventive detention, and how PPOs can further supplement ESOs so that preventive detention is unnecessary. Additionally, it argues that such a scheme upholds the protective goal in the long-term such that preventive detention's protective justifications are even further diminished.

B ESOs and PPOs reduce the legitimate scope of preventive detention

The s 87(4) evaluation process for preventive detention underwent a shift with the introduction and expansion of ESOs such that substantially fewer circumstances necessitate a sentence of preventive detention. The principle that a lengthy determinate sentence is preferable if it provides adequate protection for society, contained in s 87(4)(e), now requires the court to consider the possibility of an ESO.[51] Essentially, since the advent and expansion of ESOs, risk can be viably managed in the community in more and more instances. The legitimate role of preventive detention has shrunk.

In *R v Mist* ESOs were characterised as providing "a potential safety valve which is now an inherent quality of a determinate sentence for relevant offences".[52] Parliament has significantly expanded its ability to monitor and restrict offenders in the community under ESOs, so the quality of a finite sentence is more protective than it was before. ESOs can now be renewed every 10 years and may include an intensive monitoring condition for 12 months if such a condition is deemed necessary. With rare exceptions, to be discussed shortly, the expansion of offences which qualify for ESOs mean that there is very little offending for which preventive detention is the only avenue for public protection. As chapter IV discusses, those offences should not invoke the state's duty to override the presumption of harmlessness.

[51] *R v Parahi* [2005] 3 NZLR 356 at [32].

[52] [2005] 2 NZLR 791 at [101]

Broadly speaking, the now mandatory ESO consideration narrows preventive detention's applicability. More offenders are, at least in theory, excluded from preventive detention because lengthy finite sentences can now be supplemented by ESOs with a broad range of potential protective conditions. Finite sentences are more likely to be able to satisfy the demands of public protection as a result, and such sentences are then preferable to preventive detention under the legislation.

Further, PPOs may be available where ESOs are considered to be insufficient. PPOs have not altered the judicial perception of the potential protective quality of a finite sentence, but should be regarded as having a similar, albeit narrower impact. Essentially, the power of the state to restrict the freedom of offenders who have served finite sentences no longer ends with ESOs. If the already far-reaching restrictions they provide for are considered insufficient to manage an offender's risk, a PPO may potentially be imposed.

C New measures undermine justifications for preventive detention

The new measures, but ESOs in particular, also challenge preventive detention's method of long-term risk management, undermining its core justification. The way that indeterminate imprisonment carries out public protection is outmoded and draconian when compared to a scheme that relies on ESOs with some supplement from PPOs.

1 Less restrictive management of long-term risk without preventive detention

As well as reducing the cases where preventive detention could be appropriately given, the expansion of ESOs makes lifetime recall, one of the main justifications for imposing preventive detention, largely redundant. Whereas a finite sentence of imprisonment only makes an offender subject to recall for the time period up until their statutory release date, and offender sentenced to preventive detention and then released on parole could potentially be recalled to prison throughout the remainder of their lives.[53] The protective capacity of such a measure has been emphasised in the courts, notably by Chambers J in the High Court in *R v RCP*[54]. He considered that the imposition of a lengthy finite sentence "just to increase the time [the offender] will be subject to parole restrictions" was

[53] Parole Act 2002, s 6(4)(d).

[54] *R v RCP* HC Hamilton T 030223, 20 May 2003.

inappropriate and found preventive detention the better mechanism to monitor the offender in the long-term.[55]

Crucially, the view expressed on recall in *R v RCP* predates the new measures which allow the state to take more preventive steps after an offender has completed their sentence. Reliance on the recall feature of preventive detention since 2014 perhaps does not give appropriate weight to the ability to manage an offender's risk through the imposition of an ESO or PPO. The expansion of such measures most likely reflects the policy preference for determinate sentences where possible, as articulated in s 87(4) which better aligns with penal minimalism. The ability to manage risk after the completion of a sentence at the very least reduces the circumstances in which recall can reasonably be relied upon as a feature to justify preventive detention.

Recall shows how the development of newer protective measures has resulted in the unprincipled retention of far-reaching preventive detention features. The utility of recall is, in many circumstances, made redundant by ESOs, for example, but it remains a significant state power to limit a person's autonomy when they are sentenced to preventive detention. This limitation purportedly also warrants indeterminate detention in prison, quite possibly in excess of whatever minimum period has been deemed appropriate for punitive purposes.

