

# **Better and Better and Better? A Legal and Ethical Analysis of Preventive Detention in New Zealand**

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The first words in this title, “Better and Better and Better”, are borrowed from a discussion between Alice and the Queen of Hearts in the Lewis Carroll novel, *Through the Looking Glass*. The conversation concerned the concept of “living backwards,” and the possibility of punishing people for crimes that had not yet, and may never, occur. In the Queen’s words, punishment for wrong-doing makes people better, but if the crime in question never occurs, that is “better still; better, and better, and better!” *Through the Looking Glass*, in *The Complete Illustrated Works of Lewis Carroll* (Chancellor Press, 1982) 171.

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## **Preface**

This report is the outcome of an independent, multidisciplinary review of the Government's decision to introduce *post-sentence* detention into New Zealand via its proposed Public Safety (Public Protection Orders) Bill (PPO Bill). The proposed regime is contentious because it permits, subject to specified criteria, the ongoing and indefinite detention of an offender *after* that individual has already completed the sentence originally imposed by the sentencing court.

The research project, which was made possible by funding from the New Zealand Law Foundation, consisted of three phases. The initial phase involved a meeting in October 2013, which brought together academics and practitioners from the fields of law, ethics, psychology and psychiatry. Presentations were given on varying aspects arising from the proposed regime. These included presentations by Professor Bernadette McSherry, an expert on post-sentence preventive detention regimes in Australia, as well as Dr Armon Tamatea, formerly a Senior Advisor for Psychological Research, Rehabilitation and Reintegration Services, New Zealand Department of Corrections, and currently a senior lecturer in clinical psychology at the University of Waikato.

An outcome of this meeting was a joint submission made to the Justice and Electoral Select Committee on the PPO Bill, which was supported by all of those who attended the October meeting. Associate Professor Colin Gavaghan, Professor John McMillan (Principal Investigators) and Dr Armon Tamatea provided oral evidence to the Justice and Electoral Select Committee on the PPO Bill in November.

The final phase of the research involved drafting a more detailed report. As well as addressing the questions raised at the Workshop about the proposed PPO regime, it was decided that this would provide a broader overview of the trend towards 'preventive justice' in New Zealand, and an evaluation of the issues and concerns which this raises. This is that report.

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## I. Introduction

The current political focus on Law and Order, in particular the imposition of harsher penalties for serious crimes, is not a new governmental concern in New Zealand, nor is it a partisan issue<sup>1</sup> Measures by both Labour and National-led coalition governments over the last decade and a half have sought to address perceived deficiencies in the Criminal Justice system, particularly with respect to the role ascribed to victims in legal processes and to the length of custodial sentences imposed for serious crimes.<sup>2</sup>

This can, in part, be traced to events preceding the 2002 sentencing and parole reforms, which included a Law and Order petition that was successful in forcing a citizens initiated referendum in 1999.<sup>3</sup> The referendum asked:<sup>4</sup>

should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

The overwhelming response of voters was “yes”.<sup>5</sup> Since then, successive amendments have been made to the Sentencing Act 2002 and the Parole Act 2002 that, together, replaced the Criminal Justice Act 1985.<sup>6</sup> While some of these amendments have introduced flexible and arguably creative sentencing options for some types of offending (such as restorative justice and sentences of home detention), there has also

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<sup>1</sup> For example, Edwards notes that despite the Labour-led coalition governments significant penal reform measures, opposition parties in the 2008 election year campaigned strongly on anti-crime measures. See B Edwards “New Zealand” (2009) 48 *European Journal of Political Research* 1052 at 1058. Law and Order was very much on the political agenda also in the 2011 elections—indeed the current Public Safety (Public Protection Orders) Bill was one of the 2011 National party election promises.

<sup>2</sup> In 1997 the Ministry of Justice released an impressive document to engage public discussion on the range of principles that underpin sentencing procedures. See Ministry of Justice *Sentencing Policy and Guidance: A Discussion Paper* (Ministry of Justice, New Zealand, Wellington, 1997).

<sup>3</sup> The petition was initiated by Norm Withers whose 70 year-old mother was badly beaten in 1997 while working in her son’s shop.

<sup>4</sup> See Citizens Initiated Referendum (Appointed Day) Order (No. 2) 1999.

<sup>5</sup> At the election 1,663,755 voted “yes” with just 147,009 voting “no”. As John Pratt has pointed out, however, the referendum received criticism for conflating several different questions and allowing only one answer; *A Punitive Society: Falling Crime and Rising Imprisonment in New Zealand* (Bridget Williams Books, 2013).

<sup>6</sup> Section 8 of the Sentencing Act requires the Court to take into account and information provided to the court regarding the effect on the victim when sentencing an offender.

been a very apparent trend of progressively increasing custodial penalties for serious criminal offences.<sup>7</sup> The cumulative effect of these measures has led John Pratt, professor of criminology at Victoria University, to claim that:<sup>8</sup>

From the early 1990s to the present, the rate of imprisonment here [in New Zealand] has moved from being merely on the high side of the western norm to being a complete outlier.

In addition to the trend towards longer sentences, though, recent years have seen an increasing trend towards what has been labelled “preventive” or “protective” justice.<sup>9</sup> The “preventive” or “protective” justice concept is distinguishable from traditional retributive accounts of the criminal law. The traditional approach is premised on the view that the criminal justice system derives its legitimacy as a result of imposing punishment that is in response and in proportion to the offender’s culpability for acts already carried out.<sup>10</sup> Preventive justice, in contrast, is forward-looking and risk-oriented, concerned less with what the offender has already done, than with what he is thought likely to do in future.

The ready appeal of such an approach is not hard to understand. Measures designed to protect some of the most vulnerable members of society from some of its most dangerous members are likely to command popular support. Seen against a backdrop of increasing “penal populism”,<sup>11</sup> and increasing demands on governments to keep us “safe”, it is easy too to understand the political impetus behind proposals to detain dangerous criminals until society can be assured of their safety.

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<sup>7</sup> The sentences that may be imposed under the Act, from least to the most restrictive are: “(a) discharge or order to come up for sentence if called on: (b) sentences of a fine and reparation: (c) community-based sentences of community work and supervision: (d) community-based sentences of intensive supervision and community detention: (e) sentence of home detention: (f) sentence of imprisonment.” Sentencing Act 2002, s 10A.

<sup>8</sup> J Pratt *A Punitive Society: Falling crime and Rising Imprisonment in New Zealand* (Bridget Williams Books, 2013) at 9.

<sup>9</sup> For example see A Ashworth, A Lee and L Zedner “Oxford Preventive Justice Project” University of Oxford, Faculty of Law <[www.law.ox.ac.uk](http://www.law.ox.ac.uk)>.

<sup>10</sup> SJ Morse “Blame and Danger: An Essay on Preventive Detention” (1996) 76 Boston University Law Review 113 at 121 citing P Robinson “Foreword to the Criminal-Civil Distinction and Dangerous Blameless Offenders” (1993) 83 Criminal Law & Criminology 693 at 706-708.

<sup>11</sup> Pratt *A Punitive Society* at chapter 4.

In addition, while the retributive approach to criminal justice can sometimes appear to be premised on rather archaic ideas of blame and punishment, the “preventive” approach often appears to be informed by rational concerns and scientifically informed techniques of risk-assessment. This aspect goes some way to explaining the support for such initiatives not only among the expected “tough on crime” conservative constituency, but frequently too among those who may be considered more socially progressive.<sup>12</sup> Finally, as we explore in Part V, the government is not only morally and politically, but also legally obligated to take steps to protect its citizens from danger.

As we discuss in this report, though, there may well be reasons to be concerned about the trend towards preventive justice. Some of these have to do with the possibility that predictions of future dangerousness may be mistaken; in Part IV, we evaluate the accuracy with which such predictions can presently be made. Others relate to the various practical consequence of preventive initiatives. Clearly, if these are unlikely to be effective in reducing risk, then their principal rationale is undermined. A third class of concerns relate to the compatibility of preventive measures with New Zealand’s domestic and international human rights obligations.

At the heart of concern about preventive initiatives, though, there are also issues of principle, and in particular, a fear that the increasing trend towards preventive justice imperils a basic building block of our ideas of justice. When we depart from a paradigm concerned largely with blame for past actions, and embrace instead a paradigm wherein the state can detain people based on predicted future actions, something quite fundamental may have shifted in our society. Identifying precisely what that something may be is a task we undertake in Part V.

The Public Safety (Public Protection Orders) Bill, which is the principal focus of this report (and which we discuss at length in Part III), represents a significant step in the direction of preventive justice. It should be clear from the outset, though, that it is by no means a first step in that direction – either for New Zealand, or internationally.

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<sup>12</sup> See, for example, the explicitly feminist support for the Public Safety (Public Protection Orders) Bill at its first reading from Labour MP Sue Moroney; (18 September 2013) 693 NZPD at 13480.



Rather, New Zealand is already some way down that road. In Part II, we evaluate the steps that have already been taken towards – and in a few cases, back from – a preventive model of justice.

At the time of writing, the PPO Bill has already had a second reading in Parliament. By the time of publication, it may already be law. It is our hope, nonetheless, that this report presents an opportunity to pause and to consider how much further we, as a society, should travel down that particular road.

## II. A Trend Toward “Preventive” Justice in NZ

### *A. Introduction*

The move towards “preventive” justice may have accelerated in recent years, but it would be a mistake to regard it as a novel phenomenon. In New Zealand, a range of options are already available to the state to prevent convicted persons from committing potential future criminal acts, ostensibly justified on the grounds that they are necessary to secure the safety of the wider public. These include the judicial and statutory trend toward imposing lengthier sentences for serious crimes, sentences of Preventive Detention, Extended Supervision Orders and the “three strikes” legislation introduced in 2010. The following analysis examines the scope of the regimes, the prescribed risk-threshold for imposition of the various mechanisms, and the expert evidence that is used in judicial determinations in respect of each of these regimes.

In this Part of the report, we are concerned with preventive initiatives that are at least quasi-criminal in nature; that is, they are either imposed as part of a punitive sentence, or are triggered by a criminal conviction. The broader “preventive project”, however, also includes various civil schemes, which need have no connection to the criminal justice system at all. Some of those will be considered later in the report.

### *B. History of Preventive Detention*

Preventive detention is the sentencing of an offender to an indeterminate, or “non-finite” sentence. Its origins in New Zealand may be traced back to the Habitual Criminals and Offenders Act of 1906, which authorised the court to impose a non-finite reformatory sentence of detention following a finite prison term.<sup>13</sup>

The Criminal Justice Act 1954 introduced the actual sentence of preventive detention into New Zealand for the first time.<sup>14</sup> In its original form, preventive detention was available for three categories of offender *over* the age of twenty-five years: repeat minor offenders; repeat middle range offenders; and sexual offenders against children

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<sup>13</sup> Ministry of Justice *Sentencing Policy and Guidance: A Discussion Paper* (Ministry of Justice, New Zealand, Wellington, 1997) at 108 citing P Webb *A History of Custodial and Related Penalties in New Zealand* (Government Printer, Wellington, 1982) at 19-25.

<sup>14</sup> Criminal Justice Act 1954, s 75.

with at least one prior similar conviction. The seriousness of the past or current offending reduced the number of previous offences and sentences required for eligibility. The criterion for imposition of the sentence was whether the High Court was “satisfied that it was expedient for the protection of the public that the offender should be detained in custody for a substantial period.”<sup>15</sup>

Preventive detention as such was abolished in 1967, *except* for persons qualifying by reason of sexual offending (which included child sexual offending). One of the reasons given by the incumbent Minister of Justice for repealing the provisions “was the *inappropriateness* of preventive detention for offenders whose record, though long, did not make them a menace to society.”<sup>16</sup> Additional reasons included the “stresses associated with an indeterminate sentence, and the difficulty of deciding when release would be justified”.<sup>17</sup> The sentence of preventive detention has since focused more narrowly on violent and sexual offenders considered likely to pose further serious harm. In 1993 the Criminal Justice Act 1985 was amended to permit the court to impose a sentence of preventive detention with a non-parole period greater than 10 years in “exceptional” cases.<sup>18</sup>

Later in 1999, the Ministry of Justice noted the issues associated with “protective” sentencing in its *Sentencing Policy and Guidance: A Discussion Paper*.<sup>19</sup> It specifically acknowledged the problems associated with sentencing people to periods of imprisonment that are disproportionate to their offending, on the basis of predictions of their likelihood of committing dangerous offences in the future. It noted academics von Hirsch and Ashworth’s arguments that it:<sup>20</sup>

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<sup>15</sup> Section 75.

<sup>16</sup> Ministry of Justice *Sentencing Policy and Guidance: A Discussion Paper* (Ministry of Justice, New Zealand, Wellington, 1997) at citing P Webb *A History of Custodial and Related Penalties in New Zealand* (Government Printer, Wellington, 1982) at 74 (emphasis added).

<sup>17</sup> Ministry of Justice *Sentencing Policy and Guidance* citing P Webb *A History of Custodial and Related Penalties in New Zealand* (Government Printer, Wellington, 1982) at 74.

<sup>18</sup> Criminal Justice Amendment Act 1993.

<sup>19</sup> Ministry of Justice *Sentencing Policy and Guidance: A Discussion Paper* (Ministry of Justice, New Zealand, Wellington, 1997).

<sup>20</sup> At 117, and at 62 citing A Von Hirsch and A Ashworth (eds) *Principled Sentencing* (Northeastern University Press, Boston, 1992) at 104.

... is especially problematic because of the difficulty of predicting offending, and the added difficulty in predicting serious violence due to the relative rarity of such events. ... The 1981 Floud Report's conclusion that the prediction of violent offending has at best a 50 per cent success rate appears to still hold true.<sup>21</sup> This level of accuracy is well below the normal standard of proof for a criminal conviction that is proof *beyond reasonable doubt*. Furthermore, protective sentencing on the basis of predictions of future behavior runs counter to the fundamental right to be presumed innocent until proven guilty. In fact it creates the reverse presumption. In effect, protective sentencing deprives certain individuals of rights basic to our criminal justice system.

This departure from the standard principles [sic] is advocated on the basis of the risk of extreme harm which these offenders are seen to pose. The fact that these offenders have shown through past behavior that they are capable of, or highly likely to carry out, extremely harmful actions justifies *tipping the balance away from the offenders' rights and towards the rights of their potential victims*. This public protection balance has been clear in the courts' exercise of the discretion to impose preventive detention on eligible offenders ... (emphasis added).

In the abstract above, the Ministry of Justice considered both the principles of forfeiture (whereby the offender "forfeits" their usual rights to liberty) on the basis of the correlative rights of members of the public to be protected from dangerous persons. However, the paper acknowledged the difficulty of balancing rights-claims based on mere prediction. It continued to quote Von Hirsch and Ashworth that:<sup>22</sup>

Each society must make a moral decision as to how far to tip the balance between the rights of the offender not to be put at risk of excessive confinement through inaccurate predictions, and the rights of potential victims to be protected from convicted offenders who are assessed as likely to commit further very dangerous offences. In making such decisions it must be recognized that dangerous offences are also committed by people who have not previously been convicted, or whose previous convictions have not led to suggestions that they be considered for protective sentencing. There is, nevertheless, a reasonable

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<sup>21</sup> J Floud and W Young *Dangerousness and Criminal Justice* (Heinemann, London, 1981).

<sup>22</sup> Ministry of Justice *Sentencing Policy and Guidance* at 117 and at 62, citing Von Hirsch and A Ashworth (eds) *Principled Sentencing* (Northeastern University Press, Boston, 1992) at 104.

degree of consensus as to the need for some type of protective sentencing provisions.

Despite accepting that some type of protective sentencing is justified on moral grounds, the Ministry nevertheless considered that issues regarding eligibility, prediction methods and accuracy made a strong case for “substantial procedural protections of the rights”<sup>23</sup> of those considered for protective sentences. This is a given if one considers that it involves curtailing an individual’s liberty “merely because people like him or her will offend again, ... [when] we cannot specify which of them will actually do so”.<sup>24</sup>

### ***C. Increasing Sentences and non-Parole Periods***

Despite the repeal of habitual offender legislation, and the reduced scope of preventive detention in the 1960s, preventive detention in various forms has been expanding incrementally in New Zealand over the last decade and a half. One subtle means by which this has been achieved is by the imposition of lengthier minimum sentences of imprisonment for defendants convicted of serious crimes, as a result of judicial discretion and statutory amendments.

When sentencing William Bell and his co-defendant in 2003 after the infamous Returned Services’ Association (RSA) murders, Potter J noted an apparent trend in increasing sentences in the case of serious violent crimes. One expert to provide evidence in *R v Bell and Tupe*<sup>25</sup> was a psychologist who informed the court that Bell’s profile closely matched that of the “proto-typical psychopath”, elaborating:<sup>26</sup>

It is clear that Mr Bell has habitually engaged in increasingly serious predatory offending since early adolescence ... his offending has been planned as well as opportunistic and has been motivated by greed as well as by revenge motives. The lavish [sic] even sadistic nature of his violence points to underlying rage

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<sup>23</sup> At 118.

<sup>24</sup> Von Hirsch and A Ashworth (eds) *Principled Sentencing* (Northeastern University Press, Boston, 1992) at 104 cited in The Ministry of Justice *Sentencing Policy and Guidance: A Discussion Paper* (Ministry of Justice, New Zealand, Wellington, 1997) at 62.

<sup>25</sup> *R v Bell and Tupe* (Unreported HC, Auckland T.020505, 13 February 2003, Potter J).

<sup>26</sup> At [44]. For a thorough discussion of the challenges psychopathy poses for the law see AR Fox, TH Kvaran, and RG Fontaine “Psychopathy and Culpability: How Responsible Is the Psychopath for Criminal Wrongdoing?” (2013) 38 *Law & Social Inquiry* 1-26.

and motives of revenge easily kindled in Mr Bell who is unable to bear criticism or even the slightest rejection. The psychological dynamic is supported by substance abuse, lack of empathy and remorse and would be very difficult to change even if Mr Bell had some insight and were motivated and able to engage in treatment.

The expert opinion suggested that Bell's psychological profile identified him as an intractable offender. Significantly, however, the court observed that: "[t]o the extent that the psychiatric reports attempt to assess the risk of *future* offending, they are relevant documentation for the purposes of the Parole Board, rather than for sentencing."<sup>27</sup> This was because, although Bell would qualify for a sentence of Preventive Detention under the Sentencing Act 2002, he was subject to the provisions of the Criminal Justice Act 1985 that provided a lesser penalty.<sup>28</sup> Given the circumstances of the offence, the presumption in favour of life imprisonment for murder applied. The issue therefore was the length of the minimal non-parole period to be imposed.

A minimum sentence of 10 years was generally applicable. However the Sentencing Act 2002 permitted the Court, if satisfied that the circumstances surrounding the offence were "sufficiently serious",<sup>29</sup> to impose a greater minimum parole period.<sup>30</sup> That minimum period of imprisonment was what "the Court considers to be justified, having regard to the circumstances of the case including those of the offender."<sup>31</sup>

In considering the appropriate minimum period of imprisonment, the court reviewed the sentencing decisions in *R v Bain*<sup>32</sup> and *R v Lundy*.<sup>33</sup> Both cases involved multiple

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<sup>27</sup> *R v Bell and Tupe* (Unreported HC, Auckland T.020505, 13 February 2003, Potter J) at [46].

<sup>28</sup> Section 6 of the Sentencing Act conferred on an offender the right, if convicted of an offence for which the penalty has been varied since the offence was committed to have the benefit of the lesser penalty when sentenced. This is consistent with the New Zealand Bill of Rights Act 1990.

<sup>29</sup> Section 103(3). This is defined as being "out of the ordinary range of offending of the particular kind".

<sup>30</sup> Section 103(3) was repealed by the Sentencing Amendment Act 2004.

<sup>31</sup> *R v Bell and Tupe* (Unreported HC, Auckland T.020505, 13 February 2003, Potter J) at [56].

<sup>32</sup> *R v Bain* (Dunedin High Court, T.1/95, 21 June 1995).

murders where the seriousness of the offending was found to justify imposing longer than usual non-parole periods. In *R v Lundy* the Court of Appeal held that the seriousness of the offences justified a non-parole period of 20 years.<sup>34</sup> This was accompanied by the Court's observation that, since *R v Bain* (in which the court imposed a non-parole sentence of 16 years) society's "attitude to very serious violent crime has hardened".<sup>35</sup> Although not noted by the Court, when Bain was sentenced in 1999 a judge was only authorized to impose a minimum non-parole period in "exceptional circumstances", which was subsequently amended to the broader "sufficiently serious" test.

The court made a similar reference to public opinion justifying longer sentences in the case of *R v Watson*.<sup>36</sup> In *Watson* the court imposed a 17-year sentence without parole on a convicted double murderer, noting that the crimes "have outraged the public of New Zealand".<sup>37</sup> Ultimately, Bell was sentenced to imprisonment for life and a 33-year non-parole period imposed. His subsequent release after that time is for the parole board to determine.

The Sentencing Act 2002 now provides that, in the context of life imprisonment for murder, a non-parole period may *not* be less than 10 years and a minimum term of imprisonment to satisfy all / any of the following purposes *must* be imposed by the court:<sup>38</sup>

- (a) holding the offender accountable for the harm done to the victim and the community by the offending;

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<sup>33</sup> *R v Lundy* (CA.106/02, CA.137/02, 13 August 2002).

<sup>34</sup> "We have to say that Mr Lundy's murder of his daughter in these circumstances coming on top of the murder of his wife, requires denunciation and demonstration of society's abhorrence at a very high level."

<sup>35</sup> [62]. Very few surveys have been undertaken regarding the public perception of appropriate punishment for serious offences. One exception to this is: J Paulin, W Searle and T Knaggs *Attitudes to Crime and Punishment: A New Zealand Study* (Ministry of Justice, Wellington, 2003). The findings varied, but suggested that "while there may be general agreement among the New Zealand public in relation to the sentencing of offenders convicted of more serious crimes (such as importing heroin and aggravated burglary)" there was a comparative "divergence of opinion with respect to crimes of medium seriousness".

<sup>36</sup> *R v Watson* [1999] 3 NZLR 257.

<sup>37</sup> See J Roberts "Sentencing Reform in New Zealand; An Analysis of the Sentencing Act 2002" (2003) 36 Australian & New Zealand Journal of Criminology 249 at 253.

<sup>38</sup> Sentencing Act 2002, section 13(2).

- (b) denouncing the conduct in which the offender was involved;
- (c) deterring the offender or other persons from committing the same or a similar offence;
- (d) protecting the community from the offender.

Just one of the purposes of accountability for harm, denouncement, deterrence, or protection mandates a non-parole period of greater than 10 years.

Following amendments in 2010, if an offender is convicted and sentenced to life imprisonment for murder, and the court is satisfied that *no* minimum period of imprisonment would suffice to satisfy one or more of the above factors, the offender may be sentenced to imprisonment for life without parole.<sup>39</sup> This could plausibly result in a particularly severe crime resulting in the detention of an offender for the rest of his natural life. The European Court of Human Rights (ECtHR) was recently required to consider the compatibility of indeterminate sentences with the rights protected by the European Convention on Human Rights and Fundamental Freedoms (ECHR) in *Vinter v United Kingdom*.<sup>40</sup> Based on ECtHR jurisprudence, the legitimacy of such a sentence from a human rights perspective depends upon whether or not that sentence is “reducible”, which is discussed further in the following section.

#### *Human Rights Jurisprudence: Vinter v United Kingdom*

The mandatory sentence for murder in England and Wales is life imprisonment, with a minimum term of imprisonment imposed to achieve the purposes of punishment and retribution according taking into account the seriousness of the offence. However, a trial judge may, in exceptional cases impose a “whole life order” instead of a minimum term. A whole life order may be imposed if the judge considers that the seriousness of an offence is exceptionally high.

A prisoner who receives a whole life order cannot be released other than at the discretion of the Secretary of State. The relevant statute provided that the Secretary’s discretion may only be exercised on compassionate grounds if the prisoner is

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<sup>39</sup> Sentencing Act 2002, s 103(2A) which was inserted by s 10(3) Sentencing and Parole Reform Act 2010 and only applies to murders committed after 1 June 2010.

<sup>40</sup> *Vinter v United Kingdom* (2013) 57 EHRR.



terminally ill or is seriously incapacitated.<sup>41</sup>

*Vinter* concerned three applicants (British nationals) subject to “whole life orders”. The applicants claimed that they were subject to amounted to “ill treatment” contrary to Article 3 of the ECHR. The Court found that if a life sentence is “reducible”, i.e. there is “both a prospect of release and a possibility of review”,<sup>42</sup> the sentence will not be incompatible with Article 3 of the Convention. Consequently if a prisoner serving a life sentence under domestic legislation that *confers the right to be considered for release* is refused release because it is considered that he or she continues to pose a danger to the public - no human rights breach results. The Court unequivocally observed that States have a duty:<sup>43</sup>

... to take measures for the protection of the public from violent crime and the Convention does not prohibit States from subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender’s continued detention where necessary for the protection of the public<sup>44</sup> ... Indeed, preventing a criminal from re-offending is one of the “essential functions” of a prison sentence<sup>45</sup> ... This is particularly so for those convicted of murder or other serious offences against the person. The mere fact that such prisoners may have already served a long period of imprisonment does not weaken the State’s *positive obligation* to protect the public; States may fulfill that obligation by continuing to detain such life sentenced prisoners for as long as they remain dangerous.<sup>46</sup> (Emphasis added)

The applicants in *Vinter* were successful in their claim that “whole life orders” were “irreducible”, and therefore contrary to Article 3. The Court stated:

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<sup>41</sup> Crime (Sentences) Act 1977, s 30(1).

<sup>42</sup> At [110].

<sup>43</sup> At [108].

<sup>44</sup> Citing *T. v. the United Kingdom* [GC], no. 24724/94, § 117, 16 December 1999; *V. v. the United Kingdom*, [GC], no. 24888/94, § 118, ECHR 1999-IX.

<sup>45</sup> Citing *Mastromatteo v. Italy* [GC], no 37703/97, § 72, ECHR 2002-VIII; *Maiorano and Others v. Italy*, no. 28634/06, § 108, 15 December 2009; and, *mutatis mutandis*, *Choreftakis and Choreftaki v. Greece*, no. 46846/08, § 45, 17 January 2012.

<sup>46</sup> See, for instance, *Maiorano and Others v. Italy*, no. 28634/06, § 108, 15 December 2009.

Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.

The Court also observed that states had a margin of appreciation regarding the form of a review (judicial or executive) or when it should take place. However, based on comparative materials it suggested that a review should be guaranteed no later than twenty-five years after a life sentence is passed, with regular periodic reviews thereafter.<sup>47</sup>

Of interest is that the Court also indicated an additional situation that would constitute a violation of Article 3. While it may be claimed (as many victims of crime and lobby groups do) that for some violent offences, *no* sentence could ever be disproportionate whatever its length, the Court stated that any sentence that is grossly disproportionate to the seriousness of the crime would be a breach of article 3.<sup>48</sup> Further, it might also be claimed that to the extent that a sentence detains the offender beyond the time required to serve the purpose of punishment, the additional time served would constitute a form of *de facto* preventive detention.

The following section traces the development of preventive detention in New Zealand, culminating in the “three strikes” law. Arguably the “three strikes” regime, introduced in 2010, is a paradigmatic example of the political will to enlarge the current scope of preventive detention.<sup>49</sup>

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<sup>47</sup> *Vinter v United Kingdom* (2013) 57 EHRR at [120].

<sup>48</sup> At [102].

<sup>49</sup> Sentencing Act 2002, s 86A-86I.

### D. Indeterminate Sentences: Sentencing Act 2002

Current provisions in the Sentencing Act 2002 authorise the High Court to impose an indeterminate sentence on a convicted offender in certain circumstances, specifically, if an offender is convicted of a qualifying sexual or violent offence *and* the Court is “satisfied that the person is likely to commit another qualifying sexual or violent offence if the person is released” at the expiry date of any alternative sentence that could be imposed by the Court, if a sentence of preventive detention is not imposed.<sup>50</sup>

Any sentence of preventive detention must be accompanied by an order specifying a minimum period of imprisonment of no less than 5 years.<sup>51</sup> The following table outlines the parole process following the imposition of a finite versus an indeterminate sentence of life imprisonment or preventive detention.

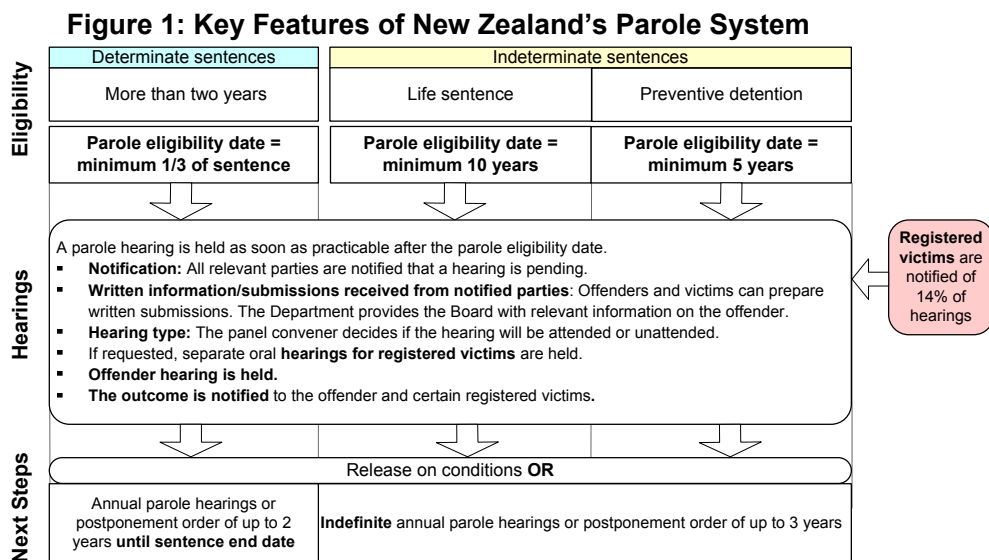


Table 1: Regulatory Impact Statement on the Parole Reform Bill (Department of Corrections, 2012) The Treasury <[www.treasury.govt.nz](http://www.treasury.govt.nz)>.

### The Scope of Preventive Detention

The Sentencing Act 2002 prescribes three qualifying conditions before a sentence of preventive detention may be imposed. Section 87(2) restricts a sentence of PD to: persons who are convicted of a sexual or violent offence as defined in section

<sup>50</sup> Section 87(2).

<sup>51</sup> Section 89(1).

87(5); who were at least 18 at the *time* of committing the offence; and the court is “satisfied” that he or she is “likely to commit another qualifying sexual or violent offence” if they are released at the expiry date of any sentence that the court is able to impose other than a sentence of PD under section 87(2).

When imposing a sentence of preventive detention, the Court must specify a minimum period of imprisonment that the offender must serve, which can be no less than five years.<sup>52</sup> The minimum period imposed must be the longer of either: the minimum period required to reflect the *gravity* of the offence committed, or the minimum period required “for the purposes of the *safety* of the community in the light of the offender’s age and the risk posed by the offender to that safety at the time of sentencing”<sup>53</sup> (emphasis added).

If the Parole Board is satisfied that an offender, if released, “will not pose an undue risk to the safety of the community or any person or class of persons” they may be released, but they may be recalled to prison if they breach their parole conditions or, once again, pose an “undue risk” to society.

#### *Statutory considerations for the imposition of Preventive Detention*

The threshold test for a sentence of PD is therefore whether the Court is *satisfied* that the person is *likely* to commit another qualifying sexual or violent offence<sup>54</sup> if released at the end of the sentence. To be “satisfied” in accordance with s 87(2) does not require proof beyond reasonable doubt.<sup>55</sup>

Section 87(4) of the Act sets out five specific statutory considerations that the Court *must* take into account if considering a sentence of PD. These are:

- (a) any pattern of serious offending disclosed in history; and
- (b) the seriousness of the harm caused to the community; and

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<sup>52</sup> Section 89.

<sup>53</sup> Section 89(2).

<sup>54</sup> Section 87(5).

<sup>55</sup> *R v Dittmer* (alt cit *R v D*) [2003] 1 NZLR 41 (CA) at [30] referencing *R v Leitch* [1998] 1 NZLR 420 (CA).

- (c) information indicating a tendency to commit serious offences in the future;  
and
- (d) absence of, or failure of, efforts by the offender to address the cause/causes  
of the offending; and
- (e) the principle that a lengthy determinate sentence is preferable if this  
provides adequate protection for society.

A sentence of PD may not be imposed unless the Court has “*considered* reports from at least 2 appropriate health assessors about the *likelihood* of the offender committing a further qualifying sexual or violent offence”.<sup>56</sup> Clearly the health assessor’s reports are central to judicial decision-making. As such, their importance cannot be underestimated. Given this, it raises questions not only regarding what weight is placed on the health assessor’s reports themselves, but how the reports are evaluated for accuracy, fairness, and probity. Some of these issues are touched upon briefly in the discussion below of the PPO scheme in Part IV of this report.

### ***E. The “Three Strikes” Regime: Sentencing Act 2002***

The “three strikes” legislation was introduced by the Sentencing and Parole Reform Act 2010. Its purpose is to “*deny* parole to certain repeat offenders and to offenders guilty of the worst murders” and to “impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences”.<sup>57</sup> It establishes a three-stage regime of escalating consequences for repeat offenders. It is applicable to 40 “qualifying” offences of a violent and sexual nature that carry a maximum applicable penalty of seven years imprisonment or more.<sup>58</sup>

A first conviction for a qualifying offence attracts a mandatory judicial “first warning”. The second conviction for a qualifying offence attracts a “final” warning and the sentence imposed *must* be served without parole.<sup>59</sup> A third conviction for a qualifying offence (with the exception of murder) requires the court to impose the *maximum* term of imprisonment prescribed for the offence *and* order that the offender

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<sup>56</sup> Sentencing Act 2002, s 88(1)(b).

<sup>57</sup> Sentencing and Parole Reform Act 2010, s 3.

<sup>58</sup> Sentencing and Parole Reform Act 2010 that inserted ss 86A-86I into the Sentencing Act 2002.

<sup>59</sup> Sentencing Act 2002, 86C.

is ineligible for parole, *unless* the court is satisfied that such a non-parole order would be “manifestly unjust” given the circumstances of the offence.<sup>60</sup>

Despite the fact that the legislation is aimed at qualifying offences that may be punished by imprisonment for a period of seven years or more, the range of offences captured by this varies from (comparatively) less serious to extremely serious offending. However, all must be treated alike in terms of sentencing without consideration of the individual circumstances. Brookbanks and Ekins illustrate the potentially problematic nature of the scheme when they observe that:<sup>61</sup>

a relatively minor indecent assault and a very serious rape are each one strike, yet are of vastly different gravity. Similarly, a street robbery and a series of vicious armed robberies are very different and yet, for the purpose of “three strikes”, are treated the same.

Special provisions are provided under the regime for murder and manslaughter. Under the Sentencing Act 2002 reforms, there is a presumption that murder is punishable by a mandatory life sentence unless, in the circumstances of the offence and offender, to do so would be “manifestly unjust”.<sup>62</sup> A nonparole period of at least 10 years must also be imposed, although if particularly aggravating features exist, a longer non-parole period of at least 17 years may be imposed.<sup>63</sup>

Under the three strikes regime, an offender who is convicted on strike two or three *must* be sentenced to *life without parole* unless it is manifestly unjust to do so, in which case life with a minimum term of imprisonment of at least 10 years or, in severe cases, 17 years, is to be imposed.

In the case of a third strike conviction, a *life sentence without parole* must be imposed unless this would be manifestly unjust, in which case a minimum period of imprisonment of at least 20 years must be imposed unless that would also be manifestly unjust. If it is, then the same approach of a second strike is to be adopted,

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<sup>60</sup> Section 86D(2),(3).

<sup>61</sup> W Brookbanks and R Ekins “The Case Against the ‘Three Strikes’ Sentencing Regime” (2010) 4 New Zealand Law Review 689 at 702.

<sup>62</sup> Sentencing Act 2002, s 102.

<sup>63</sup> Section 104.

that is, a minimum term of 10 years, or in especially severe cases, 17 years must be imposed.

Brookbanks and Ekins argue that the three-strike scheme is unjust by its potential, in some circumstances, to require the imposition of grossly disproportionate sentences. Proportionality is a difficult concept to define, particularly given that, as Stephen Morse observes, “retributive theory furnishes no adequate guide to the proportionate length of a sentence”.<sup>64</sup> However, at the core of retributive approaches is the concept that any punishment imposed will “satisfy reasonable expectations for justice in a liberal democracy”.<sup>65</sup> We consider some of these issues more fully later in the report.

The potential for arbitrary and disproportionate sentencing under the scheme is contrary to the criminal law principle of act retributivism—the concept that any punishment imposed should be proportionate to the wrongdoing. On this traditional approach, offenders should be punished for their acts, not their character or apparent disposition to crime. Further, it has traditionally been considered that offenders convicted of a crime should be treated similarly to others convicted of a similar crime. The three-strikes approach dispenses with all of these customary criminal principles. Morse has also criticised the use of such a regime on the grounds that:<sup>66</sup>

When an offender has served the sentence for a crime, the ‘slate is wiped clean’. The next offense of a previous offender is no worse per se, the victim is no more harmed, than if the offense were the offender’s first. The multiple offender demonstrates greater antisocial tendencies, is at greater risk for reoffending, and cumulatively causes society more harm than an offender who offends only once or a few times, but having antisocial tendencies is not a punishable offense in the United States. The multiple offender will also spend a great deal more aggregate time incarcerated, even in the absence of habitual offender enhancement or selective incapacitation. These sentencing schemes impose additional incarceration because we believe that the defendant is dangerous and should be preventively detained, not because the defendant deserves more punishment for

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<sup>64</sup> SJ Morse “Blame and Danger: An Essay on Preventive Detention” (1996) 76 Boston University Law Review 113 at 142.

<sup>65</sup> At 143.

<sup>66</sup> At 147.

the instant offense. The argument that the multiple offender's latest crime is more blameworthy than the same crime committed by others or than his previous crimes is a salve to the residual retributivist conscience that seems to lurk in most people. It is simply unconvincing.

If, as Morse says, the additional punishment imposed in sentencing under such a regime is undeserved, then it is clearly not related to culpability, but imposed because of the presumed dangerousness of the offender. As such, "it is pure preventive detention imposed under the guise of criminal punishment".<sup>67</sup> As noted above, one of the rationales for a Three Strike system is its presumed deterrent effect. Yet while it may seem intuitively plausible that potential offenders will be deterred by harsher penalties, the evidence for any such effect is elusive.

Criminologists have often pointed out that recidivist offenders, who are often already disenfranchised members of society, frequently acting while intoxicated, do not consider the risk of incarceration in a rational manner as others would, but assess and determine the risk of crime against the perceived benefits that may accrue from crime.<sup>68</sup> Doob and Webster, criminologists who in 2003 published the results of a meta-analysis of punishment studies, concluded that:<sup>69</sup>

A reasonable assessment of the research to date—with a particular focus on studies conducted in the past decade—is that sentence severity has no effect on the level of crime in society ... No consistent body of literature has developed over the last twenty-five to thirty years indicating that harsh sanctions deter.

One of the earliest and harshest "Three Strikes" regimes was introduced into the US state of California after a referendum attracted 72 per cent of State votes in 1994.<sup>70</sup> Under the regime, a second offence would attract double the usual penalty for the

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<sup>67</sup> At 148.

<sup>68</sup> M Gladwell *David & Goliath: Underdogs, Misfits and the Art of Battling Giants* (Allen Lane, London, 2013) at 243, citing David Kennedy *Deterrence and Crime Prevention* (Routledge, 2008).

<sup>69</sup> A Doob and C Webster "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 *Crime and Justice* 143.

<sup>70</sup> Gladwell *David & Goliath* at 236.



offence. A third attracted 25-years-to-life, even if the third offence was relatively trivial, such as shoplifting.<sup>71</sup>

A US report published in 2014, following a two-year study commissioned by the Justice Department, reported that imprisonment rates in the US have more than quadrupled in the last four decades.<sup>72</sup> Over half of prisoners are serving sentences for nonviolent crime. The report examines not only the increase in incarceration but also its societal and intergenerational effects. It recommends significant changes in sentencing, prison policy as well as social policy as a result of its findings. An editorial in the *New York Times* observed:<sup>73</sup>

While politicians were responding initially to higher crime rates in the late 1960s, this “historically unprecedented” growth is primarily the result of harsher sentencing that continued long after crime began to fall. These include lengthy mandatory minimums for nonviolent drug offenses that became popular in the 1980s, and “three strikes” laws that have put people away for life for stealing a pair of socks.”

The editorial continued:

The severity [of punishment] is evident in the devastation wrought on America’s poorest and least educated, destroying neighborhoods and families. From 1980 to 2000, the number of children with fathers in prison rose from 350,000 to 2.1 million. Since race and poverty overlap so significantly, the weight of our criminal justice experiment continues to fall overwhelmingly on communities of color, and particularly on young black men.

It is plausible that such punitive-based regimes ignore less liberty-intrusive measures to prevent future criminal harms. As indicated, it is widely accepted that social and economic factors such as poverty, income inequality,<sup>74</sup> intrafamilial abuse and a lack of access to education are, to varying degrees, correlated to crime and antisocial

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<sup>71</sup> *Ewing v California* 538 U.S. 11 (2003).

<sup>72</sup> National Research Council *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Washington, DC: The National Academies Press, 2014).

<sup>73</sup> See Editorial Board “End Mass Incarceration Now” *The New York Times* (May 24, 2014).

<sup>74</sup> R Wilkinson and K Pickett *The Spirit Level: Why Equality is Better for Everyone* (London, Penguin Books, 2010), chapters 10 and 11.

conduct. Addressing some of these social problems, it might be argued, would confer a double benefit: of reducing offending while at the same time improving the lives and the prospects of those affected. Placing the focus too squarely on protecting ‘society’ from prospective offenders risks viewing those who are already most severely disadvantaged as ‘others’, prospective external threats to ‘decent’ society, all too easily discounted from our evaluations of rights and needs.

#### ***F. Extended Supervision Orders: Parole Act 2002***

Another preventive mechanism implemented in New Zealand is the Extended Supervision Order (ESO), introduced via the Parole (Extended Supervision) Amendment Act 2004. This introduced ESOs into the arsenal of the Parole Act 2002.<sup>75</sup>

The Parole Act 2002 established the New Zealand Parole Board (formerly operated under the Criminal Justice Act 1985) and specified 6 guiding principles. The first is that when “making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Board in every case is the safety of the community”. Another is that “offenders must not be detained any longer than is consistent with the safety of the community, and that they must not be subject to release conditions ... that are more onerous, or last longer, than is consistent with the safety of the community”.<sup>76</sup>

The Parole (Extended Supervision) and Sentencing Amendment Act 2004 introduced a regime that now permits the court to impose an ESO, for a term of up to 10 years, on an offender who has completed a sentence for an eligible offence, but who is still deemed to pose a risk of committing sexual offences against children or young persons. As has been noted by the Court of Appeal, an ESO may fill a space between a finite sentence and one of preventive detention. In *R v Parahi*<sup>77</sup> it observed that when, at the point of sentencing, a Court finds that the choice between imposing a finite sentence or one of preventive detention is finely balanced, the possibility of

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<sup>75</sup> Parole (Extended Supervision) Amendment Act 2004 section 11 inserting Part 1A into the Parole Act 2002.

<sup>76</sup> Parole Act 2002, s 7(2)(a).

<sup>77</sup> *R v Parahi* [2005] 3 NZLR 356 (CA).

imposing an ESO at the end of a finite sentence could tip the scales against a sentence of preventive detention in the case of lower-level sex offenders.