2 More effective management of long-term risk without preventive detention

In addition to providing less restrictive long-term risk management, a scheme without preventive detention also provides more effective long-term risk management. While coercion and incapacitation can prevent offending in the short-term, they are less likely to lead to long-term transformation.[56] Ashworth and Zedner suggest that long-term safety may be better achieved by less onerous measures, the prospect that dangerous offenders will be released into the community at some stage suggests that option should be taken.[57]

The long-term safety engendered by ESOs substantially undercuts preventive detention's justification. It cannot deliver public protection in the long-term, and ESOs are able to deliver the short-term benefits from restraining offenders too. Without a strong protective justification, preventive detention is excessive.

[55] At [29].

[56] Kim Workman "Is this the Dawning of the Age of Surveillance? Monitoring Offenders in New Zealand" (2015) 21 JNZS 69 at 73.

[57] Andrew Ashworth and Lucia Zedner *Preventive Justice* (Oxford University Press, Oxford, 2014) at 161.

D Conclusion: reducing excess by removing preventive detention

If a scheme comprised of only ESOs and PPOs is able to sufficiently protect the public from further serious offender, then preventive detention is unnecessary. The nature of these newer measures suggest that they are able to meet this protective object without preventive detention. Preventive detention may even thwart the protective object. Retaining preventive detention ultimately breaches the state's obligation to preserve individual autonomy beyond the limitations necessary to ensure that others may enjoy their own autonomy.

As the legislation currently stands, the removal of preventive detention would mean fewer serious offenders detained indefinitely and more offenders subject to finite sentences with an ESO or PPO attached after the fact. It does not follow that the remaining measures are insufficient for public protection. Nearly all of the offences qualifying an individual for a sentence of preventive detention are included in either or both of the qualifying offences for ESOs and PPOs.[58] If those offences cannot displace the presumption of harmless for the purposes of the new measures, it is excessive for them to qualify for preventive detention, as will be detailed in chapter IV. Additionally, chapter IV will also establish that the more recently considered statutes represent a more up-to-date and principled consideration of when and to what extent restriction of liberty is appropriate.

Removing preventive detention would serve little purpose to reduce penal excess if another indeterminate detention option would simply be applied in its absence. ESOs can manage risk in the community, which addresses the danger posed by offenders who cannot justifiably be detained. PPOs are available to detain offenders, but more narrowly, which would contribute to reducing interference so that the state does not exceed its legitimate ability to restrict individual freedoms.

[58] See chapter IV for details about specific offences.

IV Preventive Detention's Outdated Approach to Risk Management

A Introduction

The legislative criteria for ESOs and PPOs reflects a modern approach to risk management that highlights preventive detention's excess. This chapter argues that these new measures reflect a more restrained conception of protective necessity, with reference to the higher threshold PPOs set out for detaining offenders, the more limited offences which qualify for both ESOs and PPOs and the more effective limiting factors which protect offenders from disproportionality.

B Threshold for detention too low

The onerous requirements to be satisfied in an application for a PPO demonstrate a more considered articulation of the limits that should restrain the state's power to detain an individual for protective purposes. The much higher level of risk that must be established than s 87 of the Sentencing Act requires thus signals preventive detention's excess.

The statutory thresholds in place to evaluate risk are harder to satisfy for PPOs than for a sentence of preventive detention in that they are comprised of mandatory elements to be proven to high degree rather than considerations to be evaluated. When the court considers imposing a sentence of preventive detention, s 87(4) requires it to take into account any pattern of serious offending disclosed by the offender's history, the seriousness of the harm to the community caused by the offending, information indicating a tendency to commit serious offences in future, the absence of, or failure of, efforts by the offender to address the cause of the offending, and the principle that a lengthy determinate sentence is preferable if it provides adequate protection for society. These cumulative requirements are not insubstantial, and require the court to conduct thorough analysis, but also leave room for evaluation.[59] As long as the offender has committed a qualifying offence and meets minimum age requirements, and the court is satisfied that they are "likely to commit another qualifying offence if… released at sentence expiry state"[60], it is open to the court to impose the sentence.

[59] "evaluative" per *R v Kumar* [2015] NZCA 460 at [83].

[60] Sentencing Act 2002, s 87(2)(c).

In contrast, to impose a PPO there must be a "severe disturbance in behavioural functioning established by evidence to a high level" in four characteristics: an intense drive or urge to commit a particular form of offending, limited self-regulatory capacity, absence of understanding or concern for impact on victims, and poor interpersonal relationships or social isolation, or both.[61] Various factors which inform an offender's risk must not only be proven, but demonstrated to exist at a higher level, and each requirement must be satisfied for the application to succeed.