The Parole Act 2002 imposes an obligation on the Chief Executive of the Department of Corrections to ensure that, prior to release, an offender who was sentenced for an eligible offence is assessed to determine the likelihood of them committing a relevant offence post-release.<sup>78</sup> Section 107I(1) of the Parole Act 2002 provides that the purpose of an ESO is to protect the community from those who pose a “real and ongoing risk of committing sexual offences against *children or young persons*”. ESOs permit the monitoring of offenders who are released at the end of serving a finite sentence, but who are assessed as likely to continue to sexually victimise young people.

*Risk-threshold for the imposition of an Extended Supervision Order*

An order for an ESO may be made by a sentencing court if it is satisfied, having considered the health assessor’s report, that the offender is *likely* to commit any of the offences specified in s 107(B)(2). Section 107F(2) requires that the health assessors report must address:

- (a) the nature of any likely future sexual offending by the offender, including the age and sex of likely victims;
- (b) the offender’s ability to control his or her sexual impulses;
- (c) the offender’s predilection and proclivity for sexual offending;
- (d) the offender’s acceptance of responsibility and remorse for past offending;
- (e) any other relevant factors.

The sentencing court is authorised to make an ESO if it is satisfied, after considering the health assessor’s report, that the offender is “likely” to commit a “relevant offence” i.e. a sexual offence against a minor (less than 16 years-of-age) after release from prison.<sup>79</sup>

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<sup>78</sup> Parole Act 2002 at s 107E.

<sup>79</sup> Section 107I(2).

When considering the likelihood of an offender committing relevant offences in the future, the High Court has endorsed the view that “one of the best indicators of what the future is likely to hold may be what has occurred in the past”.<sup>80</sup> The Health Assessor’s report includes the pattern of prior offending and current conduct (where relevant), the extent of responsibility taken for prior offending, and any engagement with rehabilitative interventions. Both clinical risk factors and actuarial instruments are used when assessing the potential of an offender to reoffend. Both “static” (i.e. unchangeable through intervention) risk factors and “dynamic” risk factors (i.e. changeable through intervention) for sexual recidivism are considered.

The actuarial tools used by psychologists include a range of assessment methods. The Automated Sexual Recidivism Scale (ASRS) relies on seven static risk factors. Offenders who score in the high-risk category have a recidivism rate of 43 per cent for sexual reoffending generally and of 36 per cent in relation to children, in the ten years after their release.<sup>81</sup> Another tool, the STABLE-2007, assesses and tracks change in an individual’s status over a period of time by examining dynamic risk factors. Another tool is the Psychopathy Checklist Screening Version (PCL: SV) that is designed to determine the level of traits associated with psychopathy. This particular tool was created following a study of offenders between 18 and 44 years.<sup>82</sup> The health assessor who provided evidence to the court in relation to one particularly well-known offender (Stuart Murray Wilson, widely referred to as the “Beast of Blenheim) when it determined if he should be made subject to an ESO, reportedly stated that:<sup>83</sup>

Offenders who display a combination of both sexual deviancy and traits of psychopathy represent a very small but very high risk group in relation to future sexual offending. Members of this group are motivated to gratify their sexual deviancy, and they also have an extremely low level of concern for their victims. For that reason they tend to take advantage of opportunities to re-offend.

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<sup>80</sup> *New Zealand Parole Board v Stewart Murray Wilson* [2012] NZHC 1634 at [31] referencing *Chief Executive of Department of Corrections v McIntosh* HC Christchurch CRI-2004-409-162, 8 December 2004 at [31].

<sup>81</sup> *New Zealand Parole Board v Stewart Murray Wilson* [2012] NZHC 1634 at [43].

<sup>82</sup> At [47].

<sup>83</sup> At [47].

Other factors that have informed a health assessor's report regarding an individual's level of risk of reoffending include: the length of time that the offender engaged in offending in the community, alcohol intake, and the presence of "attitudes and beliefs supportive of re-offending".<sup>84</sup> The age of the offender may also be relevant. In the *Wilson* case, the court was provided with evidence from a New Zealand study involving 5880 sex offenders, 562 of which were aged over 60 at the date of their release from prison. Of those 562, 19 (3 per cent) subsequently reoffended.<sup>85</sup>

The Court of Appeal has expressly noted that section 107I(5) of the Parole Act makes it clear that the objective of the ESO regime is "protective". It requires that, when determining the term of an ESO, it should remain in place for the minimum period necessary to protect young people, taking into account the level and duration of the risk posed by an offender.<sup>86</sup> Both "standard" and "special" conditions may be placed on an ESO.

#### *Standard Conditions of an ESO*

The "standard" ESO conditions contained in the Act<sup>87</sup> require an offender to report to a probation officer in the probation area within 72 hours of the commencement of the Order. Subsequently, the offender must report to the probation officer, as and when the officer requires. The offender must also notify the probation officer of their address and their workplace when asked. An offender is required to obtain the (written) approval of the probation officer prior to moving address or changing employment. The offender may not engage in any employment that the officer has prohibited.

If the officer directs the offender to take part in a rehabilitative and reintegrative needs assessment, the offender must comply. No association or contact by the offender with anyone under 16 is permitted, unless it occurs under the supervision of an adult who has been informed of the relevant offending and the supervising adult

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<sup>84</sup> At [48].

<sup>85</sup> At [63].

<sup>86</sup> *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 at [108].

<sup>87</sup> Parole Act 2002, 107JA (1).

has been approved, in writing, by the probation officer. No association, or contact by the offender is permitted with a victim unless approved by the officer, nor may an offender associate with or contact any person(s) specified in a written direction provided to the offender. Although ESOs do not, on their face, constitute preventive detention, “special” conditions may be placed on them to significantly restrict the freedom of those subject to an ESO.

### *Special Conditions*

“Special” conditions (such as special residential condition<sup>88</sup> and electronic monitoring<sup>89</sup>) may only be imposed if it is designed “to reduce the risk of reoffending by the offender” or “facilitate or promote the rehabilitation or reintegration of the offender” or “provide for the reasonable concerns of victims of the offender”.<sup>90</sup> The Parole Board may impose “special” conditions in relation to an ESO<sup>91</sup> after it receives an application by the Chief Executive of the Department of Corrections or a probation officer. Residential restrictions may be imposed that also require the offender to submit to being accompanied and monitored by an individual approved to perform person-to-person monitoring.<sup>92</sup>

The most restrictive measure permits the Parole Board to impose a special residential condition as well as the standard detention conditions set provided in s 36(2)(a), (b) and (d) of the Act as if the person were on home detention.<sup>93</sup> The Board must specify the duration of the conditions, however residential conditions that include 24 hour person-to-person monitoring may only occur within the initial 12 months of the order.

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<sup>88</sup> Parole Act 2002, 15(3)(ab).

<sup>89</sup> Parole Act 2002, s 107JA sets out standard ESO conditions; 107K permits special conditions to be imposed consistent with section 15 of the Act such as special residential conditions and electronic monitoring conditions.

<sup>90</sup> Parole Act 2002, s 15(2).

<sup>91</sup> Section 107K(1).

<sup>92</sup> Section 107K(2).

<sup>93</sup> Section 107J(1)(b).

*The Potentially Extensive Scope of ESO's*

In *Wilson v Chief Executive of the Department of Corrections*<sup>94</sup> the Court of Appeal was required to consider whether an Extended Supervision Order made by the High Court in relation to Stuart Murray Wilson was justified. As noted above, an ESO may be made if there is a “real and ongoing risk of committing sexual offences against children or young persons”.<sup>95</sup> The appellant argued that an ESO was inappropriate because his prior offending in respect of young girls was merely incidental to his offences against adult women. He claimed that he had no proclivity for offending against children in general, and that his age militated against him having any opportunity to offend against young girls.<sup>96</sup>

When considering the nature of any likely future sexual offending, including the age and sex of a likely victim, the Court essentially considered the nature of the Wilson's past offences and the character of his offending involving young girls. The Court was satisfied, on the basis of the health assessor's evidence, that the Parole Act criteria had been met.<sup>97</sup>

Significant conditions were placed on Wilson's ESO as authorised under the Parole Act 2002, against which he subsequently appealed.<sup>98</sup> Of the seventeen special release conditions imposed by the Parole Board, one included a residence condition requiring him to reside on the Whanganui prison grounds. Another release condition imposed by the Board required Wilson to:

undertake, engage in and complete a reintegration programme administered by a programme provider approved by the Probation Officer, and abide by the rules of the programme to the satisfaction of your Probation Officer and the programme provider.<sup>99</sup>

Consequently it was up to the Probation Service to determine the specifics of

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<sup>94</sup> *Stuart Murray Wilson v Chief Executive of the Department of Corrections* [2013] NZCA 144.

<sup>95</sup> Parole Act 2002, s 107I(1).

<sup>96</sup> *Stuart Murray Wilson v Chief Executive of the Department of Corrections* [2013] NZCA 144 at [28].

<sup>97</sup> There is no standard of proof applicable in relation to an ESO – it is a matter of the court coming being satisfied regarding the likelihood of future offending. *R v McDonnell* [2009] NZCA 352.

<sup>98</sup> *Stuart Murray Wilson v New Zealand Parole Board* [2012] NZHC 2247 at [19].

<sup>99</sup> At [19].

Wilson's reintegration scheme. The programme subsequently formulated by Corrections required Wilson to be accompanied by two reintegration staff *whenever* he left the prison grounds.

However, the High Court held that, by operationalising the Parole Board's reintegration condition in this way, the Corrections Department acted unlawfully. Given that Corrections could not undertake to have two persons available to Wilson at a given time, it had effectively assumed complete control over Wilson's movements. The Court held that this amounted to "de facto detention".<sup>100</sup> Indeed Young J stated that it was not "in fact a reintegration programme as imposed by the Board; it was not authorised by s 15(3)(b) of the Parole Act and was probably in breach of s 22 of the New Zealand Bill of Rights Act" (right not to be arbitrarily arrested or detained).<sup>101</sup> Ultimately the Court was not required to make a formal declaration. Rather, it referred the matter back to the Parole Board to further specify the conditions relating to Wilson's reintegration programme.

The current statutory limitation on ESOs to a maximum of 10 years means that they do not constitute an "indefinite" restriction on a subject's liberty.<sup>102</sup> However, this will probably not be the case for much longer. It was reported early in January 2014, only six months short of the 10-year anniversary of the enactment of the ESO legislation, that Corrections Minister Anne Tolley intended to introduce legislation that would enable ESOs to be put in place for child sex offenders for as long as they are required.<sup>103</sup> The Bill introducing expanded ESOs has since passed its first reading with cross-party support.<sup>104</sup> On 5 November, the Law and Order Committee recommended that the Bill be passed, subject to amendments. In so doing, the Committee noted a report from the Attorney-General, which noted certain

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<sup>100</sup> At [58].

<sup>101</sup> At [59].

<sup>102</sup> An offender subject to one of the most restrictive ESO's is Lloyd McIntosh, whose offending against children included the rape of a 23-month-old baby and a six year old child. McIntosh was released from prison in 2005 but was made subject to an ESO that required him to reside at a lodge in the grounds of Christchurch Men's Prison. McIntosh's ESO will expire in 2015.

<sup>103</sup> Anne Tolley "Extended Supervision Orders to be Expanded" (press release, 17 January 2014) <[www.beehive.govt.nz](http://www.beehive.govt.nz)>.

<sup>104</sup> The Parole (Extended Supervision Orders) Amendment Bill passed its first reading in Parliament on 3 July 2014.



“inconsistencies ... between the bill and the NZBORA.” Specifically, The Committee noted, the Attorney-General’s report expressed concern that “the bill breaches section 26 of the NZBORA, which protects against double jeopardy, effectively punishing someone twice for the same offence.” We consider the likely compatibility of this right with the proposed PPO regime later in this Report.

Such an extension to the 10-year limit was predicted by the chair of the Justice and Electoral Select Committee (Tim Barnett) in his comments on the second reading of the Bill that introduced ESO’s, should the ESO regime prove to be successful.<sup>105</sup>

Notably, the proposed extension goes further than current ESOs, as the orders seemingly would apply not only to those who have abused children, but would also cover high-risk sex offenders and very high-risk violent offenders who have completed their sentence. Clearly the impetus behind the reform is public protection. It is arguable that the proposed regime would make the PPO Bill largely redundant, given that it authorizes the imposition of an indefinite ESO and would not be limited to child sex offenders. On the other hand, courts have imposed limits on the legitimate scope of ESOs, which may mean that the proposed PPO regime provides a greater capacity to effectively isolate and indefinitely detain offenders post detention.

While it is not possible to use an ESO to impose “de facto” detention, it is equally clear that an extensive range of conditions may be imposed on an individual who is subject to an ESO. However the provisions of the PPO Bill are, by a significant margin, much more liberty restricting measures.

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<sup>105</sup> NZPD, Vol: 618; 29 June 2004. “The third issue I want to put on record is that this legislation provides for only a 10-year regime. Certainly, the Justice and Electoral Committee wanted to make it clear that we saw that there would be a need to review its operation after maybe 6 or 7 years, to ensure that if, after 10 years, it was working well, it could be extended beyond that, which would require an amendment to the legislation”.

### III. Public Safety (Public Protection Orders) Bill

#### A. Introduction

The introduction of civil detention orders was a centrepiece of the National Party's law and order policy announced in 2011.<sup>106</sup> The objective of the PPO Bill is stated in clause 4 which provides that it:

- (1) ... 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. (emphasis added).

When introducing the Bill's first reading in Parliament,<sup>107</sup> Minister of Justice Judith Collins claimed that PPOs are necessary to fill an apparent "gap" in the current penal framework, stating:<sup>108</sup>

This bill will improve public safety and save potential victims from almost certain serious harm, or worse ... The new order will complement existing measures such as parole conditions, extended supervision orders, and preventive detention. The bill responds to situations where an offender presents an unacceptable risk that cannot be managed through these existing measures.

People must ask themselves whether they would place someone who has a very high risk of imminent and serious sexual or violent offending in any community in New Zealand, let alone their own. At this very high level of imminent risk, the law runs out of options to manage these offenders' behaviours once their sentence is complete...

Although these people have offended in the past, they will not be detained for their previous crimes. They will be detained because of their imminent risk of serious sexual or violent offending, at the time of the application. The test for the risk of imminent future offending will be difficult to meet.

Interestingly, the Parliamentary speeches at the Bill's first reading demonstrated cross-party support of the Bill. The need for such a measure was generally accepted, although it was also acknowledged that further scrutiny of the Bill by the Select Committee was necessary, given the significant step being taken and the resulting tension with civil and political rights. Consequently Phil Goff stated:<sup>109</sup>

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<sup>106</sup> D Cheng "Collins Talks Tough on Detaining Sex Offenders" *The New Zealand Herald* (New Zealand, online ed, Auckland, 8 November 2011).

<sup>107</sup> After being read the Bill received 106 ayes versus 14 noes.

<sup>108</sup> (17 September 2013) 693 NZPD at 13441.

<sup>109</sup> (17 September 2013) 693 NZPD at 13365.

The regulatory impact statement does make it clear that this bill will breach human rights legislation in this country and internationally in a number of different ways. The challenge that we will face in examining this legislation—first of all the select committee examining it and then us in the House—is to ensure that any action that we are taking can be justified on the basis of an intense risk from a very small number of people.

In contrast, another member (National Party) implied that the proposed Bill would be preferable to past/historical means of dealing with intractably violent offenders using mental health measures as a means of incapacitation.<sup>110</sup> Another (Labour Party) explicitly invoked the spectre of the movie *One Flew Over the Cuckoo's Nest* as illustrative of the ways that societies might, in the past, have treated a violent or personality disordered offender.<sup>111</sup>

The Attorney-General, in his report on the consistency of the PPO Bill with the NZBoR Act under section 7 of the Act noted that the powers contained in the Bill:<sup>112</sup>

... are new and far-reaching: the explanatory note to the Bill states that it is possible that some detainees might never be released. Even those ultimately released would have been detained beyond, and possibly well beyond, their original sentences. As with extended supervision orders ... the broad terms of the Bill raise difficult questions of consistency with the Bill of Rights Act.

The Attorney-General proceeded to accede that, whether detention is ordered in a “residence” or a prison, the:<sup>113</sup>

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<sup>110</sup> Scott Simpson (National): “There are, unfortunately, in society a very small number of troubled people who have fulfilled their obligations in terms of the criminal justice system but still present a real and very threatening risk to the wider public. As Andrew Little made the point in his speech, in less enlightened times, these people would probably have been incarcerated in some kind of mental institution, where they would have been subjected to all kinds of indignities, both mental and physical and probably involving drugs and all kinds of treatments that we would consider entirely inappropriate today.”

<sup>111</sup> Andrew Little (Labour) (17 September 2013) 693 NZPD at 13365.

<sup>112</sup> Office of the Attorney-General, *Public Safety (Public Protection Orders) Bill – Consistency with the New Zealand Bill of Rights Act 1990* (14 October 2012) at [3] Ministry of Justice <[www.justice.govt.nz](http://www.justice.govt.nz)>.

<sup>113</sup> Office of the Attorney-General, *Public Safety (Public Protection Orders) Bill – Consistency with the New Zealand Bill of Rights Act 1990* (14 October 2012) at [13] Ministry of Justice <[www.justice.govt.nz](http://www.justice.govt.nz)>.

... conditions of detention under the Bill would be in part comparable to those applicable to sentenced prisoners. A person detained under a public protection order would be in the legal custody of the Chief Executive of the Department of Corrections and would be subject to restriction on their movement, visitors and day-to-day management. The manager of the residence would have powers to control detainees' correspondence and telephone calls, to administer drug and alcohol tests, to undertake searches, including strip-searches and to place detainees in seclusion and/or under forcible restraint. Detainees could work, but only within the residence or in a prison. Detainees could receive rehabilitative treatment if there is a reasonable prospect of reducing the detainee's risk to public safety.

### ***B. The PPO Bill: threshold test for an PPO***

The underlying normative protective principle is emphasized in Bill itself, which declares “it is not an objective of this Act to punish persons against whom orders are made under this Act”.<sup>114</sup> Despite this assertion, the Bill contains many hallmarks of a penal regime, not least because it only applies to persons who have been convicted of criminal offences. Clause 7 of the PPO Bill restricts the application of a PPO to any person over the age of 18 who:

- (a) has been detained in prison under a determinate sentence for a “serious sexual or violent offence”<sup>115</sup> who must be released less than six months after the date on which the chief executive applies for a PPO against them; or
- (b) is subject to an extended supervision order<sup>116</sup> that is, or was accompanied by particular monitoring provisions or long-term placement in an agency pursuant to specified provisions of the Parole Act 2002<sup>117</sup> or

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<sup>114</sup> PPO Bill, clause 4(2).

<sup>115</sup> “Serious sexual offence or violent offence” is defined as an offence committed *before*, or after the section comes into force that is (a) committed in New Zealand and is “(i) is a sexual crime under Part 7 of the Crimes Act 1961 punishable by 7 or more years’ imprisonment; and includes a crime under section 144A 10 or 144C of that Act; or (ii) an offence against any of sections 171, 173 to 176, 188, 189(1), 191, 198 to 199, 208 to 210, 234, 235, and 236 of the Crimes Act 1961; or (b) is committed overseas and would come within the description of paragraph (a) if it had been committed in New Zealand”.

<sup>116</sup> “Extended supervision order” is further defined in clause 13(3) as an order imposed on a person (before or after the section comes into effect) who was an “eligible offender” pursuant to s 1071 of the Parole Act 2002; ie the person had been sentenced for a relevant offence that was also a serious sexual or violent offence as defined in s 3 of the Parole Act 2002.

- (c) is subject to a protective supervision order;<sup>118</sup> or
- (d) has arrived in New Zealand less than 6 months after being subject to any sentence, supervision conditions, or order imposed for a serious sexual or violent offence by an overseas court and resides, or intends to reside, in New Zealand.

Clause 7 of the Bill clearly presupposes a prior conviction, given that it restricts the ambit of the legislation to persons already sentenced in the criminal justice system. The threshold level of risk for imposing a PPO is contained in clause 13(1). This authorises the High Court to make a public protection order if, after “considering all of the evidence offered”, and “in particular, the evidence given by 2 or more health assessors<sup>119</sup> including at least 1 registered psychologist” the Court is *satisfied* that:

- (a) the respondent meets the threshold for a public protection order; and
- (b) there is a very high risk<sup>120</sup> of imminent<sup>121</sup> serious sexual or violent offending by the respondent if,—

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<sup>117</sup> This is an order “(i) subject to a condition of full-time accompaniment and monitoring imposed under 35 sections 33(2)(c) and 107K(2) of the Parole Act 2002; or (ii) is subject to a condition of long-term full-time placement in the care of an appropriate agency, person, or persons for the purposes of a programme under sections 15(3)(b) and 16(c) of the Parole Act 2002”.

<sup>118</sup> A protective supervision order is an order made under clause 80 of the Bill. Clause 80(1) requires the Court to cancel a PPO and impose a PSO if, after a review under clause 17 of the Bill, the court is satisfied that the person subject to the PPO no longer poses “a very high risk of imminent serious sexual or violent offending”. If a PSO is imposed, every victim of that person must be notified by the chief executive of that order (cl 80(2)). A PSO may be subject to any requirements that the court considers is necessary to reduce that persons risk of offending or to “facilitate or promote the rehabilitation and reintegration into the community” or to “provide for the reasonable concerns of victims of the person under protective supervision” (cl 81).

<sup>119</sup> A health assessor is defined as a health practitioner who is deemed to be, or is registered with the MCNZ as a practicing psychiatrist or a registered psychologist (pursuant to the Health Practitioners Competence Assurance Act 2003).

<sup>120</sup> The RIS recommended the following definitions: “very high risk” means that the offending is considered extremely likely, “serious” means that the predicted offending would cause serious physical and/or psychological harm to one or more other persons, ‘imminent’ means that the offending is expected to occur when, provided with a suitable opportunity, the offender would immediately inflict serious harm on a vulnerable victim” [22].

<sup>121</sup> See comment in Department of Corrections, *Regulatory Impact Statement Management of High Risk Sexual and Violent Offenders at End of Sentence* (March 2012) at [31] regarding the importance of retaining “imminence” so that the scope of the legislation is not too wide. It states: “In general, high risk violent offenders typically do not meet the imminence test in respect of future violent offending”. Widening it (ie removing the criterion of imminence) would mean many persons would be detained who would not go on to re-offend in a “seriously violent manner and some who would never re-offend in a violent manner at all”. [30]

- (i) where the respondent is detained in a prison, the respondent is released from prison into the community; or
- (ii) in any other case, the respondent is left unsupervised.

For the purposes of determining whether there is a high risk of *imminent* serious sexual or violent offending, clause 2 of the PPO Bill defines “imminent” as meaning that a “person is expected to commit a serious sexual or violent offence “as soon as he or she has a suitable opportunity to do so”. Clearly this meaning is not the mainstream definition of “imminent”—which is generally defined as “going to happen at any moment”. Instead the Bill places a gloss on the meaning of “imminent”, making it sufficiently broad to encompass opportunistic sex offenders.

Clause 13(2) of the Bill provides additional explicit criteria to determine whether the legal threshold of a “very high risk of imminent serious sexual or violent offending” is met on the evidence. While cl 13(1) focuses on future dangerousness, an individual will only be eligible for a PPO if he exhibits a “severe disturbance in behavioural functioning” as specified in cl 13(2).

Clause 13(2) specifically targets the group identified by the Department of Corrections in its Regulatory Impact Statement as candidates for post sentence detention.<sup>122</sup> It provides that the Court may *not* make a finding under cl 13(1) unless it is satisfied that the following *cumulative* criteria are met:

The respondent exhibits a severe disturbance in behavioural functioning established by evidence of the following characteristics to a high level:

- (a) an intense drive or urge to commit a particular form of offending;<sup>123</sup>
- (b) limited self-regulatory capacity, evidenced by general impulsiveness, high emotional reactivity, and inability to cope with, or manage, stress and difficulties;

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<sup>122</sup> Department of Corrections, *Regulatory Impact Statement Management of High Risk Sexual and Violent Offenders at End of Sentence* (March 2012).

<sup>123</sup> At [5].

- (c) absence of understanding or concern for the impact of offending on actual or potential victims;
- (d) poor interpersonal relationships or social isolation or both.

The characteristics specified in cl 13(2) are essentially premised on a lack of “adaptive functioning” in terms of empathy, social skills, impulse control and judgment. While it implies that “volition”, “understanding” or “control” must be impaired, it stops short of requiring similar levels of impairment to the Mental Health (Compulsory Treatment and Assessment) Act 1992. This Act defines mental disorder in terms of a set of serious dysfunctions of mind that are linked to an inability to care for oneself or being a risk to others. Clause 13 (2) differs largely by degree, in that the implied impairments are less clearly mitigating or excusing. Indeed, it might be thought that the terms used in cl 13 (2) seem closer to describing the causation of criminal behaviour itself, rather than defining any mental abnormality.

The Department of Corrections, who appear to be largely responsible for the drafting of cl 13(2), have stated that:<sup>124</sup>

A psychological assessment of the offenders would be necessary to determine whether the characteristics that identify them as being at a very high risk of imminent and serious sexual or violent reoffending are present. This would include the use of psychometric and actuarial risk assessment procedures.

The Department provided examples of evidence that would suggest an “intense drive or urge to commit a particular form of offending” for the purposes of cl 13(2)(a). This included: “recurrent and intense deviant fantasy; compulsivity in relation to deviant urges; a pattern of repetitive and opportunistic offending; rapid re-offending following previous releases from custody”. The Department went on to claim:<sup>125</sup>

[o]ffenders of this type display few gains from rehabilitation or are unwilling to participate satisfactorily, usually as a result of low intelligence or other cognitive deficits.

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<sup>124</sup> At [26].

<sup>125</sup> At [24] and [25].

Most of these offenders would be child sex offenders, although adult sex offenders may also fall within this group. A very small number of violent offenders may also have the identified characteristics and may meet the imminence test.

### ***C. Civil or criminal ... and why it matters***

Notwithstanding the claim that “orders under this Act are not imposed to punish persons”,<sup>126</sup> concerns have been raised that the Public Protection Orders (PPOs) created by the Bill are more accurately seen as punitive. In particular, the requirement of prior conviction as a “triggering event” has been argued to be strongly indicative of their penal character. The Court of Appeal has held that restrictive measures in response to criminal convictions “amount to punishment.”<sup>127</sup>

Indeed, the Regulatory Impact Statement prepared by the Department of Corrections frankly acknowledged that:

[PPOs’] application only to individuals who have been imprisoned for a serious criminal offence, or subject to the most intensive form of extended supervision order, could lead courts and international human rights bodies to determine that the order is criminal rather than civil.<sup>128</sup>

If PPOs are properly seen as punitive measures, this has significant implications for human rights, both in terms of domestic law and international human rights jurisprudence. Section 26 (2) of the New Zealand Bill of Rights Act 1990 (NZBORA) provides that “No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.” It is difficult to see how a punitive

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<sup>126</sup> Clause 4(2) states: “It is not an objective of this Act to punish persons against whom orders are made under this Act.” Clause 5(a) states: “orders under this Act are not imposed to punish persons and the previous commission of an offence is only 1 of several factors that are relevant to assessing whether there is a very high risk of imminent serious sexual or violent offending by a person.”

<sup>127</sup> *R v Peta* [2007] NZCA 28, para 13. See also *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507, para 26. Both of these cases concerned the imposition of extended supervision orders under the Parole Act 2002 (as amended), but it is evident that analogous considerations apply to the proposed PPOs.

<sup>128</sup> Department of Corrections, *Regulatory Impact Statement Management of High Risk Sexual and Violent Offenders at End of Sentence* (March 2012) addendum, para 8.



sentence, imposed many years after the original sentence, could be other than an infringement of this right. As well as a technical infringement, this would violate the

important principle [] that a defendant is entitled to the certainty that, after the passing of sentence and any time for appeal, her case is over and she can get on with life. There must be finality — an end to proceedings.<sup>129</sup>

The designation of PPOs as civil or criminal may also be relevant to the question of whether they infringe the right not to be arbitrarily arrested or detained. This is also contained in s 22 of NZBORA, and is also reflected in Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which states that “No one shall be subjected to arbitrary arrest or detention.” This right might be infringed by the fact that PPOs will be applicable only to people convicted of a serious criminal offence. As noted in the Regulatory Impact Statement:

Limiting the orders solely to offenders risks the detention being found to be arbitrary ... in breach of s 22 of NZBORA and article 9 of the ICCPR. It is difficult to argue that, as a matter of principle, it is necessary to detain offenders who pose this level of risk when those who have not offended but who pose the same risk cannot be detained.<sup>130</sup>

The view that PPOs would constitute a penal measure is not, however, unanimously held. While the Attorney-General considered that several aspects of the PPO Bill suggested it was aligned with penal detention (for example that PPOs are triggered by a criminal conviction as well as the nature of custody already alluded to) he nevertheless concluded that these factors were displaced by provisions that “are characteristic of a committal, rather than a penal, regime”.<sup>131</sup>

The provisions considered to be consistent with a civil committal regime involved those requiring determination by a High Court judge not only of “a very high risk of imminent offending” but also that the individual “exhibits a severe disturbance in

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<sup>129</sup> *Police v Gilchrest* (1998) 16 CRNZ 55 at [60].

<sup>130</sup> Department of Corrections *Regulatory Impact Statement Management of High Risk Sexual and Violent Offenders at End of Sentence* (March 2012) addendum, para 9.

<sup>131</sup> At [27].

behavioural functioning”, a factor that must be established by expert evidence involving each of the four specified behavioural characteristics in the Bill.<sup>132</sup> Another claimed indicator of its civil nature was the Bill’s emphasis on a high risk of harm and the requisite disturbance in behavioural functioning required to meet the threshold for the imposition of an order, which was grounded in expert evidence and subject to ongoing review. These factors, it was argued, meant that the PPO Bill was in ‘line’ with civil committal regimes.

In addition, the Attorney-General noted that because detainees would have “a ‘right to rehabilitative treatment’ *provided* that the treatment has a reasonable prospect of reducing the risk that a detainee poses”, this suggested a “distinct and non-punitive system of detention, again consistent with a committal regime.”<sup>133</sup> The conditional nature of this ‘right’ to rehabilitative treatment may be considered problematic, as we discuss later in this report. Such an approach, however, is not a new phenomenon in corrections.

Phil Goff, (Minister of Justice when the 2002 sentencing and parole reforms were first introduced) stated at the first reading of the Public Safety (Public Protection Orders) Bill in Parliament:<sup>134</sup>

Most countries have indeterminate sentences, such as preventive detention. That meets the criteria of the United Nations Human Rights Committee. It meets the criteria followed by the European Union’s [sic] human rights court. But the concept of detaining people *after* they have served the sentence imposed on them by the court is pretty unusual. We can be pretty certain that it will breach the New Zealand Bill of Rights Act. We can be pretty certain that it breaches the International Covenant on Civil and Political Rights. You do not lightly take action and legislate in this way when you *know in advance* that you are going to be in breach of significant pieces of legislation and international obligations. (Emphasis added).

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<sup>132</sup> At [27.1].

<sup>133</sup> At [27.2.3].

<sup>134</sup> (17 September 2013) 693 NZPD at 13445.

It is certainly correct that the European Court of Human Rights has found that in certain circumstances, as long as a sentence was reducible (ie subject to a guaranteed right to review) no rights issues arise in respect of indeterminate sentences and the Convention on Human Rights given the States obligation to protect the public.<sup>135</sup> In New Zealand, indeterminate sentences which are imposed at sentencing generally have a specified parole period, after which the Parole Board must assess whether the individual still poses a risk to the community.

However, the type of sentence referred to in the international jurisprudence<sup>136</sup> involved an irreducible sentence imposed when the offender was first sentenced. This is significantly different from the PPOs proposed by the current Bill, which are sought *after* a prisoner has completed a finite sentence. Because PPOs are not “criminal” orders as such, parole periods are not imposed, although the Bill makes provision for annual review of Orders, which is discussed further below.

#### ***D. Clause 13(2) and the psychopathic individual***

Concerns have also arisen around the criteria set out in cl 13(2). Indeed, it is significant that the Bill specifies these conditions at all; given its stated rationale of public protection, we might wonder why it was not made applicable to anyone who presents “a very high risk of imminent offending,” instead of being limited to those who also “exhibit[] a severe disturbance in behavioural functioning.”

The cynic might conclude that this additional criterion has been included to satisfy human rights-based objections to the Bill. The introduction of “clinical” criteria may be thought to render more plausible the Bill’s categorisation as a “civil” measure, more in line with mental health legislation than with penal measures. However, there is a genuine connection between these characteristics and human rights arguments that, to justify civil detention, those detained must be disordered in some way that results in a diminished/absent ability to control their actions. It is an argument,

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<sup>135</sup> See the discussion of *Vinter v UK* in Part III. Section 9 of the New Zealand Bill of Rights Act provides affirms “the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment”.

<sup>136</sup> *Vinter v United Kingdom* (2013) 57 EHRR.

though, which requires deeper analysis. Of significance for this discussion is that cl 13(2) appears to characterize many of the attributes associated with psychopathy.

The most utilized assessment tool to identify psychopathy is the psychopathy checklist (PCL-R) developed by Dr Robert Hare.<sup>137</sup> It assesses 20 emotional and behavioral features that define psychopathy. Of those 20 items, two distinct factors are apparent (with further subcategories in each factor): the first factor (F1) relates to emotional and interpersonal characteristics, the second (F2) to impulsive and antisocial behavior. These are outlined in the following table.

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<sup>137</sup> R Hare *The Hare Psychopathy Checklist-Revised* (Multi-Health Systems, Toronto, 1991).

<b>PCL-R F1</b>	<b>The PCL-R F2</b>
<b>Emotional / Interpersonal characteristics</b>	<b>Impulsive and antisocial behaviour</b>
<b>Interpersonal items</b>	<b>Lifestyle items</b>
1. glibness/superficial charm	9. Need for stimulation
2. grandiose sense of self-worth,	10. Parasitic lifestyle
3. pathological deception	11. Lack of realistic, long-term goals
4. whether the person is conning or manipulative.	12. Impulsivity
	13. Irresponsibility
<b>Affective</b>	<b>Antisocial</b>
5. lack of remorse or guilt,	14. Poor behavioral controls
6. shallow affect	15. Early behavioral problems
7. callousness and lack of empathy	16. Revocation of conditional release
8. failure to accept responsibility for actions.	17. Juvenile delinquency
	18. Criminal versatility

The characteristics listed in cl 13(2) are similar to the attributes set out in F2 of the PCL-R which, together, are closely associated with Anti-Social Personality Disorder (ASPD).<sup>138</sup> These ASPD attributes are similar to the impaired control conditions specified in cl 13(2). Given, then, that the PPO Bill seems to implicitly target individuals with psychopathic traits it is worth considering the implications of the PPO Bill for this particular category of offenders.

<sup>138</sup> Typically psychopathic individuals are generally diagnosed with Anti-Social Personality Disorder. A Fox, T Kvaran and RG Fontaine “Psychopathy and Culpability: How Responsible Is the Psychopath for Criminal Wrongdoing?” (2013) 38 Law & Social Inquiry 1-26 at 3.

### *Psychopathy and the law*

The Court of Appeal has characterized psychopathy as:<sup>139</sup>

... a severe form of personality disorder with distinctive emotional, interpersonal and anti-social features. Highly psychopathic offenders are characterised by emotional deficits such as a lack of empathy or remorse, a manipulative and exploitative interpersonal style, and a blatant disregard for the rights of others. Research has consistently found psychopathy to have a strong relationship to a variety of negative criminal justice outcomes. These include poor response to available treatment interventions, increased involvement in institutional misconduct while incarcerated and high levels of violent and sexual re-offending as compared to less psychopathic offenders.

Empirical studies have indicated that psychopathic individuals have deficits in moral reasoning.<sup>140</sup> The implication of this is the possibility that psychopathic individuals may not possess the cognitive attributes sufficient for being attributed with *full* responsibility for their actions.

The relevance of impaired control to the attribution of criminal responsibility is, however, unclear and controversial. To be able to be found criminally nonresponsible, the legal presumption of sanity must first be rebutted.<sup>141</sup> Counsel for the defence must essentially *prove* insanity - albeit to the lower legal standard of 'balance of probabilities' - and more specifically, demonstrate that an accused did not understand either the nature and quality of their actions, or that they were morally wrong.<sup>142</sup> If it can be established that there was indeed an complete *absence* of understanding, or an inability to know whether the nature of an action is morally wrong, an individual may be relieved of criminal and moral responsibility for that act. It is contrary to ethical

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<sup>139</sup> *R v Peta* [2007] NZCA 28 at [39].

<sup>140</sup> A Fox, T Kvaran, and RG Fontaine "Psychopathy and Culpability: How Responsible Is the Psychopath for Criminal Wrongdoing?" (2013) 38 *Law & Social Inquiry* 1.

<sup>141</sup> The rule in *R v M'Naghten* (1854) 10 Cl & Fin 200; 8 ER 718 provides that every person is presumed sane and to possess sufficient reason to be responsible for their crime unless the contrary is proved. The *M'Naghten* rules are codified in section 23 of the Crimes Act 1961.

<sup>142</sup> Crimes Act 1961, s 23(2). See *R v Dixon* (2007) 23 CRNZ 911 (CA).

and legal principles to punish an individual for a criminal act that was not subject to the perpetrator's voluntary control.<sup>143</sup>

However, the case of psychopathy presents a particular category of individuals that pose challenges for the law, and the question of whether, and to what extent, psychopaths should be excused from criminal responsibility is both complex and contested. One problem relates to psychopathy's contested status as a mental illness. While DSM-5 does list "antisocial personality disorder", which contains significant features in common with psychopathy,<sup>144</sup> as a personality disorder, it contains no explicit reference to psychopathy itself.

In New Zealand, the defence of insanity relies on the presence of a "disease of the mind",<sup>145</sup> and whether a particular condition meets that description is ultimately a question of law for the judge.<sup>146</sup> Yet attempting to establish an insanity defence without expert psychiatric support is likely to be, to say the least, a difficult task. Describing the present legal situation in New Zealand, the authors of a leading criminal law textbook concluded that psychopathy could be regarded as a "disease of the mind" for the purposes of an insanity defence, "if there is medical evidence that the condition is regarded as a mental illness".<sup>147</sup> Although ultimately a legal test, then, the success or failure of a psychopathy-based insanity defence will depend substantially on how expert psychiatric witnesses view the condition.

The situation may be somewhat clearer with regard to ASPD, which is specifically included within DSM-5, though its status is still contested.<sup>148</sup> The authors of *Adams*

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<sup>143</sup> "By definition, an agent who is not morally responsible for behavior does not deserve moral blame and punishment for it." SJ Morse, "Psychopathy and Criminal Responsibility" (2008) 1 *Neuroethics* (2008) 205–212 at 208.

<sup>144</sup> Coid and Ullrich, for example, have written of 'considerable symptom overlap' between psychopathy and ASPD; "Antisocial Personality Disorder is on a Continuum with Psychopathy" (2010) 51 *Comprehensive Psychiatry* 426–433 at 432.

<sup>145</sup> Crimes Act 1961, s 23(2).

<sup>146</sup> B Robertson (ed) *Adams on Criminal Law*, (online ed, Brookers) at [CA23.05]

<sup>147</sup> At [CA23.06]

<sup>148</sup> "... the problems faced by people with personality disorder are often considered at the margins of what can usefully be considered a mental disorder." R Mullen, "Personality Disorder and the Mental Health Act", In J Dawson and K Gledhill (eds) *New Zealand's Mental Health Act in Practice* (Victoria University Press, 2013) at 47.

on *Criminal Law*, however, seem reasonably optimistic regarding its prospects of success:<sup>149</sup>

there would seem to be no reason in principle to conclude that a diagnosed severe personality disorder could never constitute or contribute to a “disease of the mind” for the purposes of s 23, where its effect was to render the defendant incapable of knowing what he or she was doing, or that the act was morally wrong.

Even if this were established, however, a defence based upon such a diagnosis “may well fail because the further tests in s 23(2) are not met.”<sup>150</sup> New Zealand law defines insanity in cognitive terms; a criminal defendant who, by reason of a disease of the mind, does not understand the nature of his action (including its moral nature) will not be held criminal culpable for its commission. It does not, however, provide for what might be termed *volitional* insanity. Thus it has been said that:<sup>151</sup>

Provided a person’s cognitive processes are functioning at a level sufficient to enable the accused to grasp the nature and wrongfulness of his act, the fact that his emotional and volitional capacities are abnormal will not detract from the judgment that he was legally sane.

Insofar as psychopathy or ASPD impact upon an individual’s volitional capacities – his ability to control his behaviour – he will not be excused culpability.

What, though, of the cognitive effects? Psychopathy is not typically accompanied by delusions of the type that would deprive the affected person of the ability to understand the nature of their act. Whether it would prevent them from “knowing that the act or omission was morally wrong” is a considerably more contested question, which continues to divide opinion among prominent legal theorists and philosophers.<sup>152</sup> At present, then, there is no consensus as to whether psychopathy

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<sup>149</sup> B Robertson (ed) *Adams on Criminal Law* (online ed, Brookers) at [CA23.06].

<sup>150</sup> At [CA23.06]

<sup>151</sup> AP Simester AP and WJ Brookbanks. *Principles of Criminal Law*. (4th ed, Thomson Reuters, Wellington, 2012) at 356.

<sup>152</sup> For some very recent contributions, contrast N Levy “Psychopaths and Blame: The Argument from Content” (2014) 27 (3) *Philosophical Psychology* 351-367 with E Aharoni, W Sinnott-Armstrong, KA Kiehl. “What’s Wrong? Moral Understanding in Psychopathic Offenders” (2014) 53 *Journal of Research in Personality* 175–181.



could form the basis of an insanity defence.<sup>153</sup> Furthermore, not only may psychopathy be rejected as an excusing or mitigating condition, it may even serve as an aggravating factor in sentencing.<sup>154</sup>

The extent to which psychopathy, or indeed antisocial personality disorder, provide valid grounds for civil detention under New Zealand's mental health legislation has been another contested question. As we have already noted, the Mental Health (Compulsory Assessment and Treatment) Act 1992 defines mental disorder in terms of abnormal states of mind characterized by "delusions, or by disorders of mood or perception or volition or cognition." The Court of Appeal has held that severe cases of personality disorder can satisfy this statutory definition.<sup>155</sup> Whether detention would be justified will depend, then, on whether the second limb of the test is satisfied, ie, for present purposes, whether the person poses a serious danger to the health or safety of themselves or others.<sup>156</sup>

The situation of psychopathy may be even more complicated. It is known that psychopaths are volatile and struggle to control impulses, and that many of them have diminished cognition.<sup>157</sup> However, it also seems clear that the legislative intent and clinical interpretation of the 'mood' and 'cognition' requirements tend to be interpreted with recognised mental illnesses.

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<sup>153</sup> In Australia too, there is uncertainty whether psychopathy would provide a basis for an insanity defence; see D Lanham, D Wood, B Bartal, R Evans. *Criminal Laws in Australia* (The Federation Press, 2006) at 13. Though the decision of the Australian High Court in *Willgloss v R* [1960] HCA 5 is often thought to suggest that it would not, the judgment – which is now in any event over half a century old – did not entirely preclude this possibility.

<sup>154</sup> "To the extent psychopathy is considered at all in sentencing, it will virtually always be considered an aggravating factor, such as using it as a risk factor for dangerousness in capital sentencing." SJ Morse "Psychopathy and Criminal Responsibility" (2008) 1 *Neuroethics* 205–212 at 206. See also A Fox, T Kvaran, and RG Fontaine "Psychopathy and Culpability: How Responsible Is the Psychopath for Criminal Wrongdoing?" (2013) 38 *Law & Social Inquiry* 1 at 2.

<sup>155</sup> "A recognised and severe personality disorder which has the phenomenological consequences identified in the definition of mental disorder (delusions, disorders of mood, perception or volition or cognition) of the severity indicated in the definition ("serious danger", "seriously diminish[ed] capacity") would in normal speech be 'an abnormal state of mind.'" *Waitemata Health v Attorney-General* [2001] 21 FRNZ 216 at 234, per Elias CJ.