PPOs represent a closer consideration of the kind of offending which may warrant detention of an offender for preventive reasons. At the first reading of the Bill, the then-Minister of Justice, Judith Collins, emphasised that the "four characteristics that give rise to the risk… are integral to the justification for continuing detention under a public protection order", and that the test for risk of imminent offending is difficult to meet.[62] These features are essentially intended to function as safeguards against unjustified detention. The point at which they determine detention is necessary suggests anything lesser would be excessive, as does the Regulatory Impact Statement's acknowledgement that introduction of PPOs, despite their narrower application, was "likely to be controversial"[63].

The higher threshold for PPOs is, as far as detention for preventive purposes is concerned, a more appropriate balance of individual rights to freedom and public rights to protection, requiring a greater level of risk to be demonstrated before intervention. Nonetheless, Parliament clearly intended to retain preventive detention. Its protective scheme has thus become characterised by excess, focalised in the sentence of preventive detention.

C Qualifying offences too expansive

ESOs and PPOs bring to light the excess of the offences which can qualify an individual to be sentenced to preventive detention. A handful of offences that qualify for preventive detention do not qualify for ESOs, and another handful do not qualify for PPOs.

[61] Public Safety (Public Protection Orders) Act 2014, s 13(2).

[62] (17 September 2013) 693 NZPD 13441.

[63] Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (September 2012) at 3.

3 ESOs

The expansion of ESOs undermines the presence of certain qualifying offences in preventive detention and suggests they ought to have been removed. The scope of offending which can trigger the imposition of ESOs expanded in 2014, but the limits Parliament defined for that offending make some qualifying offences for preventive detention somewhat anomalous. There are three offences which qualify for preventive detention which do not qualify for ESOs.[64] These are committing an indecent act on a dependent family member,[65] but only when the victim is between the ages of 16 and 18 years old, conspiracy to murder[66] and abduction of a young person under 16.[67] Their absence from ESOs, despite the inclusion of all other offences which qualify for preventive detention, suggests that they should no longer play a role in establishing the necessity of state intervention.

On the occasion of the most recent contemplation of this kind of offending by Parliament, the attitude was taken that such offending is not of sufficient seriousness to invoke the state's heightened duty to protect the public. The inability to even consider an ESO for these offences even though a far more restrictive measure could be on the table at sentencing suggests that they should not qualify for preventive detention either.

4 PPOs

There are three offences which qualify for preventive detention which do not qualify for PPOs.[68] It shares the first excluded offence, s 131(3) indecent assault on a dependent family member, with ESOs. Once again, the exclusion does not apply where the dependent family member in question was under 16 years old, and such offending may qualify for a PPO.

The very narrow offending which does not qualify for any post-sentence preventive order serves to indicate that the conception of what kind of offending may warrant an enquiry which threatens principles of presumption of innocence and proportionality, as it is reflected in preventive detention legislation, is outdated. Other offences which do not

[64] Sentencing Act 2002, s 87(5) and Parole Act 2002, s 107B.

[65] Crimes Act 1961, s 131(3)

[66] Crimes Act 1961, s 175

[67] Crimes Act 1961, s 210

[68] Sentencing Act 2002, s 87(5) and Public Safety (Public Protection Orders) Act 2014, s 3

qualify for PPOs are s 129A(2) indecent act on another person knowing that the other person has been induced to consent to the act by threat and section 183(4) exploitatively doing an indecent act on a person with a significant impairment. The penalty for both of these offences is imprisonment not exceeding 5 years.

Considering that the lowest potential minimum period for any sentence of preventive detention is 5 years, it would perhaps be difficult to impose preventive detention for offending under these provisions without risking alarming disproportionality. Further, since they have been deemed inappropriate for detention under PPOs, it is anomalous for them to be considered appropriate to still qualify for preventive detention. Nonetheless, they have the potential to trigger consideration and imposition of the sentence.

D Limiting factors inadequate to prevent unacceptable disproportionality and excess

1 General risk of disproportionality in preventive measures

There is an inherent disproportionality involved in measures that restrict offenders beyond the demands of retributive justice. This disproportionality is better mitigated by ESOs and PPOs than it is by preventive detention. The retributivist justification for punishment is that criminal conduct deserves a punitive response and limits this response with reference to the principle of proportionality so that punishment should reflect the severity of the wrongdoing.[69] As discussed, preventive detention, PPOs and ESOs all conflict with the principle of proportionality. The minimum period of imprisonment for preventive detention is determined to satisfy the demands of retributive justice, and detention beyond that point is disproportionate to the relevant offending. The two post-sentence orders also restrict liberty after the sentence is served, exceeding the demands of retributive justice.

Restriction of liberty after retributive justice is served then rests on protective justifications. In the case of preventive detention, that is after the minimum period of imprisonment. In the case of ESOs and PPOs, that is after the finite sentence is served. ESOs and PPOs more effectively reflect that underlying justification, while the criminal sentence of preventive detention is less able to clearly justify its imposition with protective concerns alone.

[69] David Hayes *Confronting Penal Excess* (Hart Publishing, London, 2019) at 3.

One the key objections to ESOs and PPOs is their retrospective application, and particularly the danger that they constitute double punishment. Indeed, Whata J declared in the High Court that ESOs are inconsistent with the New Zealand Bill of Rights Act 1990, s 26(2) due to its retrospective application.[70] Even barring such a declaration, or in the case that conviction occurred after the law change, we should be critical of the state's ability to impose further restrictions when an offender has served a penalty for an offence. I argue, however, that ESOs and PPOs mitigate the risk of this kind of disproportionality. While preventive detention is not subject to the same 'double-punishment' criticism due to its imposition at the time of sentencing, its protections against unacceptable disproportionality are weaker.

2 Separability from punishment and potential displaceability

Retrospectivity concerns about ESOs and PPOs can largely be addressed by their better separability from punishment and displaceability. Paul H Robinson posits that "if preventive detention is needed beyond the prison term of deserved punishment, it ought to be provided by a system that is open about its preventive purpose and is specifically designed to perform that function"[71]. Because ESOs and PPOs take place outside criminal sentencing, they are better able to reflect their underlying preventive purpose.

Preventive detention is unable to achieve that separation. A punitive measure involves both censure and the imposition of hard treatment for an offence, which, strictly speaking, preventive detention does as a criminal sentence of imprisonment. Such a measure still may be predominantly preventive, and in international law the determination of whether a measure is punitive is one of substance and effect rather than express purpose.[72] ESOs and PPOs are not immune from punitive effect. Von Hirsch points out that "the deprivations of prolonged preventive confinement would be much like those of prolonged imprisonment", and that the "loss of liberty would be the same", as would the forced proximity to other people who may be dangerous.[73] Even though PPOs are imposed in a civil content, they have a quasi-criminal quality in that they are triggered by the commission of an offence

[70] *Chief Executive of the Department of Corrections v Chisnall* [2020] NZHC 243 at [14].

[71] Paul H Robinson "Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice" (2001) 114 Harv.L.Rev. 1429 at 1432.

[72] *Welch v United Kingdom* (1995) 20 EHRR 247 (ECHR) at [33].

[73] Andreas von Hirsh "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons" (1972) 21 Buff.L.Rev. 717 at 743.

and they may carry a "punitive taint."[74] Whata J acknowledged that the ESO regime has a punishing effect and shares many features with penalty regimes.[75]

The difference is that the post-sentence measures are able to account for this uncomfortable reality. They contain more inherent protections against disproportionality and face greater justificatory hurdles on a case-by-case basis. For ESOs, successive reapplications must be made if an offender is to be monitored in the long term, which requires the basis of that restriction to be repeatedly substantiated by the state. There is also finer gradation of conditions depending on an individual offender's circumstances as they can be tailored to mitigate specific risks. While PPOs involve restrictions that are less flexible, they must be reviewed on an annual basis by the review panel established in the Act and must be reviewed by the High Court every five years.[76]

By contrast, there is no significant limitation on disproportionality after the imposition of preventive detention. The Parole Board does not consider release from preventive detention until the end of the minimum term of imprisonment, which is at least five years. Due to lifetime recall, there is no avenue for an offender to entirely displace the sentence either. Determination of release is never referred to a higher body than the Parole Board, despite the much higher level of interference involved in the sentence than in ESOs, which are also governed by the Parole Board.

3 The "serious harm" consideration in preventive detention

Protections against disproportionality are not much stronger at sentencing. The court must undertake an evaluation of proportionality per s 87(4)(b), which requires consideration of the seriousness of the harm to the community caused by the offending before imposing preventive detention. In light of the qualifying offences for preventive detention, in many cases serious harm does not create a barrier for a sentencing court. *R v Parahi,* for example, deals with the question of whether the harm the offender caused was serious in one brief paragraph, determining that it "need not address it in depth".[77]

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[74] Colin Gavaghan, Jeanne Snelling and John McMillan *Better and Better and Better? A Legal and Ethical Analysis of Preventive Detention in New Zealand* (Report for the New Zealand Law Foundation, University of Otago, Dunedin, 2014) at 81.

[75] *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126 at [87].

[76] Public Safety (Public Protection Orders) Act 2014, ss 15 and 16.