<sup>156</sup> For further discussion, see R Mullen, "Personality Disorder and the Mental Health Act", In J Dawson and K Gledhill (eds) *New Zealand's Mental Health Act in Practice* (Victoria University Press, 2013).

<sup>157</sup> C Harenski, R Hare, K Kiehl "Neurodevelopmental bases of psychopathy: a review of brain imagining studies" in Malatesti and McMillan eds *Psychopathy and Responsibility: interfacing law, psychiatry and philosophy* (Oxford University Press, 2010).

The disputed clinical status of personality disorders and (even more so) psychopathy is, then, paralleled by an equally disputed legal status. People affected by such conditions are, almost by definition, likely to carry out anti-social or criminal acts, but whether they find themselves detained in the criminal justice or mental health system is far from predictable, leading to the description of this choice in one recent Honours thesis as “a placement lottery.”<sup>158</sup> Whether in psychiatry, law or philosophy, there is no consensus as to whether such people are – in traditional terms - “bad” or “mad”.

### *The Ethics of Psychopathy and Treating the Psychopathic Individual*

Classic theoretical accounts of when we might restrict liberty so as to prevent harm to others weigh the harm to be prevented, against the ability of an agent to act voluntarily.<sup>159</sup> In cases where someone has a seriously reduced capacity for voluntary action, perhaps due to an acute psychotic episode, intervening to curtail actions that might lead to others, or themselves, being harmed would be justifiable. However, in the context of mental illness, there is also an obligation to act therapeutically for that person, in addition to preventing harm.

Consequently depriving someone of their liberty because they pose a risk of harm to themselves or others, because they are unable to understand or control their actions due to mental illness, is justified insofar as we are working toward their recovery. This is why the New Zealand Mental Health (Compulsory Assessment and Treatment) Act 1992 is justified in a liberal democracy.

As we have seen, those who have only a diminished ability to understand or control their actions (such as psychopathic individuals) may not be covered by Mental Health legislation, because they would often not meet the statutory threshold for “mental disorder”. But insofar as the proposed PPO system rests on analogous reasons – diminished voluntariness combined with risk to others – it is at least arguable that it should give rise to analogous obligations.

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<sup>158</sup> C Deans “Avoiding Arbitrary Detention of People with Dangerous and Severe Personality Disorder” Dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours) at the University of Otago (October 2009) at 59.

<sup>159</sup> J Feinberg *Harm to Self: The Moral Limits of the Criminal Law* (Oxford University Press, New York, 1986).

If they do not have the same ability to act responsibly as most people, and given that their liberty has been restricted in a way that would not ordinarily be warranted, the state arguably incurs an ethical obligation to do what can reasonably be done to assist them in a recovery from their violent or sexual impulses to the greatest extent possible and to enable them to achieve liberty. Indeed, the Attorney-General himself has noted that detention that is justified on the basis of “apprehended risk” must occur in a “distinct clinical and presumptively therapeutic context” if it is to comply with the sorts of standards required by the European Court of Human Rights.<sup>160</sup>

Clearly if it is possible to justify civil commitment post-sentence for the protection of the public in these circumstances, the justification is premised on the correlative rights of others type of argument—ie the rights of society not to be exposed to a heightened risk of harm and the consequent limitation on the part of the psychopathic individual to create such a risk.<sup>161</sup> However, this depends upon the *risk* that he or she poses. While this is, as we discuss in the next section, always difficult to quantify, there is some evidence that psychopathy, particularly if it co-exists with sexual deviancy,<sup>162</sup> provides a strong indicator of future sexual re-offending.<sup>163</sup>

It does not follow, however, that this risk level is fixed or wholly resistant to therapeutic interventions. As noted by two New Zealand clinical psychologists from the New Zealand Department of Corrections, the “treatment or management of psychopathic behaviour is one that is yet to receive rigorous study”.<sup>164</sup> They also

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<sup>160</sup> Office of Attorney General “Public Safety (Public Protection Orders) Bill – Consistency with the New Zealand Bill of Rights Act 1990” (14 October 2012), para 23.2

<sup>161</sup> The correlative rights principle claims that because others are potentially placed at risk by “dangerous/psychopathic” persons, this justifies protective mechanisms to effect the rights of other(s) to be safe/protected from harm. A Fox, T Kvaran, and RG Fontaine “Psychopathy and Culpability: How Responsible Is the Psychopath for Criminal Wrongdoing?” (2013) 38 *Law & Social Inquiry* 1-26.

<sup>162</sup> In this context sexual deviancy constitutes sexual activity with children or coercive sex with non-consenting adults. *R v Peta* [2007] NZCA 28 at [41].

<sup>163</sup> *R v Peta* [2007] NZCA 28 at [39] and [42] citing Hildebrand, de Ruiter and de Vogel “Psychopathy and Sexual Deviance in Treated Rapists: Association with Sexual and Nonsexual Recidivism” (2004) 16 *Sexual Abuse: A Journal of Research and Treatment* 1. The study found a sexual re-conviction rate of 82% over an average follow-up of 11.8 years for offenders who were both psychopathic and sexually deviant, in comparison to 18% for offenders who were both non-psychopathic and non-deviant. See also Rice and Harris “Cross-validation and Extension of the Violence Risk Appraisal Guide for Child Molesters and Rapists” (1997) 21 *Law and Human Behaviour* 231.

<sup>164</sup> N Wilson and A Tamatea “Challenging the ‘Urban Myth’ of Psychopathy Untreatability: the High-Risk Personality Programme” (2013) 19 *Psychology, Crime & Law* 493.

note that there is some evidence that focusing on dynamic-risk factors (ie factors that may alter with intervention/treatment) associated with offending (rather than on focusing on the psychopathic individual's basic personality) may reduce sexual or violent offending. So while psychopathy poses barriers to treatment, focusing on the factors that tend to produce criminality may present a "promising direction for psychopathy 'treatment' and the development of innovative programmes."<sup>165</sup>

Wilson and Tamatea recently published a New Zealand study reporting the results of an experimental treatment programme run by the Department of Corrections. The High-Risk Personality Programme was targeted at reducing violence in a psychopathic group. It was reported that, as a result of the programme, most of the 12 participants were able to have their "high" security classification reduced following the programme.<sup>166</sup> The authors stated:<sup>167</sup>

Despite mixed offending results and the limitations of one small sample, the HRPP outcomes appear promising, suggesting that not only do psychopathic offenders – as a group – appear to benefit from correctional programmes (Polaschek et al, 2005), but they may further benefit from purpose-built interventions designed to target specific features.

While the authors of the study noted its limitations and the need for care not to over-generalise the outcome of the programme to high-risk psychopathic populations, the study demonstrated that the participants in the programme made measurable and positive changes.<sup>168</sup> The authors conclude:<sup>169</sup>

The more we understand these offenders in terms of their functional differences the greater our ability to assist those able to change and to identify those who, at this stage, remain a significant risk to others if released ... The HRPP outcomes while positive should be interpreted as small steps towards understanding this

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<sup>165</sup> At 495, citing S Wong and R Hare *Guidelines for Psychopathy Treatment Program* (Toronto, Ontario, Multi-Health Systems, 2006).

<sup>166</sup> This involved violence as measured by the Violence Risk Scale (VRS) which was developed by Wong and Gordon and comprises a structured clinical judgment involving both static and dynamic variables. See N Wilson and A Tamatea "Challenging the 'Urban Myth' of Psychopathy Untreatability: the High-Risk Personality Programme" (2013) 19 *Psychology, Crime & Law* 493 at 499.

<sup>167</sup> N Wilson and A Tamatea "Challenging the 'Urban Myth' of Psychopathy Untreatability: the High-Risk Personality Programme" (2013) 19 *Psychology, Crime & Law* 493 at 505.

<sup>168</sup> At 505.

<sup>169</sup> At 507.

population as a group defined by challenging behaviours.

Despite the pervasive pessimistic view regarding the ability to provide treatment, rehabilitate and reintegrate high-risk offenders, several innovative and intensive programmes run in New Zealand prisons have reported that participants have made modest, but nevertheless significant, improvements in relation to diverse treatment goals.<sup>170</sup> If this indeed is a category of individuals targeted by the Bill, there is a strong argument that they should be provided with early treatment and intervention programmes to reduce the likelihood of the becoming subject to a PPO at the end of their sentence.

### *Legal Rights to Rehabilitation and Treatment*

There are, then, strong ethical reasons to support the provision of treatment for those detained for reasons of public protection. Does this ethical argument find support from the law? In *Miller v NZ Parole Board*<sup>171</sup> the appellants claimed that New Zealand was in breach of its obligation under the ICCPR for allegedly failing to provide adequate prison programmes to facilitate successful parole of prisoners. Article 10(3) provides that: “the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation ...”.

The Court of Appeal made two observations in respect of this. First, it held that art 10(3):<sup>172</sup>

is premised on particular thinking as to ‘treatment’ for criminal behavior. This thinking may not accurately reflect what is therapeutically practicable or ethically appropriate.

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<sup>170</sup> D Polaschek “How to Train Your Dragon: An Introduction to the Special Issue on Treatment Programmes for High-Risk Offenders” (2013) 19 *Psychology, Crime & Law* 409; D Polaschek and T Kilgour “New Zealand’s Special Treatment Units: the Development and Implementation of Intensive Treatment for High-Risk Male Prisoners” (2013) 19 *Psychology, Crime & Law* 511; N Wilson, G Kilgour and D Polaschek “Treating High-Risk Rapists in a New Zealand Intensive Prison Programme” (2013) 19 *Psychology, Crime & Law* 527.

<sup>171</sup> *Miller v NZ Parole Board* [2010] NZCA 600.

<sup>172</sup> *Miller v NZ Parole Board* [2010] NZCA 600 at [142], citing Professor Manfred Nowak *CCPR Commentary* (2<sup>nd</sup> ed, NP Engel, 2005) at 253-254.

Second, it stated that in the Court’s view, art 10(3) is given effect to by s 52 of the Corrections Act 2004, which provides that:

The Chief executive must ensure that, to the extent consistent with the resources available and any prescribed requirements or instructions issued under section 196, rehabilitative programmes are provided to those prisoners sentenced to imprisonment who, in the opinion of the chief executive, will benefit from those programmes.

Clearly, as was indeed noted by the Court, s 52 is expressed subject to resource restraints and the Chief Executive’s discretion regarding greatest benefit, whereas the ICCPR is not. While the Court was bound to follow s 52, it stated that “in any event, we think that art 10(3) cannot be sensibly construed as imposing an obligation to provide ‘treatment’ irrespective of either cost or likely benefit”.<sup>173</sup> This does not bode well for those subject to a PPO accessing rehabilitative or treatment programmes.

### ***E. Procedural Safeguards for Individuals Subject to a PPO***

Another important concern relates to the adequacy of procedural safeguards proposed for persons who are made subject to a PPO. The PPO Bill requires an annual review by the Review Panel.<sup>174</sup> If the Panel considers that an individual subject to a PPO is no longer a very high risk of imminent serious or violent offending, it may direct the chief executive to apply for a court review to determine whether an individual should be released from the PPO to intensive community management (protective supervision order).<sup>175</sup>

Questions have been raised about the adequacy of this review process. It has been suggested, for example, that anyone subject to a PPO should be entitled to a yearly

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<sup>173</sup> *Miller v NZ Parole Board* [2010] NZCA 600 at [143].

<sup>174</sup> The Minister of Justice must appoint a 6-person review panel, one of whom must hold (or have held in the past) office as a High Court or a District Court Judge. Members must have experience and expertise in assessing the potential for individuals to pose a high risk to public safety and in addition the panel must include—at least 2 members who are health assessors; and at least 4 members who have experience in the operation of the New Zealand Parole Board. See clause 107.

<sup>175</sup> After reviewing the bill, the Select Committee recommended a new clause be inserted so that if a court finds that a person no longer “poses a very high risk it must make a finding to that effect”. Subclause 80(1B) would require the person to be “released from detention as soon as practicable after a protective supervision order was imposed”. Public Safety (Public Protection Orders) Bill (68-2) (15 April 2014) (as reported by the Justice and Electoral Committee) at 4.

review by a court rather than a Review Panel. Further, the fact that the latter is to be appointed by the Minister of Justice<sup>176</sup> has raised “concerns as to whether this would allow the Panel sufficient independence to pass muster in terms of the arbitrariness requirement of the International Covenant on Civil and Political Rights.”<sup>177</sup>

A preferable alternative may be to adopt something akin to Scotland’s Risk Management Authority, an independent body established to set standards for, issue guidance to and accredit those involved in the assessment and minimisation of risk.<sup>178</sup> It has been beyond the remit of this report to consider the structure and performance of the Authority in detail, but on the face of it, it may avoid some of the concerns about independence and expertise that were raised during the Workshop part of this project.

Further concerns derive from the ambivalent wording of the clause, and the provision that a Review Panel that forms the view that a person subject to a PPO no longer poses a very high risk of serious offending *may* direct the chief executive to apply for a court review. If the circumstances justifying the PPO are no longer present, it may be thought that a court review should be mandatory rather than at the panel’s discretion.

Furthermore, the issue of review needs to be considered against the background of the Parole Amendment Bill which is currently before Parliament. This Bill is intended to “reduce the number of parole hearings where the *offender has little prospect of release*”.<sup>179</sup> Given that it is the *right* to be considered for release that prevents preventive detention breaching civil and political rights,<sup>180</sup> it would seem that this militates toward a more meaningful review process than that currently contained in the Bill.

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<sup>176</sup> Clause 107(2)

<sup>177</sup> Preventive Detention Working Party “Submission to the Select Committee on the Public Safety (Public Protection Orders) Bill” (Wellington, November 2013).

<sup>178</sup> B McSherry “Throwing Away the Key: The Ethics of Risk Assessment for Preventive Detention Schemes” (2014) 21 *Psychiatry, Psychology and Law* 779-790 at 787

<sup>179</sup> Parole Amendment Bill 73-1.

<sup>180</sup> *Vinter v United Kingdom* (2013) 57 EHRR.

### *Effect on Prisoners*

One of the key differences between the proposed PPO scheme and the existing ‘punitive’ scheme of PD lies in the timing of the order. While the latter must be imposed at the time of sentencing, PPOs may be imposed some time – potentially many years – later. This has raised concerns about the impact on the psychological well-being of those who are subject to them. As McSherry has said, there may well be a difference between the situation where “the offender knows from the start of the sentence that it is indefinite, but subject to review processes”,<sup>181</sup> and the situation where the offender has psychologically prepared themselves from a release date, only to have it snatched away without warning at the last moment.

Again, it lies beyond the scope of this report to evaluate such literature as may exist in this respect, but we identify it as another issue worthy of consideration and investigation.

### *Youth Justice*

Significantly, the scope of the Bill will extend to offenders who were younger than 18 at the time of their offending, as the Bill only requires that a person be 18 at the time that the PPO is imposed. A PPO is enforced either at the end of a finite sentence, or after a person has been subject to an ESO or a protective supervision order, so encompasses offenders who were under 18 at the time of their offending. The reason underlying this was spelt out by Department of Corrections, who explained that if the Bill did not extend to offenders under 18, then:<sup>182</sup>

On the basis of the profiles of offenders currently subject to the most intensive form of extended supervision order a quarter of future candidates would otherwise not be eligible for the order and would have to be released irrespective of the public safety they posed.

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<sup>181</sup> B McSherry *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2013) at 184.

<sup>182</sup> Department of Corrections, *Regulatory Impact Statement Management of High Risk Sexual and Violent Offenders at End of Sentence* (March 2012) at [83].



This raises significant youth justice issues, which although extremely important, are beyond the scope of this paper.<sup>183</sup>

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<sup>183</sup> See Andrew Becroft “How to Turn a Child Offender into an Adult Criminal in 10 Easy Steps” (Children and the Law International Conference, 2009 Conference Prato Italy) at 9 where he states: “The dangers of ignorance of, and inattention to, risk factors is disturbingly illustrated in the high profile New Zealand case of Bailey Junior Kurariki. He was aged 12 at the time of the offence and is the youngest person in the country’s history to be convicted of manslaughter”. J Ryberg “Punishing Adolescents – On Immaturity and Diminished Responsibility” (2014) *Neuroethics* 1-10.

## IV. Determining “Risk”

### A. Introduction

Common to all “preventive justice” initiatives is the necessity of assessing risk. As we have discussed, this is a feature of New Zealand’s existing programme of punitive PD, and also of the compulsory detention and treatment provisions of the Mental Health (Compulsory Assessment and Treatment) Act. If enacted, it will also be a feature of the PPO legislation.

The majority of the evidential burden regarding the PPO threshold of “very high risk of imminent serious sexual or violent offending” is placed on the health assessor, and in particular, registered psychologists are given a prominent role in this regard.<sup>184</sup> This raises questions about the nature, method, accuracy and relevance of risk assessment tools used. It also attracts questions as to how courts assess the quality of such expert evidence, and the robustness of psychological tests applied.

The courts have indicated the nature and source of the evidence relied upon in New Zealand when estimating future risk of criminality. In *Miller v AG*, a case involving claims against the parole and Department of Corrections systems, the Court of Appeal noted that:<sup>185</sup>

The Parole Board’s policies provide for a structured decision-making process which is based in part on methods of actuarial risk assessment which have been developed for New Zealand within Corrections ... Much (indeed probably most) of the expertise in New Zealand in relation to actuarial risk assessment (and particularly the instruments used in New Zealand) is located within Corrections.

One of these actuarial tools is the New Zealand-specific Risk of re-Conviction X Risk of re-Imprisonment model (RoC\*RoI). The sole function of the RoC\*RoI is to assist

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<sup>184</sup>Clause 9 of the PPO Bill requires that an application for an Order must be supported by at least 2 reports. A registered psychologist must provide one, and the other may be provided by either a psychiatrist or another registered psychologist.

<sup>185</sup> *Miller v A-G* [2010] NZCA 600 at [59].

Corrections in making decisions regarding identification of offenders for treatment programmes, rather than to predict an individual's likelihood of future criminality, which is discussed further below.

### ***B. Distinguishing the Purpose of Actuarial Tools: NZ's (RoC\*RoI).***

The RoC\*RoI is a predictive model based on static predictors developed primarily by New Zealand Department of Justice senior psychologists in the mid 1990s.<sup>186</sup> It was devised after the criminal histories of more than 133,000 offenders in three specific years and the five years following were used to formulate predictive models regarding the likelihood of reconviction for specific serious offences, sentences of imprisonment and a sentence of imprisonment for a specific term. The model has been claimed to be highly accurate, though some reservations have been expressed.<sup>187</sup>

The two risk models (1. re-Conviction and 2. re-Imprisonment) are combined to express the likelihood that an individual will be reconvicted of an offence in the future *and* be sentenced to imprisonment for that offence. The Department explains:<sup>188</sup>

As a combined measure, it is quite possible that any individual may have a very high chance of re-offending (say 90%), but a very low chance of also being sent to prison for that offence (say 10%). In such a circumstance, the actual chance of someone being both reconvicted for an offence, and being sent to prison for that offence would be only 9 percent. Conversely, it is possible for a person to

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<sup>186</sup> L Bakker, J O'Malley, and D Riley *Risk of Reconviction: Statistical Models predicting Four Types of Reoffending* (Department of Corrections, Wellington, 1999).

<sup>187</sup> Department of Corrections *Risk of re-Conviction X Risk of re-Imprisonment model (ROC\*ROI)* <corrections.govt.nz>. In a New Zealand study of 199 male offenders serving sentences of seven years or more for (mostly) violent offences, the RoC\*RoI was found to have a high Area Under the Curve (AUC = 0.83), and when combined with the screening version of the Psychopathy Checklist (PCL-SV), the accuracy was raised to 0.86 – or 86% probability that the score of a randomly selected offender from the study who was reimprisoned exceeds the score of a randomly selected offender who was not [taken from: NJ Wilson *The utility of the Psychopathy Checklist – Screening Version for predicting serious violent recidivism in a New Zealand offender sample*. (Unpublished doctoral dissertation, University of Waikato, Hamilton NZ, 2003). Dr Armon Tamatea noted that the RoC\*RoI has not been subject to independent peer review and publication and the source code has not been made freely available. Current correctional assessment practice involves reporting on the total PCL score in descriptive terms. Offenders are typically not offered access to the evidence-recording documentation to retain protection of third party disclosures (eg comments from the offender's spouse) and to prevent distortion of the assessment process. Oral presentation to workshop, November 2013, Dunedin.

<sup>188</sup> Department of Corrections *Risk of re-Conviction X Risk of re-Imprisonment model (ROC\*ROI)* <corrections.govt.nz>.

have a very low chance of reoffending, but a very high chance of receiving a prison term if they do. Again, the combined value expressed by the RoC\*RoI measure would result in a low probability of being reconvicted and sent to prison.

The model, then, seeks to predict not only if future reoffending and conviction will occur, but further, whether any future offending will be of low, medium or high level of seriousness, and any future period of imprisonment will be short, medium or long term. However, the Roc\*RoI has *not* proven to be accurate in the case of child sex offenders and youth offenders, who often score very low on the Roc\*RoI. The Department explains:<sup>189</sup>

This reflects the fact that often this is a specialist form of offending, which occurs at a very low frequency with long gaps between offences. Sexual offending against children may also go undetected for long periods due to the nature of the offences and their effects on victims. The Roc\*RoI model was developed as a measure designed to predict future general offending. Sex offending against children is not necessarily highly correlated with other forms of criminal behavior.

The RoC\*RoI was developed as a tool for assessing priorities among sentenced inmates for access to treatment and prison programmes, with higher priority given to those in the higher-risk groups including young offenders with complex needs.<sup>190</sup> Importantly in this context, the Ministry of Justice has conceded:<sup>191</sup>

Although potentially very significant in terms of resource allocation for correctional programmes, *such use of prediction models is of an entirely different order to its use in determining whether, and for how long, an individual should be deprived of his or her liberty.* The model seeks to identify whether the individual belongs to a high-medium-or low-risk group, but does not identify the risk associated with the specific individual.