[77] *R v Parahi* [2005] 3 NZLR 356 at [49]

The stakes of the consideration are very high. The court grappled with its weight in *R v Simmonds*[78], acknowledging the barriers to release from preventive detention. Although any offender may be released from preventive detention at the end of the minimum term if the Parole Board is satisfied that release is consistent with the safety of the community, "in many instances the Parole Board is not able to get to that degree of satisfaction", such that "a sentence of preventive detention… may well result in a person being imprisoned for life".[79] The failure to protect from disproportionality at sentencing is quite likely a failure to protect from disproportionality entirely.

4 Limiting considerations in ESOs and PPOs

PPOs and ESOs contain more effective constraints to mitigate disproportionality. The mandatory characteristics for PPOs relate to drive to commit certain offending, limited self-regulatory capacity, absence of understanding or concern for the impact of offending, and poor interpersonal relationships.[80] A sentencing court can impose an ESO if satisfied that the offender has a pervasive pattern of serious sexual or violent offending and there is a high risk they will commit a relevant sexual offence or a very high risk they will commit a relevant violent offence,[81] and the characteristics of which the court must be satisfied mirror those required for PPOs.

These characteristics essentially provide several avenues for an offender to avoid being labelled dangerous. These avenues are generally better justified by the protective object and maintain the transparency of the measures. In contrast, the "serious harm" consideration conjures up notions of desert, which muddies that waters of precisely what justifies the term spent in prison after the minimum period in a sentence of preventive detention.

The ESO and PPO factors speak more directly to an offender's risk rather than the specific harm their offending has caused, even where they appear to contain moral judgments. A case may be made that the requirement that an offender demonstrate an "absence of understanding or concern for the impact of offending on actual or potential victims" functions to punish the absence of remorse. The requirements for "poor interpersonal relationships or social isolation" may be seen to make a similar moral judgment on an

[78] CRI 2010-009-000716.

[79] At [23].

[80] Public Safety (Public Protection Orders) Act 2014, s 13(2).

[81] Parole Act s 107I(2).

individual's lifestyle. However, these requirements designed to reflect a lack of adaptive functioning in areas which protect against risk of reoffending, like empathy and social skills.[82]

In application in the courts, the connection of these factors to an offender's risk are made clear. In considering the offender's understanding of the impact of his offending on victims in *McCorkindale,*[83] his inability to develop this empathy was noted to be a "barrier to his full comprehension of treatment material delivered to him and the application of it"[84]. In *Chief Exec v Wilson*, it was found that "any concern as to the impact of his offending on the victims has done little to mitigate Mr Wilson's risk of reoffending".[85] In terms of poor interpersonal relationships in *McCorkindale*, the offender was found to have "insufficient skills and motivation to initiate and maintain appropriate and meaningful relationships that may serve a protective function in respect to his sexual offending risk".

E Conclusion

The effect of the new measures is highlight preventive detention's excess in its pursuit of the protective object. The new measures indicate that the modern conception of what is necessary for public protection allows for less state encroachment on individual liberties. It requires a higher demonstration of risk and stronger limitations on state coercion. Preventive detention has no place in this modern scheme. It sets the bar for detention too high, it captures too many offences and provides too few safeguards.

[82] Colin Gavaghan, Jeanne Snelling and John McMillan *Better and Better and Better? A Legal and Ethical Analysis of Preventive Detention in New Zealand* (Report for the New Zealand Law Foundation, University of Otago, Dunedin, 2014) at 38.
[83] [2020] NZHC 2484.
[84] At [21].
[85] At [55].

V Preventive Detention's Excessive Pursuit of Non-Protective Goals

A Introduction

This chapter argues that preventive detention's excess is fundamental to its character as criminal penalty, and particularly as an indeterminate sentence of imprisonment. Any law that carries out a protective object must, according to penal minimalism, have clear justification.[86] Preventive detention is unable to satisfy this requirement because of its location in the sentencing process. This chapter argues that other sentencing purposes pervade preventive detention and contribute to its particular determination of protective necessity and its excessive intervention. It demonstrates this entrenched, principle-deep excess through a comparison of preventive detention with life imprisonment and through an exploration of preventive detention's contradictory treatment of rehabilitation

B Likeness to retributive sentence of life imprisonment

1 Life imprisonment and preventive detention

Comparing preventive detention to the sentence of life imprisonment subsequent on a murder conviction demonstrates how inextricably preventive detention is tied to sentiments of retribution. This fundamental connection makes preventive detention inalterably excessive, as it cannot be constrained to a protective goal at its very foundation. Although the two indeterminate sentences are given different names and are provided for in different provisions, they effectively deal with offenders in the same way. The retributive nature of life imprisonment thus undermines the purportedly protective justification for preventive detention. This comparison suggests that preventive detention was not constructed with the exclusively non-punitive object it expressly holds in the current Act.

Implicit retributive justifications existing alongside protective justifications for preventive detention is messy in itself for the requirements of penal minimalism, it also indicates that perhaps the breadth of qualifying offences for preventive detention and its lower threshold for potential risk in comparison to PPOs is not simply an articulation of protective necessity, but influenced by elements of other sentencing objectives.

[86] David Hayes *Confronting Penal Excess* (Hart Publishing, London, 2019) at 4.

Life imprisonment and preventive detention are the two indeterminate prison sentences provided for in the Sentencing Act,[87] and there is little to distinguish the two in terms of how the detention of an offender plays out. The sentence for murder can be conceived of in three different portions.[88] The first portion is the minimum period of imprisonment to be served in full. For life imprisonment, the Act dictates that an offender must be given a minimum period of imprisonment of at least 10 years, and this minimum period should satisfy any or all of the purposes of accountability, denunciation, deterrence, and protection.[89] For preventive detention, the Act requires a minimum period of imprisonment for at least 5 years.[90] The minimum period is typically set by determining what would be appropriate if a finite sentence were given, and applying that once the court has decided to impose preventive detention.

The second portion of the sentence is determined in the interests of public safety by the Parole Board.[91] This portion will vary depending on the offender, but is supported by a protective justification. The third portion is release with the ongoing possibility of recall to prison.[92] Although life imprisonment is now the presumed sentence for murder rather than a mandatory one, exceptions from that presumption operate in narrow and exceptional circumstances.[93] Life imprisonment is then, generally speaking, the sentence imposed for all different kinds of offending that constitute the offence of murder.

The first portion is what may distinguish different life imprisonment sentences from one another. The minimum period of imprisonment is ten years, but the Sentencing Act provides that it must be at least 17 years in specified circumstances.[94] The lowest possible non-parole period perhaps distinguishes life imprisonment and preventive detention somewhat. Under preventive detention, offenders can receive a five year minimum period. Before the Sentencing Act, the lowest possible minimum period for preventive detention had been ten years, which indicates a previous alignment with life imprisonment that was abandoned for greater flexibility.

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[87] Sentencing Act 2002, ss 87 and 102.

[88] Andrew Ashworth *Sentencing and Criminal Justice* (6th ed, Cambridge University Press, Cambridge, 2015) at 124.

[89] Sentencing Act 2002, s 103(2).

[90] Sentencing Act 2002, ss 84(2) and 89(1).

[91] Parole Act 2002, s 28(2).

[92] Parole Act 2002, s 6(4)(d).

[93] Nick Chisnall "Murder and Life Imprisonment" [2014] NZLJ 184 at 184.

[94] Sentencing Act 2002, s 104.

2 Preventive detention pursuing punitive goals

The justification for life imprisonment being the mandatory sentence for murder, or the very strongly presumed sentence in the New Zealand context, is contested,[95] but is certainly not limited to or centred around public protection. While the minimum period varies, the three stages are applied to offenders consistently, regardless of difference in the degree of seriousness of the offence or whether or not they are considered to be a risk to public safety. In *R v Cunnard*,[96] Court of Appeal rejected the notion that murder is an offence apart from all others and noted that parity between offences remains a relative consideration under s 102 in relation to the circumstances of the offence. However, it is undeniable that life imprisonment is a distinctive way of dealing with a distinctive kind of offending. Ashworth and Zedner suggest that determinate sentences could be imposed for murder, "on the same footing as sentences for all other serious crimes" where there is not a finding of dangerousness from which the public ought to be protected.[97] As long as it is not treated the same as other sentences for other offences, there remains some particular quality that justifies life imprisonment for murder.

The Court of Appeal have characterised the presumption of life imprisonment as "a long-standing and strong one, reflecting the sanctity accorded to human life in our society and its associated abhorrence of the crime of murder".[98] This particular sanctity perhaps conjures up the Old Testament 'eye for an eye' notion of proportionality as the guiding moral principle of punishment.[99] This particular kind of proportionality requires punishments to mirror the crime closely, the key example being capital punishment as the appropriate response to murder.[100] Life imprisonment is perhaps a modern remnant of the concept of a mirror punishment. The potential term beyond the minimum period and lifetime subjectivity to recall then rest on a retributive notion of punishment, even if this is also provided for when the court determines the minimum period of imprisonment.