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<sup>189</sup> Ministry of Justice *Sentencing Policy and Guidance: A Discussion Paper* (Ministry of Justice, New Zealand, Wellington, 1997).

<sup>190</sup> At 67.

<sup>191</sup> At 67.

Consequently the RoC\*RoI provides a mechanism for identifying individuals most likely to become subject to a PPO based on the cl 13(2) criteria, and to institute entry into the available prison programmes.

Other assessment tools which are used to estimate sexual recidivism in the case of sex offenders in New Zealand include the Automated Static Risk Scale (ASRS), and the Violence Risk Scale: Sex Offender Version (VRS-SO).<sup>192</sup> These tools, and their use, will be a vital factor in the implementation of imposing Orders under the Bill, which triggers particular issues regarding the performance and interpretation of risk assessment.

### ***C. Expert testimony***

In the United States, the scrutiny of scientific testimony at state level is governed by principles developed in the courts,<sup>193</sup> currently by the principle articulated in *Frye v United States*.<sup>194</sup> This means that to be admissible, testimony must be based in science that is “sufficiently established to have gained general acceptance in the particular field in which it belongs”. So for example any risk assessment tool used must be premised on a relevant theory.

At the US federal level, the *Daubert* standard applies,<sup>195</sup> and has also been used in New Zealand.<sup>196</sup> The *Daubert* standard requires that the court, in determining whether the methodology presented in expert testimony is valid considers:<sup>197</sup>

- (1) whether the theory or technique in question can be and has been tested;
- (2) whether it has been subjected to peer review and publication;
- (3) its known or potential error rate;
- (4) the existence and maintenance of standards controlling its

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<sup>192</sup> N Wilson, G Kilgour and D Polaschek “Treating High-Risk Rapists in a New Zealand Intensive Prison Programme” (2013) 19 *Psychology, Crime & Law* 527.

<sup>193</sup> For a discussion of this see T Brown and E Murphy “Through a Scanner Darkly: Neuroimaging as Evidence of a Criminal Defendant's Past Mental States” (2010) 62 *Stanford Law Review* 119.

<sup>194</sup> *Frye v United States* 293 F 1013 (DC Cir 1923).

<sup>195</sup> *Daubert v Merrell Dow Pharmaceuticals, Inc* 509 U.S. 579 (1993).

<sup>196</sup> *See R v Calder* (unrep, NZHC, 12 April 1985).

<sup>197</sup> “*Daubert Standard*” <[www.law.cornell.edu](http://www.law.cornell.edu)>. For a discussion see Geoffrey Pipoly “*Daubert Rises: The (Re)applicability of the Daubert Factors to the Scope of Forensics Testimony*” (2012) 96(4) *Minnesota Law Review* 1581.

operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.

This would plausibly impose a requirement on the court to determine the validity of any actual assessment tool. For example, a risk-assessment tool developed elsewhere may not have sufficient validity in New Zealand, unless it has been specifically tested in a local prison cohort. The New Zealand High Court Rules impose duties on expert witnesses to alert the court to any limitations in evidence provided to the court.<sup>198</sup> Nevertheless there is reason for concern regarding the scrutiny placed on evidence of risk and dangerous in the courts.<sup>199</sup> Given that as much as PPOs are concerned with public safety they are concerned with managing “fear” of crime, which is difficult terrain in that it is susceptible to distortions of risk resulting in false positives/false negatives, which is an extremely problematic issue.<sup>200</sup>

#### *The Risk of Inappropriate Judicial Deference*

As much as expert evidence is important, ultimately decision making regarding the imposition of a PPO will reside with the judge who is ultimately responsible for considering the arguments for and against such an order. In this context there is a potential, as expressly noted in the New Zealand Court of Appeal in the context of ESOs, for undue judicial deference to be given to expert psychological testimony. In *Barr v The Chief Executive of the Department of Corrections*, the Court stated:<sup>201</sup>

We wish to make it clear, however, that first instance Judges need not accept it as necessary, or right, to rubber stamp opinions of health assessors advanced by the Department of Corrections in ESO applications ... What is required is a careful assessment of all the historical and current factors, along with expert

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<sup>198</sup> Rule 9.44 of the High Court Rules (Judicature Act 1908, schedule 2) requires that an expert comply with the Code of Conduct for an Expert Witness. (See schedule 4 of the High Court Rules). Clause 4 of the Code provides that “If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence”. Clause 5 provides that: “If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or data or for any other reason, this must be stated in his or her evidence”.

<sup>199</sup> K Gledhill “Preventive Sentences and Orders: The Challenges of Due Process” (2011) *Journal of Commonwealth Criminal Law* 78 at 103.

<sup>200</sup> B McSherry *The Law and Ethics of Preventive Detention and Risk Assessment: International Perspectives on Forensic Mental Health* (Routledge, New York, 2014).

<sup>201</sup> CA60/06 20 November 2006 at [32].

opinions of others, bearing in mind that an ESO can have substantial ongoing impact on an offender who has already completed the sentence imposed by the Court for the offending.

Another Court of Appeal case, *R v Peta*, also provides evidence that concerns regarding the robustness of some risk assessments provided to the courts are well-founded and further, that some expert testimony is not always subjected to adequate scrutiny in the court.<sup>202</sup>

### *The Risk of Poor Execution and Interpretation*

*R v Peta* involved an appeal following the imposition of an ESO. During the course of the appeal, it was discovered that the actuarial tool used as part of the defendant's risk assessment had not only been scored badly, it had also been misinterpreted by the person responsible for it, and its meaning was subsequently poorly explained to the trial court.<sup>203</sup> The Court of Appeal noted that this risked "lending pseudo-scientific validity to findings which were not properly based".<sup>204</sup> The Court quoted Dr Vess, an expert who provided evidence for the appellant, to the effect that:<sup>205</sup>

In conducting assessments for the Court, failure to follow standardised procedures and recognise scoring criteria for recognised risk measures are potentially worse than not using such measures at all. Erroneous and misleading conclusions may be drawn but appear to have the weight of scientific research behind them, and therefore carry an undeserved weight in legal proceedings where they are introduced into evidence.

After reviewing the actuarial tools used in New Zealand in the context of sexual offending, the Court provided the following guidance on best practice:<sup>206</sup>

... there are well validated actuarial measures that can help distinguish between higher and lower risk offenders. This is especially the case with those measures

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<sup>202</sup> See, for example, the Decision of the Health Practitioners Disciplinary Tribunal, 203/psy08/98P <[www.hpdt.org.nz](http://www.hpdt.org.nz)>.

<sup>203</sup> *R v Peta* [2007] NZCA 28. This only came to light after the assessment was reviewed by a senior official in the Department of Corrections following an appeal filed by the defendant.

<sup>204</sup> At [67].

<sup>205</sup> At [67].

<sup>206</sup> At [50] [51], [52].

that more clearly address the risk presented by specific sub-groups of offenders such as child molesters. The ASRS [Automated Sexual Recidivism Scale] is one such measure. Findings based on static actuarial measures such as ASRS by definition cannot, however, detect changes in risks over time. Such measures are now augmented by standardised approaches to assessing dynamic risk factors through measures such as SONAR [Sex Offender Needs Assessment Rating].

The utility of tools such as ASRS and SONAR is only realised when they are properly administered, scored and integrated with other relevant information known to relate to the risk of re-offending. Other known risk factors identified in the research as empirically associated with increased rates of sexual recidivism should be reported on, including sexual deviance *and level of psychopathy*. The factors, other than those contained in the actuarial measures, used to formulate a clinical assessment of risk and the effect they are said to have must be identified explicitly. Further, *it is recognised that risk is contingent on a variety of factors that are difficult or impossible to predict with certainty*. Risk assessments should state as clearly as possible the recognisable contingencies that will influence the degree of risk present. A risk assessment report should also specify as clearly as possible the likely victims and the likely severity of harm of subsequent offences.

Risk assessments and the related judicial decision making for risk management are best informed through an individualised formulation of risk. This should draw upon a variety of different sources of information in an attempt to identify risk factors within an aetiological (causative) framework. *This recognises that risk is contingent upon factors that are both environmental and inherent in the individual*. Such an approach also helps avoid the shortcomings of a mechanical and potentially formulaic assessment of risk, one that is overly reliant on static historical factors and potentially insensitive to features of the individual that change with time and context. (emphases added)

The results of a properly conducted risk assessment must be effectively communicated to the Court. Adequate training in this is required. When reporting the findings of a risk assessment, comparative categorical labels such as high, moderate or low risk should be qualified by probability statements that give corresponding re-offence rates for groups of similar offenders and the numbers of offenders in each category should be specified.



The Court also observed, again in reference to ESOs but equally relevant to PPOs, that:<sup>207</sup>

as the imposition of ESOs through the criminal justice system involves significant restrictions (including detention) on offenders and they are imposed in response to criminal behaviour, ESOs amount to punishment: see *Belcher* at [49]. Given this, it is perhaps surprising that more offenders have in the past not called their own evidence with regard to s 107F(2) factors (particularly of the individualised risk factors) when they seek to challenge the imposition of an ESO.

Given that PPOs are significantly more liberty-limiting than ESOs, these observations reinforce the need not only for careful assessment and presentation of risk assessment, but also that those subject to a PPO application should have access to legal representation.

#### ***D. PPOs and the Burden of Proof***

The PPO Bill as currently drafted imposes a greater risk threshold (very high risk of imminent serious sexual or violent offending) than those specified in the legislation governing the imposition of ESOs and PD. However, the burden of proof applied by the courts when considering expert evidence reduces the practical impact of this elevated risk threshold.

The Court of Appeal has held, when considering a sentence of PD, that the standard of proof required by the Sentencing Act 2002 is *not* the criminal standard. In *R v Dittmer*<sup>208</sup> the requirement that the court is “satisfied” that the evidence indicated the statutory threshold was met for imposing PD was held to have the same meaning as that applied by the Court of Appeal in *R v Leitch*<sup>209</sup> to the comparative provisions in the earlier Criminal Justice Act 1984. Consequently, “satisfied” simply requires that court “makes up its mind” that the statutory criteria for preventive detention is met on the evidence presented. Unlike the usual criminal standard, the burden of proof required is *not* proof beyond reasonable doubt.

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<sup>207</sup> *R v Peta* [2007] NZCA 28 at [13].

<sup>208</sup> *R v Dittmer* [2003] 1 NZLR 41.

<sup>209</sup> *R v Leitch* [1998] 1 NZLR 420.

The PPO Bill requires the court being “satisfied”, on the basis of evidence presented, that there is a “very high risk of imminent serious sexual or violent offending”. The Select Committee confirmed that the civil standard of the balance of probabilities will apply.<sup>210</sup> So, although the Orders are premised on “high risk”, it is not subject to a stringent burden of proof, which makes the evidential threshold potentially malleable by a court.

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<sup>210</sup> Public Safety (Public Protection Orders) Bill (68-2) (15 April 2014) (as reported by the Justice and Electoral Committee) at 2.

## V. Principles in conflict

### A. Introduction

In this section, we consider the matters of principle that lie at the heart of the debate over preventive justice programmes. While the respective weights to be accorded to these principles is a matter for personal and political judgment, it is to be hoped that there is some value in articulating them clearly.

### B. *The State's Protective Function*

The rationale for preventive detention relies in large part on the belief that the state has a duty to protect society in general, and vulnerable persons in particular, from harm. In many respects, the existence of such a duty is neither contentious nor problematic. The imperative to protect, in particular, the most vulnerable members of community from serious and predictable harm can easily be established in ethical terms, but it has also been legally recognized across a range of jurisdictions.<sup>211</sup>

Statutory implementation of such a duty is hardly unknown to New Zealand. The civil commitment regime under the Mental Health (Compulsory Assessment and Treatment) Act 1992 is a paradigmatic example of the protective jurisdiction of the State. This scheme permits an individual to be involuntarily detained for the purpose of assessment and treatment on the basis of evidence that he/she is suffering from a “mental disorder” (as defined by the Act) to such a degree that it “poses a serious danger to the health or safety of that person or of others”.<sup>212</sup> The state duty to protect innocent individuals from harm is also an important aspect of criminal law theory. The infliction of criminal punishment is justified, in part, by protective objectives, including incapacitation, deterrence and rehabilitation. One of the stated “purposes

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<sup>211</sup> For detailed discussion of this obligation in an international context, see K Gledhill “Preventive Sentences and Orders: The Challenges of Due Process” 2011(1) *Journal of Commonwealth Criminal Law* 78-104 at 87-90; L Lazarus “Positive Obligations and Criminal Justice: Duties to Protect or Coerce” in Zedner and Roberts (eds) *Principles and Values in Criminal Law and Justice* (Oxford University Press, 2012). For specific application with regard to potentially dangerous psychiatric patients, see C Gavaghan “A Tarasoff for Europe? A European Human Rights Perspective on the Duty to Protect” (2007) 30 *International Journal of Law and Psychiatry* 255–267.

<sup>212</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2.

and principles” of the Sentencing Act 2002 is to “Protect the community from the offender.”

The state’s protective function not only provides a *justification* for such measures; at least in some circumstances, it imposes a legal *obligation* to do so. The New Zealand Supreme Court recently considered the possibility of the state incurring civil liability for failure to discharge this duty. *Couch v Attorney-General* involved a claim in exemplary damages on the basis of vicarious liability brought against a Government Department—the New Zealand Parole Service.<sup>213</sup>

The offender and parolee, William Bell robbed a Returned Services’ Association (RSA). Bell was on parole following imprisonment for aggravated robbery of a petrol station. He was working at the Panmure RSA to obtain work experience, despite having a history of violence and problems associated with alcohol. After working in the premises for a couple of weeks, Bell obtained access to the building outside work hours with the purpose of robbing it. In the course of the robbery he unleashed the torrent of violence that left three dead and Susan Couch seriously injured. Following her partial recovery, Ms Couch attempted to claim exemplary damages against the Attorney-General for allegedly deficient supervision of Bell by the Parole Service. The proceeding was based on an alleged breach of a duty of care by a parole officer to a member of the public who suffered serious harm at the hands of a convicted offender who had been released on parole.

In New Zealand, members of the public who suffer personal injury as a result of a criminal assault are entitled to cover under the Accident Compensation Act 2001. However, the trade-off for the compensation scheme is that the Act bars any subsequent civil claim for personal injury, apart from a claim in exemplary damages.<sup>214</sup> Consequently, the claim was made for exemplary damages.

To succeed in a claim for negligence it had to be established that the Probation Service owed a duty of care to Ms Couch, that the duty of care was breached, and that

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<sup>213</sup> *Couch v Attorney General* [2008] NZSC 4.

<sup>214</sup> Accident Compensation Act 2001, s 317.

the breach was *causative* of the harm that she subsequently suffered. The Court of Appeal initially struck-out the claim on the grounds that no duty of care existed, and therefore a claim in negligence was not actionable. Couch appealed to the Supreme Court.<sup>215</sup> The substance of the claim was that Ms Couch would not have been injured had the Parole Service and the supervising officer:<sup>216</sup>

acted with the standard of care reasonably to be expected of those with statutory obligations to supervise a known violent offender who had been assessed by the Probation Service psychologists as at high risk of reoffending.

The crucial question addressed by the Supreme Court was whether it was arguable that the Probation Service owed a duty of care to the victim in circumstances where no such duty of care had previously been recognised by authority. In determining whether such a duty of care could exist, Elias CJ and Anderson J (two of the five Supreme Court judges) considered two factors to be particularly salient. First the Probation Service's statutory obligations of supervision and control over the parolee, which are:<sup>217</sup>

imposed in substantial part for the protection of the public. We do not think it can be confidently said at this preliminary stage that in carrying out its statutory responsibilities the Probation Service *cannot* owe a duty of care to the plaintiff, whether as *fellow employee* of the parolee (the basis upon which her counsel puts it) or indeed as a *member of the public*. (emphasis added).

The second factor was the knowledge regarding the risk presented by the parolee and “the means reasonably available to the Probation Service for avoiding harm through realisation of such risk”.<sup>218</sup> The Court noted Cardozo J's renowned conceptualisation of the scope of a duty of care in the context of risk that “The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.”<sup>219</sup>

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<sup>215</sup> *Couch v Attorney General* [2008] NZSC 4.

<sup>216</sup> At [6].

<sup>217</sup> At [5].

<sup>218</sup> At [5].

<sup>219</sup> At [48] citing Cardozo again delivering the judgment of the majority of the Court of Appeals of New York in *Palsgraf v Long Island Railroad Company* (1927) 248 NY 339 at 344.

Elias and Anderson did not consider that the fact that the injury was inflicted by Bell, a third party, barred the Probation Service from being liable for negligent supervision, *if* that lack of care was found to be causative of the harm.<sup>220</sup> The remaining judges (Blanchard, Tipping and McGrath) considered that the plaintiff's claim, if amended, *could* (although they did not express an opinion as to whether it actually *did*) meet the requisite standard of proximity, by the fact that she was at the necessary *distinct and special risk* in the particular circumstances.<sup>221</sup> However, it was noted that to succeed in a claim of exemplary damages, the standard of breach required of any duty of care recognised by law is extremely high. The plaintiff would have to:<sup>222</sup>

establish that the departure from the standard of care reasonably to be expected constituted 'truly exceptional and outrageous' conduct.<sup>223</sup> The defendant must have departed 'so far and so flagrantly from the dictates of ordinary or professional precepts of prudence, or standards of care', that the conduct should be punished by an award of exemplary damages.

Significantly, while this test of outrageous conduct might, more often than not, bar recovery in exemplary damages, the court did not consider that policy considerations *alone* were sufficient to prevent the claim being heard. Elias CJ and Anderson J rejected the Court of Appeal's finding that to find a duty of care was owed to the public would be inconsistent with the "public interest in facilitating the reintegration of offenders".<sup>224</sup> This, they considered, would effectively confer an immunity on the Service regardless of "how great the foreseeable risk and no matter how gross the want of care in supervision", which was not sympathetic with

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<sup>220</sup> At [54].

<sup>221</sup> At [124]. The material that might provide an arguable case for the victim being at "distinct and special risk" included the fact that: the defendants knew that Bell had been classified as posing a high risk of reoffending; his prior offence of robbery was distinguished by an apparent attempt by Bell to "inflict gratuitous and random violence" on a person at the scene; Bell "was known to be in constant need of money to feed his alcohol addiction"; he was permitted to work where significant amounts of cash from bar takings were likely to be present; he had the ability to assess the security systems while working which made the RSA "premises a predictable target for any further robbery he might be minded to commit", consequently anyone present at the time of such a robbery "was at greater risk than members of the public generally and those present were particularly vulnerable because Bell had exhibited a tendency to commit random violence during a robbery".

<sup>222</sup> At [11].

<sup>223</sup> At [11] citing *Bottrill v A* [2003] 2 NZLR 721 at para [37] (PC) per Lord Nicholls, [26].

<sup>224</sup> *Couch v Attorney General* [2008] NZSC 4 at [36].

s 6 of the Crown Proceedings Act 1950<sup>225</sup> nor s 27(3)<sup>226</sup> of the New Zealand Bill of Rights Act 1990.<sup>227</sup>

Although the Supreme Court did not strike out the application, it clearly acknowledged that establishing a breach of duty to the requisite standard would be difficult and that proving causation may equally be problematic.<sup>228</sup> It ultimately concluded that: “[o]n any view, knowledge of the risk posed by Bell will be critical to an ultimate conclusion of legal responsibility.”<sup>229</sup>

In a subsequent decision, the Supreme Court considered the Attorney-General’s alternative strike-out argument that exemplary damages are not available in New Zealand with respect to negligence for personal injury.<sup>230</sup> Although the Court held that exemplary damages are available in limited instances, it overruled a prior Privy Council decision<sup>231</sup> and reinstated the test for exemplary damages as formulated by the Court of Appeal in *Bottrill v A*.<sup>232</sup> Consequently a defendant must be consciously aware of the risk of causing harm, but deliberately run that risk regardless, to be liable in exemplary damages.

Clearly a victim will struggle to recover in exemplary damages given this threshold test. Nevertheless, the Supreme Court, reinforced that the state is subject to a duty (a) to prevent the infliction of foreseeable harm (b) to an identifiable individual or group (c) by an offender who is within scope of the justice system, (d) when to do so is reasonably within their power. But the level of foreseeability of risk required

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<sup>225</sup> Liability of the Crown in tort.

<sup>226</sup> Section 27(3) Right to Justice: (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

<sup>227</sup> SC, [36]. See at [125]: “[t]he balance between protection of citizens and rehabilitation of offenders similarly cannot be finally determined with complete confidence on the pleadings. The legislative environment cannot be said to point conclusively against a duty of care on policy grounds” per Blanchard, Tipping and McGrath.

<sup>228</sup> *Couch v Attorney General* [2008] NZSC at [37].

<sup>229</sup> At [68]. (Elias/Anderson).

<sup>230</sup> *Couch v AG (No 2)* [2010] NZSC 27 (Elias dissenting).

<sup>231</sup> *Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721.

<sup>232</sup> [2001] 3 NZLR 622 (CA).

is such that it is unlikely that a case will be successfully brought against the state on the basis of a negligent failure to protect a member of the public.

Given this, the following sections consider the tensions between the protective duties of the state to the general public, with the protection of individual liberties and principles of penal theory.

### *C. Principle-based concerns regarding preventive justice*

When weighed against concrete risks to children and other potential victims, the sorts of principled concerns that arise around preventive detention can sometimes seem abstract, ethereal and “academic” in the worst sense. Why should society balk at locking up someone who has already shown himself to be capable of serious violent crime? How can the rights of such people – “the worst of the worst”, in the words of one submission to a Select Committee<sup>233</sup> – ever be thought to outweigh the safety of innocent people?

At first glance, those concerned with articulating such concerns face an uphill task, at least if their concerns are to seem relevant and worthy of serious consideration. It is sometimes thought by under-appreciated academics that we live in an age when politicians and media are particularly resistant to arguments from principle, but as long ago as 1968, HLA Hart expressed a similar concern:<sup>234</sup>

No one expects judges or statesmen occupied in the business of sending people to the gallows or prison, or in making (or unmaking) laws which enable this to be done, to have much time for the philosophical discussion of the principles which make it morally tolerable to do those things.