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[95] Andrew Ashworth *Sentencing and Criminal Justice* (6th ed, Cambridge University Press, Cambridge, 2015) at 127.

[96] [2014] NZCA 138 at [26].

[97] Andrew Ashworth *Sentencing and Criminal Justice* (6th ed, Cambridge University Press, Cambridge, 2015) at 127.

[98] *R v Williams* [2005] 2 NZLR 506 at [57].

[99] Morris J Fish "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" (2008) 28 OJLS 57 at 57.

[100] Ibid at 58.

R v Tarrant may articulate how life imprisonment is justified in more modern terms. On the High Court's view, "a prime function of the criminal law is to protect the community from crime. Whether in seeking to punish an offender, or in trying to deter or reform, the purpose of imposing sentence is ultimately to protect society. The more damaging and grave the crime the greater that need becomes."[101] On this account, the purpose of a severe punishment is not simply to achieve symmetrical injury, but to achieve multiple aims which go towards the ultimate goal of improving conditions in society. Crucially, the High Court distinguished this goal from protecting the community from a specific dangerous offender.[102]

The justifications behind life imprisonment for murder suggest similar rationales may implicitly rest behind preventive detention because of how closely the two sentences resemble one another. Preventive detention then far exceeds goals of preventing future offending, and its lower threshold for imposition can be called into question. It does not simply determine when risk requires state intervention, but also when an offender's wrongdoing is so morally objectionable that it warrants a quasi-life imprisonment sentence. Offenders are therefore not adequately protected against unjustified detention. The comparison casts doubt on every stage of the evaluative process. The qualifying offence, rather than a mechanism to displace the presumption of harmlessness, takes on a different character. It perhaps signals that particular offending may be so grave that it warrants a more substantial punitive response than a determinate sentence.

The designation of dangerousness itself then takes on a more punishing character. It has been contended that offenders subject to preventive detention-type sentences "have, at least for a while, lost the moral basis for claiming the right to benefit"[103] from the presumption of innocence in relation to future offending. In the case of preventive detention, that right to benefit is diminished for the remainder of the offender's life through recall, a burden which cannot be displaced. The same circumstances are applied to offenders who may not have been found to impose a substantial risk, and most likely as a means of punishment. Whether or not the murderer is in prison, they undergo lifelong subjectivity to a penalty. It becomes less convincing that this condition under preventive detention is not also a punishment. The offender seems to be designated to be undeserving of the assumption that they will behave in a law-abiding manner. This justification for designating dangerousness

[101] *R v Tarrant* [2020] NZHC 2192 at [176].

[102] Ibid.

[103] Andrew Ashworth and Lucia Zedner *Preventive Justice* (Oxford University Press, Oxford, 2014) at 148.

far exceeds any protective goal. It is justified as a necessary punishment, rather than a necessary protection.

C Ineffective pursuit of rehabilitative goals

The purpose of preventive detention, "to protect the community from those who pose a significant and ongoing risk to the safety of its members",[104] is clearly meant to be achieved by incapacitating certain offenders by detaining them in prison until the Parole Board is satisfied that they "do not pose an undue risk to the safety of the community".[105] The way that preventive detention treats rehabilitation does not uphold this goal and instead promotes excess. While the promotion of rehabilitation is not a statutory purpose of preventive detention, its relevance in the sentencing sphere generally seems to have concerning influence in its imposition.

The courts have considered that a sentence of preventive detention can provide a particular incentive for an offender to engage in treatment or rehabilitative programmes in comparison to the imposition of a finite sentence. In *R v Bryant*[106], decided in the year following the enactment of the Sentencing Act 2002, the Court of Appeal considered that an offender subject to preventive detention "controls his own destiny", and that the incentive to successfully participate in treatment in order to be released under s 28 of the Parole Act 2002 gives preventive detention a certain advantage over a finite term. The Court of Appeal has reiterated this position more recently in *Wilson v R.*[107] In that case a sentence of preventive detention was upheld, and the sentencing judge's statement telling the offender that it "will provide you with the incentive you need to engage fully in therapeutic treatment". The judge had then recognised that the offender would first need to acknowledge his offending and accept that he needed to address the underlying causes, a point he had "not yet reached".