In fact, Hart’s observation can perhaps be read less as a complaint about judges and legislators, and more as a challenge to legal philosophers, to explain more clearly what those justificatory principles might be. As we do so, it is hoped that the most important of those principles will emerge from behind their veil of abstruse language,

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<sup>233</sup> Sensible Sentencing Trust, “Submission to the Select Committee on the Public Safety (Public Protection Orders) Bill” (Wellington, November 2013).

<sup>234</sup> HLA Hart *Punishment and Responsibility* (Oxford University Press, 1968).



and become recognizable as the sorts of considerations that most thoughtful people, however unknowingly, already have in mind when approaching these types of issues. The principled concerns about PD derive from two distinct concerns. The first relates to checks and limitations on state powers, the second to ideas of moral agency. Together, these concerns have given rise to what the eminent criminal law theorist Stephen Morse has described as “desert/disease jurisprudence.” Morse describes this in the following terms:<sup>235</sup>

At present, the state’s ability to deprive people of their liberty is constrained by desert/disease jurisprudence. The state may imprison people in the criminal justice system if they deserve punishment for crimes they have committed, and it may civilly commit dangerous people if they are not responsible agents—usually because they have a mental abnormality, such as a major mental disorder. Otherwise, with rare, limited exceptions, such as rejecting bail for dangerous agents, the state must leave people at liberty no matter how potentially dangerous they may be.

Rational people, according to Morse, are generally treated as responsible moral agents, with all the freedom and responsibility that entails. When they break the rules, they are – for the most part – held morally and legally responsible, and punished accordingly. Non-rational people are subject to a different body of rules, whereby both their liberty and their culpability is substantially reduced, perhaps even negated altogether. In modern democracies, the deprivation of liberty by the state has generally required one or other of those justifications. In the following sections, we explore those categories, and consider the sorts of limits they impose on detention provisions.

### *The desert justification*

While the notion that punishment should be a response to what people “deserve” is an appealing one, the reality is that competing theories exist as to why punishment is justified. In simple terms, the debate around punishment has been characterized by a conflict between consequentialist and retributivist approaches. The former is concerned with the promotion of what we might call “the good”, the latter with what

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<sup>235</sup> SJ Morse “Protecting Liberty and Autonomy: Desert/Disease Jurisprudence” (2011) 48 San Diego Law Review 1077 at 1078-9.

we might call “the just.” Thus, consequentialist (sometimes called utilitarian) accounts are predominantly concerned with good outcomes, such as deterrence – both of the offender himself, and others who might be tempted to offend in future; rehabilitation; and, in some circumstances, incapacitation in the interest of public safety. Retributivist concerns, in contrast, are predominantly focused on what people *deserve*. “Retributivists,” as one recent book has explained, “claim that criminals *deserve punishment in proportion to their crimes*”.<sup>236</sup>

The respective influence of these schools has waxed and waned through the history of legal and political thought, but it is probably safe to say that all modern theories of punishment contain important elements of both approaches. Certainly, consequentialist concerns with public safety (sometimes expressed in terms of concerns for the rights of potential or actual victims) are prominent in most theories of criminal justice. Yet retributivist concerns are invariably present too, albeit that they may be less easily recognizable as such.

At first blush, a consequentialist approach to legal punishment may seem more enlightened, pragmatic, and humane. It conceives of punishment as a pro tanto evil, that can be justified only in terms of countervailing goods, and it is responsive to evidence about what actually works in achieving those goods. Yet, as has long been recognized by legal theorists, a consequentialist approach untempered by retributivist considerations could lead to grave injustice.<sup>237</sup>

At their most extreme, consequentialist approaches could see innocent people “punished” if this would, on balance, produce good consequences. The point is illustrated by the oft-cited example of the conviction of an innocent man (or perhaps the overly harsh punishment of one guilty of a minor offence) as a means of assuaging public outrage over an unsolved murder.<sup>238</sup> If that outrage was likely to result in

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<sup>236</sup> T Brooks *Punishment* (Routledge, 2012) at 15.

<sup>237</sup> “[U]nreservedly promoting deterrence and prevention risks licensing unrestrained state intervention and, in the absence of specified limits, may result in an overly extensive and intrusive criminal law.” A Ashworth and L Zedner ‘Prevention and Criminalization: Justifications and Limits’ (2012) 15 *New Crim L Rev* 542 at 553.

<sup>238</sup> See HJ McCloskey “A Non-Utilitarian Approach to Punishment” in Ezorsky (ed) *Philosophical Perspectives on Punishment* (University of New York Press, Albany, 1972) at 127.

widespread riots, it is not difficult to conceive of a consequentialist justification for the false conviction. If we regard that as unjustified, it must be because we recognise the existence of certain ethical “side-constraints”, rules which restrain our actions even at the expense of achieving a “better” outcome.<sup>239</sup>

Furthermore, it strikes many people as intuitively right that punishment should be in just proportion both to the seriousness of the offence, and to the offender’s degree of culpability for it. The fact that someone has committed a crime of any sort should not, on this theory, entitle us to subject him to just *any* punishment that can be justified on grounds of social utility. If it transpires – to cite another famous jurisprudential example – that shoplifters are more readily deterred than murderers, it does not follow that the penalty for shoplifting should be more severe than that for murder. Retributivist principles dictate that, in broad terms, the punishment should fit the crime. Typically, that has been taken to mean that concern should be paid both to the severity of the crime, and to the extent of the offender’s culpability for it.

In a New Zealand context, both theoretical accounts are explicitly acknowledged in the General Principles and Purposes of the Sentencing Act 2002. These Principles and Purposes are in fact a paradigmatic example of the “compromise” approach that has come to characterize attitudes to sentencing, and to punishment. Certainly, objectives such as to:

- Deter the offender or other persons from committing the same or a similar offence
- Protect the community from the offender
- Assist in the offender's rehabilitation and re-integration into the community

can be understood without departing from a straightforwardly consequentialist, “public good” paradigm. But other principles may reflect more retributivist, or mixed, considerations, for example to:

- Hold the offender accountable for harm done to the victim and the community

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<sup>239</sup> Some consequentialists have, in fact, sought to respond to this concern by arguing that punishing the innocent could *never* result in predictably good results, all things considered. This, in turn, has led to responses that such an empirically contingent claim seems too flimsy a philosophical basis to oppose punishment of the innocent; see MS Moore *Placing Blame: A Theory of Criminal Law* (Oxford University Press, 1997) at 97.

- Promote in the offender a sense of responsibility for, and acknowledgement of, that harm
- Denounce the conduct in which the offender was involved.

Between the extremes of “pure” retributivist or consequentialist positions, then, lie a range of compromise positions. These recognize the importance of public protection, and the necessary role of deterrence, rehabilitation and incapacitation in achieving it; but at the same time, they seek to restrict the sort of measures that can be utilized in pursuit of those aims, by insisting upon retributivist constraints against punishing the innocent or disproportionate punishment, even when they are likely to produce ‘good’ outcomes.

Thus, in liberal democracies, punishment is widely regarded as being justified only in response to, and in proportion to, crimes that an individual has been proved to have committed.<sup>240</sup> That is, people can only justifiably be punished when they are shown to have committed crimes, and they can only receive such punishment as is fitting for those crimes.<sup>241</sup> These two ideas – responsiveness and proportionality – together impose a retributivist restriction against unchecked consequentialism in penal policy. The retributivist restriction serves as an important bulwark against witch hunts and show trials, and against framing innocent people – even when it is thought likely that those acts would serve important political or social objectives. It also reflects what appears to be a widely shared intuition that the severity of a punishment should correspond to the seriousness of offending. But what does it have to say about preventive detention (PD)? Does PD violate the rules of responsiveness or proportionality?

The argument that PD violates these rules derives from the fact that it is oriented towards potential offences that the individual has not yet committed. As such, it cannot be a response to the offences of which he has already been convicted.

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<sup>240</sup> Inchoate crimes, such as unsuccessful attempts and conspiracy, are sometimes considered to be partial exceptions to this rule, but their inclusion within the limit has been achieved by regarding them as full criminal offences in themselves.

<sup>241</sup> A Von Hirsch “Proportionality in the Philosophy of Punishment” (1992) 16 *Crime and Justice* 55-98.

Punishment that is not a response to a crime violates the rule of responsiveness. Alternatively, punitive PD may be seen as responsive to a crime; but insofar as it is in excess of the sentence deemed proportionate to the individual's offending, it violates the rule of proportionality.

How do supporters of PD respond to these criticisms? First, they may seek to deny that PD infringes the rules of responsiveness and proportionality, on the basis that it does not constitute punishment at all. This claim – that penal principles do not apply, because PD is not a punishment – will be considered later, when we consider the 'disease' part of Morse's theory, and the so-called civil detention schemes. But, as outlined in Part II, at least some sentences of PD are overtly punitive. Whether such schemes violate retributive restraints has been much debated among legal theorists.

For defenders of such schemes, the rule of responsiveness is satisfied because PD can only be imposed when someone has been convicted of a (usually serious) criminal offence. Non-offenders cannot ever be subject to punitive PD, however dangerous we may consider them to be. The fear of punishing the innocent, then, need not concern us.

Yet this may not entirely allay retributivist concerns. It is not in dispute that subjects of punitive PD deserve some measure of punishment; but insofar as it results in the imposition of a longer sentence than what could otherwise be imposed for the offence in question, retributivists may ask precisely what the additional punishment is *for*. If it is not punishment for what the individual actually did, then what is the justification for inflicting it upon him?

Supporters of punitive PD may respond to these concerns in a couple of ways. One approach would be to observe that, after a guilty verdict, the judge has a range of sentences at his/her disposal, from which s/he is free to choose the most appropriate. We do not, after all, respond to all convictions for a given type of offence with exactly the same sentence, but rather, recognize a sentencing range within which the judge is free to exercise a degree of discretion. Part of that discretion could be informed by considerations of possible future offending. Thus, the person subject to

PD would not be receiving a sentence that is disproportionate to his offending, but rather, one of a range of sentences, each of which could be seen as proportionate.

A variation on this approach derives from what has been called “negative retributivism.” This is a mixed approach to punishment, combining both retributivist and consequentialist elements, which holds that “punishment is only justified if someone deserves to be punished,” but that, once that threshold has been passed, “the *severity* of punishment may be determined by factors beyond desert.”<sup>242</sup> Again, this may address the responsiveness concern, though it is less clear that it addresses concerns about proportionality.

Finally, there is the “forfeiture principle”. This recognizes that, while in general, the retributive constraint limits us to punishing people only for what they have done, the situation may be different for someone who transgresses the law and commits a serious violent offence. Such an offender’s rights may be forfeited to the extent that predictions may be invited regarding their propensity to cause further harm in the future. As Alec Walen has explained it:<sup>243</sup>

If they show sufficient disrespect for the law, then they no longer deserve to receive one of the benefits that normally flow from being an autonomous and accountable person. In particular, they no longer deserve to have the status of a person who must be presumed to be law-abiding.

It is important to note that neither “negative retributivism” nor the “forfeiture principle” dispense altogether with the need for a retributive trigger, or with notions of desert. Rather, it is specifically the presence of an offence that allows consequentialist considerations to inform how offenders are treated. Yet even these approaches may be thought to justify only a limited range of consequence-based sentencing. The fact that someone has committed a crime does not, presumably, afford the state *carte blanche* in terms of how he is treated. That sentencing can

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<sup>242</sup> T Brooks *Punishment* (Routledge, 2012) at 33.

<sup>243</sup> A Walen “A Punitive Precondition for Preventive Detention: Lost Status as a Foundation for a Lost Immunity” (2011) 48 San Diego L Rev 1229.

legitimately be informed by consequentialist considerations does not mean that all procedural safeguards can be dispensed with.

We discussed some of these limitations in Part IV, in the context of New Zealand's Bill of Rights Act 1990. For now, it is worth mentioning a few of the limits that may still exist with regard to sentencing in this context. One concern may be that the enhanced sentence (S + PD) should still retain some sort of proportionality to the crime committed. Much controversy has surrounded the application of so-called "three strikes" laws, especially in the USA. In one high-profile example, Leandro Andrade was sentenced to a minimum of 50 years for shoplifting children's video cassettes from a K-Mart store. Although the US Supreme Court decided, on a narrow majority, that the law in question was not unconstitutional,<sup>244</sup> many commentators<sup>245</sup> have agreed with Justice Souter's dissenting judgment that the sentence displayed "demonstrable gross disproportionality."

Retributivist concerns with proportionality arise when heavy sentences are imposed on those who have committed only fairly trivial offences. Even when an offender has been convicted of a serious offence, though, it does not necessarily follow that just any sentence may be imposed. We may still have good reason to assure ourselves, for example, that:

- he is treated similarly to others convicted of similar offences, or if not, that any different treatment is justified on rational, non-arbitrary grounds;
- any consequentialist concerns that have a bearing on his sentence are supported by good evidence;
- he is not subjected to 'double punishment', i.e. punished twice for the same offence.

When PD is imposed at the time of sentencing, it is at least possible that these criteria could be satisfied. It is possible to view that offender as being punished once, with a sentence that includes an element of PD (S + PD). Insofar as S + PD is seen either as being within the allowable range of sentences for the offence in question, there is no

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<sup>244</sup> *Lockyer v. Andrade*, 538 U.S. 63 (2003).

<sup>245</sup> For a detailed critique of the majority decision, see the introductory chapter of E Cherminsky's *The Conservative Assault on the Constitution* (Simon & Schuster, 2011).

question of the punishment being disproportionate. Likewise, if we are persuaded by either the “negative retributivist” approach or “forfeiture principle”, we may regard S + PD as being a proportionate response to the offending.

With regard to retrospective PD (R-PD), however, the position is less clear. Insofar as the imposition of R-PD is properly seen as punitive, it is difficult to see how it can avoid the charge of being double punishment. It is this concern that has led to political moves to classify R-PD as civil rather than punitive in nature.

*Hurricanes, microbes and wild beasts:*<sup>246</sup> *treating offenders as people rather than things*

A second principled objection to preventive PD, and “pre-crime” measures more generally, is that it fails to accord those detained their full status as autonomous human subjects. As such, it may be thought to transgress against what Michael Corrado describes as “the notion of freedom – the notion that someone who is still capable of choosing and acting freely has not yet forfeited his right to do so.”<sup>247</sup> In a similar vein, Anthony Duff worries that PD “denies my responsible agency by treating me as someone who cannot be trusted to guide his actions by the appropriate reasons,”<sup>248</sup> while Lucia Zedner worries that “it negates autonomy and denies individuals the chance to remain innocent by slamming shut the ‘window of opportunity’ to choose to do right.”<sup>249</sup>

The notion that predictive sentencing denies agency has not found universal favour among academic commentators. Corrado, for instance, has argued that making a prediction about how someone will act in future – even a very confident prediction -

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<sup>246</sup> From SJ Morse “Protecting Liberty and Autonomy: Desert/Disease Jurisprudence” (2011) 48 San Diego Law Review 1077, at 1080.

<sup>247</sup> ML Corrado “Punishment and the Wild Beast of Prey: The Problem of Preventive Detention” (1995-1996) 86 Journal of Criminal Law and Criminology 778 at 779.

<sup>248</sup> RA Duff *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing, 2007) at 165.

<sup>249</sup> L Zedner “Pre-crime and Pre-punishment: A Health Warning” (2010) 81 Criminal Justice Matters 24 at 25.



is not the same as denying that that person has a choice about how he will act. The choices we make, he argues, can be both free and highly predictable.<sup>250</sup>

Nonetheless, concerns about treating people as mere actuarial probabilities, rather than as moral agents, continue to be a major source of opposition to PD. It is one thing to punish people for choosing to do the wrong thing, but it is quite another to deny them the opportunity to choose to do the right thing.

### *Disease jurisprudence and civil detention*

Whereas the “desert” rationale for state detention relies largely upon considerations of culpability and blameworthiness, and provides the justification for the penal system, the “disease” rationale rests upon very different considerations and takes very different forms. Typically, the policies that will be justified by this line of reasoning will be civil in nature, and will make no claim to serve a retributive function. Rather, they exist entirely to serve a protective function, by incapacitating those perceived to pose a grave risk to public safety. The measures provided for by the Public Safety (Public Protection Orders) Bill are at least putatively non-punitive.<sup>251</sup>

As we discussed in Part II, non-punitive or “civil” detention is certainly not unknown in New Zealand. As with other democratic states, provision is made for detention in a number of situations. In emergency situations, a medical officer of health may order that people be placed in quarantine for “the purpose of preventing the outbreak or spread of any infectious disease.”<sup>252</sup> Individuals can be detained for the purposes of assessment and treatment,<sup>253</sup> on the basis of evidence that they are suffering from a “mental disorder” to such a degree that it “poses a serious danger to the health or

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<sup>250</sup> ML Corrado “Punishment and the Wild Beast of Prey: The Problem of Preventive Detention” (1995-1996) 86 *Journal of Criminal Law and Criminology* 778 at 802.

<sup>251</sup> Clause 4(2) states: “It is not an objective of this Act to punish persons against whom orders are made under this Act.” Clause 5(a) states: “orders under this Act are not imposed to punish persons and the previous commission of an offence is only 1 of several factors that are relevant to assessing whether there is a very high risk of imminent serious sexual or violent offending by a person.”

<sup>252</sup> Health Act 1956, s 70(1)

<sup>253</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992

safety of that person or of others”.<sup>254</sup> And those awaiting trial may, of course, be remanded in custody.<sup>255</sup>

From that perspective, it may be considered that non-punitive “civil” detention is neither especially novel nor uniquely problematic. Yet there are aspects of the sort of “civil” detention scheme proposed in initiatives such as the PP (PPO) Bill that may give rise to particular concerns.

Existing civil detention schemes are readily distinguishable from punitive detention in a number of ways. Often – as in cases of remand and quarantine – the detention will be for a relatively brief period. Although the duration of remand periods in New Zealand has been rising, the median remand period in 2011 (the last year for which figures are available) was just over 50 days<sup>256</sup> - clearly not a trivial length of time, but very far from the prospectively indefinite detention proposed in the Bill. Likewise, detainees held under quarantine provisions will be held only until for the duration of the emergency.

A second way in which PPOs may be thought to differ from existing civil detention schemes relates to the possible “punitive taint” they may be thought to carry. While it is easy to say that people detained because they are affected by mental disorders or carriers of infectious diseases are not being *blamed* for their situations,<sup>257</sup> it is quite possible that – whatever the legislative intentions behind it – post-sentence detention will be widely seen as an extension of the punishment handed down to an offender. Unlike those unfortunate enough to contract an infectious disease or develop a mental disorder, the trigger for post-sentence detention is a criminal act. And the proposal that detention may be in a prison also serves to distinguish PD from those other forms of “civil” detention.

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<sup>254</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2.

<sup>255</sup> Criminal Procedure Act 2011, s 168.

<sup>256</sup> [www.corrections.govt.nz/resources/offender-volumes-report/offender\\_volumes\\_report\\_2011/5\\_prison\\_remind\\_snapshots.html](http://www.corrections.govt.nz/resources/offender-volumes-report/offender_volumes_report_2011/5_prison_remind_snapshots.html)

<sup>257</sup> It is, of course, not impossible for some forms of putatively civil detention can be constructed or enforced so as to have a punitive or ‘blaming’ dimension, but this sort of approach has long been disavowed in most democratic legal systems, and is specifically denied in the PPO Bill.

These sorts of concerns about PD are not new. More than forty years ago, Andrew von Hirsch – now Professor of Penal Law and Theory at Cambridge University – was issuing similar warnings:<sup>258</sup>

Even if preventive confinement is not officially labelled “punishment,” the deprivations of prolonged preventive confinement would be much like those of prolonged imprisonment. The loss of liberty would be the same. So would many of the other unpleasant aspects of confinement, such as forced association with other persons, some of whom may well be actually dangerous. The social obloquy of confinement would be similar - since labeling someone a potential criminal would have much the same stigmatizing effect as labeling him a past offender.

Even if it were the case that PD could be viewed as a properly civil scheme, aimed only at risk avoidance and free from any punitive taint, other questions arise. Typically, civil detention is applied to those who are considered unable to control the danger they pose to society. This is why it may be thought to circumvent the concerns raised in the last section, that preventive detention denies the moral agency of detainees, and treats them as if they were the equivalent of wild animals. As Stephen Morse explains:<sup>259</sup>

For people who are dangerous because they are disordered or because they are too young to “know better,” the usual presumption in favor of maximum liberty yields. Because the agent is not rational or not fully rational, the person’s choice about how to live demands less respect, and the person is not morally responsible for his or her dangerousness. The person can therefore be treated more “objectively,” like the rest of the world’s dangerous but nonresponsible instrumentalities, ranging from hurricanes to microbes to wild beasts.

Much the same reasoning could presumably be applied to carriers of infectious diseases; the risk they pose is not a factor of their deliberate choices – for which they can be praised or blamed – but of processes largely beyond their control.<sup>260</sup> They will

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<sup>258</sup> A von Hirsch “Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons” (1972) 21 Buffalo Law Review 717 at 743.

<sup>259</sup> SJ Morse “Protecting Liberty and Autonomy: Desert/Disease Jurisprudence” (2011) 48 San Diego Law Review 1077 at 1080.

<sup>260</sup> Those who deliberately or recklessly expose others to serious infectious can find themselves falling foul of the desert/blame part of the legal system.

pose that risk regardless of the choices they make, or – in the case of some mentally disordered people – precisely because they are unable to make choices in any meaningful sense.

The PPO Bill, however, does not apply to just anyone who is deemed to be dangerous. Rather, the PD scheme it creates is explicitly restricted to those who exhibit “a severe disturbance in behavioural functioning”, evidenced by (inter alia) “an intense drive or urge to commit a particular form of offending” or “limited self-regulatory capacity”.<sup>261</sup> Would it, perhaps, be more accurate to characterize such people as being closer, in terms of moral agency, to carriers of infectious diseases and mentally disordered persons?

Yet the cohort of people to whom PPOs will apply are not likely to be wholly lacking in moral agency; the fact that they must have served a criminal sentence implies that they possess sufficient mental capacities for criminal culpability. Rather, they appear to occupy an intermediate category, which straddles the “desert” and “disease” rationales for detention. For Morse, such individuals stand to receive the worst of both worlds: blamed and punished for the initial offence, and then, when that punishment is done, treated in a manner that we generally reserve for those who pose non-culpable threats.<sup>262</sup>

If potential predators are insufficiently responsible to be left at liberty until they commit another offense, why should they be held criminally responsible for such an offense in the first place? After all, offenders held responsible enough to warrant fully the state’s most severe infliction—the imposition of criminal blame and punishment—are now being committed at the end of a prison term justified by desert because they allegedly are not responsible for precisely the same type of behavior for which they were convicted and punished.

In response, it could be argued that there is nothing inherently contradictory in holding both that someone satisfies the criteria for criminal blame, and for civil detention. As Morse himself has noted, it is not entirely obvious that the standard for

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<sup>261</sup> Clause 13(2).

<sup>262</sup> SJ Morse “Protecting Liberty and Autonomy: Desert/Disease Jurisprudence” (2011) 48 San Diego Law Review 1077 at 1101.

responsibility need always be identical for the purposes of criminal justice and involuntary civil commitment.<sup>263</sup> Yet there may be some normative force in his argument that “the rationality sufficient for criminal blame and punishment *should* be sufficient to avoid involuntary civil commitment.”<sup>264</sup>

Morse’s work is certainly influential in this area, but his approach is not beyond challenge. An alternative view might regard the desert/disease dichotomy as being insufficiently nuanced to reflect reality. Joel Feinberg’s approach saw responsibility not in binary terms, but instead as lying on a spectrum. Thus, between the fully responsible and the wholly non-responsible, there lies a whole range of degrees of responsibility, meriting an array of different responses. Perhaps the approach of the PPO Bill better reflects this messy reality, treating this particular group of partially non-responsible people nonetheless as being responsible *enough* for criminal punishment, while at the same time being disordered enough to merit civil confinement.

As criminal culpability and mental disorder are legal categories, there need be nothing objectively wrong in taking such an approach. Yet at some level, it may seem dissatisfying, if not unfair. A fully responsible offender will be blamed, but may not be civilly confined. A fully non-responsible offender is in the opposite position. Under the PPO Bill, a partially responsible offender faces the uniquely harsh fate of being *both* blamed and civilly confined, largely on the basis of the same offence.

Perhaps something could be said for the more nuanced approach if it was reflected in the punitive part of the process. A partially responsible offender may not satisfy the criteria for an insanity defence, but his reduced level of responsibility could nonetheless be reflected in his culpability via a partial defence or formal mitigation such as diminished responsibility. In New Zealand, however, no such partial defence is available; an offender whose mental disorder falls short of the insanity test will, if found guilty, be convicted of the full offence, and any mitigation in sentencing will be

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<sup>263</sup> SJ Morse “Psychopathy and Criminal Responsibility” (2008) 1 *Neuroethics* 205–212 at 210.

<sup>264</sup> SJ Morse, “Psychopathy and Criminal Responsibility”, at 211 (emphasis added)

at the discretion of the judge (who may, as we have seen, just as easily regard that disorder as an aggravating factor).

It is arguable, then, that Morse's desert/disease model is too simplistic to account for the partially responsible, for whom both criminal punishment and civil confinement may be appropriate. At the very least, though, their culpability should reflect the extent to which their responsibility is compromised. To attribute full legal culpability to someone who is legally recognised as being affected by "an intense drive or urge to commit a particular form of offending" or "limited self-regulatory capacity" may be thought to uncouple culpability for responsibility in a troubling way.

For someone to satisfy the criteria for civil commitment, then – and certainly the criteria set out in the PPO Bill – it must be acknowledged that their capacity for responsibility and control are substantially impaired. We suggest that such impairment should also be reflected in the degree to which they are deemed criminally culpable. While it need not provide a complete excuse, it should at least mitigate their guilt.<sup>265</sup> It is possible that someone may satisfy the conditions for both desert- and disease-based detention, but it is hard to see how they can satisfy them both fully. Either someone has impaired responsibility, or they do not; this is not a quality that can be selectively acknowledged or ignored on the grounds of expedience.

#### *Least restrictive alternatives*

Even where the case for preventively restricting someone's liberty is made out, this does not afford the state *carte blanche* with regard to how and to what extent this is done. Domestic and international law, as well as well-established jurisprudential principles, impose substantial limits in this regard. One common and important limitation requires that any compulsory or coercive powers be the least restrictive necessary to achieve the state's legitimate ends.

Thus, one of the stated purposes of the Mental Health (Compulsory Assessment and Treatment) Act is to "ensure that assessment and treatment occur in the least

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<sup>265</sup> For a similar conclusion regarding strong deviant impulses, see V Bergelson "The Case of Weak Will and Wayward Desire" (2009) 3 Criminal Law and Philosophy 19–28.

restrictive manner consistent with safety.”<sup>266</sup> In the context of quarantine, similar restrictions are generally taken to apply. In comparison with detention for mental disorder, such provisions are rarely invoked, but the recent Ebola scare has seen several US jurisdictions detain citizens suspected of being infected. This has led to criticism from constitutional lawyers, who have insisted that, even in an emergency, the state must justify the need for detention. As law professor Wendy Parmet has explained:<sup>267</sup>

while governments have the right, if not the duty, to impose quarantine in appropriate circumstances to protect the public’s health, individuals can only be detained when doing is the least restrictive alternative.

Indeed, at the time of completing this report, a US judge has ruled that the detention of nurse Kaci Hickox was not legally justifiable, provided she agreed to comply with less restrictive monitoring provisions.<sup>268</sup>

If the PPO Bill, or any other preventive detention scheme, is to be seen as broadly in line with those mechanisms, then it seems that it too should be justifiable on the grounds of least restrictive alternative. Given the array of existing preventive powers we discussed in Part II, can post-sentence detention really be said to be the least restrictive measure necessary to protect public safety?

Specifically, what of the possibility that the existing mechanism of Extended Supervision Orders could be used as an alternative to detention? The Regulatory Impact Statement makes the claim that:<sup>269</sup>

A strengthened form of the most intensive form of an extended supervision order would not reduce the risk of violent and adult sex offenders re-offending because they could not be safely managed under the order.

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<sup>266</sup> Ministry of Health, *Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992* (November 2012) at vii.

<sup>267</sup> W Parmet “Ebola Quarantines: Remembering Less Restrictive Alternatives”, Bill of Health blog, 26 October 2014, at <http://blogs.law.harvard.edu/billofhealth/2014/10/26/ebola-quarantines-remembering-less-restrictive-alternatives>. For more detailed discussion of the US situation, see LO Gostin and BE Berkman “Pandemic Influenza, Ethics, Law, and the Public's Health” (2007) 59 Admin L Rev 121.

<sup>268</sup> “Judge says nurse who treated Ebola patients does not have to be fully quarantined” *The Washington Post*, 31 October 2014.

<sup>269</sup> Regulatory Impact Statement, para 71.

It is unclear whether this is a legal claim about the current applicability of ESOs, or an empirical claim about their efficacy. If it is the former, then certainly, the manner in which ESOs are presently provided for limits their applicability; as discussed in Part II, ESOs are currently limited both in terms of duration and with regard to the class of offenders to whom they may be applied. However, as we also explained, both of these limitations will be addressed by the reforms in Parole (Extended Supervision Orders) Amendment Bill.

If, on the other hand, the claim is an empirical one, that the risk of re-offending not only cannot be eliminated, but cannot even be *reduced* by the implementation of an ESO, then it is the sort of claim that should be informed by evidence. Have ESOs proved wholly ineffective in those cases where they have been imposed? Do those cases differ so greatly from those in current contemplation as to render ESOs ineffective? Legislators certainly enjoy a substantial margin of appreciation in selecting the means towards their purpose, but this does not afford infinite discretion. Where a significantly more restrictive option is being selected, it should be incumbent upon those seeking to introduce it to demonstrate why the less restrictive option is insufficient. Mere assertion is insufficient.

The RIS refers to the option of a strengthened and intensive form of ESO as presenting the “greatest risk” of all the alternatives considered. “Greatest risk”, however, does not necessarily imply “great risk”, or even “substantial risk” in an absolute sense. Minimising risk to public safety is an important part of the law’s function, but it is not its whole function. Rather, we believe it is incumbent upon legislators to balance the safety of the public against the rights of those who will be subject to these orders. If a less restrictive option – such as an ESO – reduces risk of re-offending to a low level, that option should not be rejected simply because it is marginally less safe than lifelong incarceration. A mere assertion that the less restrictive measure is insufficient to achieve the Bill’s objective does not satisfy the state’s obligation in this respect.



## VI. Conclusion

Preventive detention is not a new concept in New Zealand, nor is it even a particularly recent one. As we have shown, within the realms of both criminal and civil law, options have long existed for the detention of individuals thought to present dangers to the public, and sometimes to themselves.

In recent years, though, the range of such options has expanded. Particularly within the criminal realm, the past decade and a half has seen the introduction of an array of new initiatives at least ostensibly oriented towards greater public protection: increasing custodial sentences for serious crime; increased non-parole periods; the introduction of ESOs; and the introduction of the three strikes sentencing system. To this array, the Government now proposes to add PPOs, while a further piece of legislation will extend the maximum interval between parole hearings.<sup>270</sup>

From one perspective, the PPO Bill constitutes just one more addition to New Zealand's existing armoury of preventive detention provisions. At best, it may be seen to capture some extremely dangerous individuals who may "fall between the cracks" at the margins of punitive and therapeutic models of detention, in the interests of protecting some of society's most vulnerable people.

Serious concerns, however, surround the blurring of these models of detention. At worst, such "hybrid" or "quasi-criminal" forms of commitment<sup>271</sup> may be thought to contain some of the worst features of both models. Unlike the existing PD scheme, PPOs are not intended as a punitive measure, in response to a conviction for a serious crime. As such, they cannot be justified within a traditional punishment narrative (see Part V). Yet they have many features in common with penal sentences. They will often be spent in prisons or prison grounds. They will only be imposed upon those convicted of serious crimes. These features raise the possibility that, whatever their actual intended purpose, they will quickly come to be seen as further punishment, both by the detained person and by the wider public. Whether the courts come to share that view is harder to predict, but if they do, then the prospect arises that they

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<sup>270</sup> Parole Amendment Bill 2012.

<sup>271</sup> See SJ Morse "Blame and Danger: An Essay on Preventive Detention" (1995) Boston University Law Review 113 at 119.

will be seen as “double punishment”, and hence, as a violation of the New Zealand Bill of Rights Act 1990.

Alternatively, if PPOs are seen as purely civil, then other problems arise. In comparison with the provisions for detention under mental health legislation, the therapeutic imperative is decidedly diluted, and indeed seen by several professionals to whom we spoke as little more than an afterthought. Secondly, if they are to avoid being arbitrary detention, and thereby violating both domestic and international human rights, rigorous procedural safeguards must exist around PPOs. As we discussed in Part III, doubts exist about the frequency, independence and adequacy of review procedures.

With regard to review procedures, and in particular evaluation of evidence as to future dangerousness, we have identified several concerns. We have further suggested that these could potentially be addressed, at least in part, by procedural changes to the PPO regime, including more regular reviews and guaranteed state funding of expert witnesses for the detainee. However, we also recommend that close attention should be paid to the creation of an independent body, possibly along the lines of Scotland’s Risk Management Authority. This independent public body includes among its remit:

- accreditation of risk assessors to carry out duties on behalf of the High Court;
- approval of Risk Management Plans for offenders subject to an Order for Lifelong Restriction;
- development of appropriate resources to support best practice, including publication of Standards and Guidelines.<sup>272</sup>

Evaluation of the performance of the RMA lies beyond the scope of this report, but on the face of it, its independence from any Government Ministry may help insulate it from the sorts of political pressures that could otherwise be brought to bear in what are often likely to be cases that generate considerable publicity and emotion.

Doubts have also arisen as to whether PPOs have been shown to be in proportion to legitimate state objectives, and the least restrictive means by which those objectives can be achieved. Any regime which has the protection of the public as its prime

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<sup>272</sup> <http://www.rmascotland.gov.uk/about-the-rma/>

objective is only justified so far as there is a real risk of serious harm, and no less intrusive means of achieving the objective of public protection. To the extent that there is a less intrusive means available, such detention becomes arbitrary.<sup>273</sup>

ESOs constitute less liberty-intrusive measures than PPOs. At their most restrictive they enable an individual to live outside the prison environment, but subject to electronic tagging or one-on-one monitoring. Given the current Bill before Parliament<sup>274</sup> that extends these beyond their current 10-year limit and increases the scope of individuals who may be subject to an ESO, it is unclear why this regime is considered inadequate for the cohort of offenders in question, or cannot be modified sufficiently, to achieve the objective of public protection in this context.

A thorough review of the efficacy of ESOs is beyond the scope of this report, and we acknowledge that there *may* be valid reasons why they will not always be suitable.<sup>275</sup> However, we argue that it is incumbent upon the Government to demonstrate why this less restrictive alternative is not adequate for its purposes. A mere statement to this effect is surely insufficient. We also note that, in its Report on the Parole (Extended Supervision Orders) Amendment Bill, the Law and Order Committee acknowledged that “ten years of experience with the extended supervision orders demonstrate that they work effectively to achieve their primary objective of protecting the community.”<sup>276</sup>

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<sup>273</sup> *Fardon v Australia*, Communication No. 1629/2007 at [7.4]: “[t]o avoid arbitrariness”, the State Party must demonstrate that its purposes “could not have been achieved by means less intrusive than continued imprisonment or even detention.”<sup>273</sup>

<sup>274</sup> See Parole (Extended Supervision Orders) Amendment Bill 2014 (195-2).

<sup>275</sup> Consider, for example, the case of Barry Allan Ryder: a paedophile released from Lake Alice Psychiatric Hospital in 1993. Ryder was convicted and sentenced to nine years imprisonment for the kidnap and attempted rape of an 11-year-old boy in 1994. Prior to his release a nurse from Lake Alice, Neil Pugmire, had spoken publicly of his concern that Ryder would reoffend, an action that placed his employment in jeopardy. (“Whistle-blowers” legislation was introduced as a result of this.) When initially paroled, Ryder was subject to intense supervision for a year. When the level of supervision was reduced he reoffended. In 2003 Ryder was sentenced to preventive detention after being convicted of kidnapping, indecent assault and sexual violation. Whether this suggests that the ESO regime per se proved ineffective in his case, or supports the conclusion that the original level of supervision was proving adequate, is precisely the sort of question that merits closer examination. NZPA “Where is Apology to Pugmire, asks Act?” *New Zealand Herald* (New Zealand, 15 March 2003) <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

<sup>276</sup> Parole (Extended Supervision Orders) Amendment Bill 2014 (195-2) (select committee report) at 3.

At the heart of the debate around all preventive detention schemes lies a fundamental question about how accurately can we predict future dangerousness. In Part IV, we evaluated some of the techniques and methodologies currently available. While we are not in a position to evaluate the reliability of those techniques, we were struck by repeated warnings about over-reliance upon contested methodologies and concerns about undue judicial deference to experts. The Australian experience should serve as a warning in that regard, with Professor Bernadette McSherry warning that:<sup>277</sup>

In relation to sex offenders, it is very concerning that expert testimony in court regarding preventive detention and supervision is generally accepted by judges without challenge. It is one thing to accept the admissibility of such evidence, but another thing entirely to fail to question its reliability and validity.

In particular, care should be taken to avoid an asymmetrical approach to risk assessment, whereby assessors, chief executives or judges feel compelled to “err on the side of caution” by avoiding potential false negatives at the expense of likely false positives. A decision to detain a “dangerous” person indefinitely is far less likely to become demonstrably the “wrong” decision, not least because the person in question will have very limited opportunity to *prove* it wrong. The same cannot, of course, be said of someone released to offend again.

The political pressures this can bring to bear were illustrated by Defence Minister Gerry Brownlee, in a different context, just as this report was going to press. Responding to concerns from lawyer Michael Bott that proposals to suspend or cancel the passports of people suspected of supporting Islamic State, or ISIS, were unnecessary and disproportionate, Mr Brownlee replied:<sup>278</sup>

... I think the real question is what would New Zealanders think if agencies of the state knew about people who had expressed some of the intentions that these people have but then did nothing and an incident occurred ...

Finally, in Part V, we analysed some of the principled concerns on both sides of the argument about preventive detention. It would be trite to conclude merely that there

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<sup>277</sup> B McSherry *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2013) at 232.

<sup>278</sup> Radio National 6 November 2014, download available at: <http://www.radionz.co.nz/news/national/258672/fears-over-is-law-changes-dismissed>.

are compelling claims on both sides, and stating the obvious to point out that the case for “safety” is considerably easier to present in a compelling manner than the contrary position. Nonetheless, we hope that we have managed to some extent to explain why serious concerns exist about further erosion of the traditional limits placed on state power to detain.

What Stephen Morse calls the “desert/disease model” proclaims that responsible people may only be detained if they are guilty of a crime. In contrast, non-responsible people (those identified as criminally insane at the time of a crime) may be civilly, not criminally detained.<sup>279</sup> The former are responsible culpable agents, accountable for the harm they cause; the latter are not. We have considered the possibility that this binary model may be too simplistic to account for those whose cognitive or volitional capacities, while not wholly absent, are impaired such that they are only *partially* responsible for their actions. It is this cohort who have been described as entering an “allocation lottery” when they commit a criminal act, as to whether they are dealt with by the criminal justice or mental health systems.

Whether such people should be deemed culpable and prosecuted, or deemed non-responsible and “sectioned”, is an ongoing area of debate. An intermediate position would hold that their responsibility and liberty would exist on a sliding scale, varying with their capacities. Thus, they may receive mitigation – though not exoneration - for their offending, but some manner of ongoing monitoring or restraint may, as required, be placed on their liberty when they have completed their sentence.

At present, limited potential exists for such an intermediate response in New Zealand law, which has never recognized either the partial defence of diminished responsibility or a “volitional limb” to the insanity defence. The debate around the PPO regime could, in theory, present an opening for discussions of more nuanced approaches to responsibility, approaches that could better reflect modern psychiatric,

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<sup>279</sup> In terms of the ordinary individual suffering from “mental disorder”, the law permits them to be detained only if they pose a threat to themselves or others that cannot be managed in any other way, but does not require that they are otherwise lacking in decision-making capacity. This state of affairs is itself controversial, and reforms have been proposed that would more closely align mental health treatment with other forms of medical treatment in this respect. See J Dawson and K Gledhill (eds) *New Zealand’s Mental Health Act in Practice* (Victoria University Press, 2013) at 25.

neurological, philosophical and, indeed, jurisprudential thinking on ideas of volition, culpability and choice. In view of prevailing public and political moods, however, we remain more hopeful than optimistic in this regard.

It is unsurprising, if nonetheless somewhat frustrating, to note that several concerns that were raised with us during this research project have featured only in passing, or indeed not at all, in this report. Considerations of time, space and expertise necessitated focusing on some concerns to the expense of others. Nonetheless, it would be remiss were we not to mention that an array of practical, political and economic issues were raised during the various meetings and discussions.

A crucial issue pervading the PPO regime is its potential to impact disproportionately on Maori. As Rumble observes, Maori are already disproportionately represented at all levels of the criminal justice system, a fact<sup>280</sup>

at least in part due to systemic factors that operate at one or more steps of the criminal justice process which make it more likely for Maori to be apprehended, arrested, charged, convicted or imprisoned, with the result that Maori ‘accumulate’ in the system in greater numbers.

Another concern we encountered, but were unable fully to investigate, pertained to resources, and more specifically, the concern that the PPO regime would focus attention and resources on a small number of already well-known offenders, at the expense of less dramatic but potentially more effective interventions elsewhere in the penal system. Indeed, many of the concerns raised about PPOs reflect a wider discourse about the appropriate response to the threat of criminal offending.

We began this report with an acknowledgment that ever “tougher” penal policies have been a feature of both Labour- and National-led governments in New Zealand’s recent history. There is little indication of this trend slowing, far less reversing, any time soon; even were it to do so, it is vanishingly unlikely that it would begin with the cohort of offenders prospectively detained by PPOs. Yet the “penal populism” that has at least in part driven this trend may be in danger of mistaking genuinely effective

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<sup>280</sup> See Department of Corrections *Over-representation of Maori in the Criminal Justice System: An Exploratory Report* (Policy, Strategy and Research Group Department of Corrections, 2007) especially Part 2 “Criminal Justice Bias and Accumulation.”

strategies for those that feel most viscerally satisfying. If initiatives such as this are genuinely motivated by promoting public safety, rather than the infliction of further punishment on society's most detested members, then those policies must be informed by the best available evidence of efficacy.

A final question relates to the future of preventive detention and other “protective” restrictive measures. If introduced, PPOs will be limited to those who have been convicted of serious offences, but given that their rationale is protective rather than punitive, it is valid to consider why such a requirement is thought necessary. As the Regulatory Impact Statement noted:

It is difficult to argue that, as a matter of principle, it is necessary to detain offenders who pose this level of risk when those who have not offended but who pose the same risk cannot be detained.<sup>281</sup>

Indications as to potential future legislative directions may also be drawn from Child Harm Prevention Orders, which originally formed part of the Vulnerable Children Bill.<sup>282</sup> Although still partially based on previous conduct, these Orders would have dispensed with the need for a criminal conviction, requiring instead only that the High Court “finds, on the balance of probabilities, that the respondent has committed a qualifying offence.”<sup>283</sup>

Child Harm Prevention Orders were omitted from later versions of the Bill. Furthermore, the sorts of restrictions they would have imposed, though far from trivial, stopped some way short of detention. Nonetheless, their presence in a Government-sponsored Bill suggests at least the possibility that New Zealand may not have reached the end of the road in terms of “quasi-criminal” safety-oriented restrictions.

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<sup>281</sup> Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (18 September 201) at 20.

<sup>282</sup> Vulnerable Children Bill 2013 (150-1) cls 44-99.

<sup>283</sup> Clause 55(1)(b)