Such reasoning perhaps exemplifies the paradoxical nature of characterising preventive detention as containing rehabilitative potential. As both aforementioned judgments emphasised, preventive detention is not a sentence of last resort. In *Wilson*, this proposition was used to support the imposition of the sentence despite the offender not having

[104] Sentencing Act 2002, s 87(1).
[105] Parole Act 2002, s 28(2).
[106] [2003] NZCA 300.
[107] [2016] NZCA 377.

previously had the opportunity to undergo high intensity sex offender treatment or treatment for underlying issues with alcohol, which could possibility reduce his risk of reoffending. However, the s 87(4)(d) consideration of "the absence of, or failure of, efforts by the offender to address the cause or causes of the offending" has favoured preventive detention where offenders have previously undergone rehabilitative treatment in prison and this has failed to satisfactorily reduce their risk.[108] The Court of Appeal acknowledged in *Neketai v R*[109] that it is "well established that where a prisoner is not a treatment failure, the Court will often conclude that a lengthy finite sentence is appropriate."

It is concerning that an offender's rehabilitative potential can be used to justify the imposition of a sentence of preventive detention while its absence can justify precisely the same thing. Rehabilitation as a sentencing goal has been associated with disproportionality in other jurisdictions, and risks allowing the duration of punishment to depend on how long it takes to 'fix' an offender rather than the offender's wrongdoing.[110] When an offender is designated with the label of dangerousness, as they are when sentenced to preventive detention, it becomes extremely difficult to displace that presumption.

PPOs constitute a better reflection of the role of rehabilitation. An important protection for offenders detained for preventive reasons is the availability of rehabilitative treatment that might reduce their risk.[111] However, the purpose this availability serves in a scheme where offenders are detained is to prevent detention from becoming arbitrary. The availability of resources provides for a potential path to release, but offenders subject to detention may be unlikely to benefit from them substantially. The Regulatory Impact Statement leading up to the enactment of the Public Safety (Public Protection Orders) Act acknowledges that offenders who would be subject to PPOs stand to gain little from rehabilitation,[112] but the Act still provides for the right of residents to receive rehabilitative treatment if there is a reasonable prospect it will reduce the offender's risk to the safety of the public.[113]

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[108] Cases cited in *Neketai v R* [2016] NZCA 174 at [32] include *Hartley v R* [2014] NZCA 162 at [151] and [154]; *Pritchard v R* [2010] NZCA 403 at [40]-[41].

[109] [2016] NZCA 174 at [32].

[110] David Hayes *Confronting Penal Excess* (Hart Publishing, London, 2019) at 6.

[111] Andrew Ashworth and Lucia Zedner *Preventive Justice* (Oxford University Press, Oxford, 2014) at 169.

[112] Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (September 2012) at 6.

[113] Public Safety (Public Protection Orders) Act 2014, s 36.

D Conclusion: fundamental excess

The pursuit of goals outside of the protective object is excessive, and it represents the excess at the very heart of preventive detention as a measure. Its likeness to life imprisonment demonstrates a latent or covert retributive justification that calls into question the legitimacy of its risk assessment. It appears to be concerned not solely with public safety, but with setting certain offenders apart from others and punishing them excessively. Its contradictory and ineffective pursuit of rehabilitative goals also speaks to fundamental excess. Preventive detention cannot avoid pursuing non-protective sentencing goals. On a fundamental level, it interprets preventive justice principles through a broader sentencing lens. No amended or altered preventive detention can reduce this innate excess.

VI Conclusion

A coherent and principled preventive justice scheme has no place for an indeterminate sentence of imprisonment as currently enacted by the sentence of imprisonment. Through the lens of penal minimalism, detaining offenders under sentences of preventive detention can no longer be justified. We do not need it to appropriately protect the public. To retain it is to unnecessarily encroach on the rights and freedoms of offenders.

Chapter II articulated the importance of striving for minimalism in preventive measures, particularly in contexts that are characterised by excess. In New Zealand we have tended to expand state powers to restrain and detain, and a paradigm shift we are unable to address the resulting excess.

Chapter III argued that abandoning preventive detention would effectively address that excess without endangering the public. It showed that ESOs and PPOs in tandem are able to uphold the state's duty to protect the public, as they actually encroach on the role of preventive detention such that retaining it is excessive and unjustified.

Chapter IV further challenged the relevance of preventive detention in light of the new measures, arguing that they represent a more appropriate and restrained notion of preventive justice. Preventive detention conflicts with this notion, and thus exceeds any protective justification that could uphold it.

Finally, chapter V demonstrated that preventive detention's excess is principle-deep. Justifications that feed into it go far beyond public protection. Like life imprisonment, it marks certain offenders out as particularly worthy of punishment, and using other sentencing principles, it seeks to capture more offenders than preventive justice demands. No reference to the safety of the public can justify such disproportionate interference.

On each ground, justifications for preventive detention could not stand up. The criminal justice system's resort to it as a sentence is unnecessary. It is no longer needed.

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