

# Controlling Child Sex Offenders: A Touchy Subject

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*Ze Wānanga o Ōtago*

A dissertation submitted in partial fulfillment of the requirements for the degree of

Bachelor of Laws (with Honours)

At the University of Otago, Dunedin

New Zealand

13 October 2006

## Acknowledgments

*I would like to sincerely thank the following people:*

*My supervisor Geoff Hall for his assistance and patience;*

*Mark Henaghan for being such a great Dean throughout my time at law school;*

*Everyone who came to my seminar for their support;*

*My friends and fellow tutors for making my time at University awesome fun;*

*And finally, my family who have always supported me in everything that I have done.*

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## **Introduction:**

Child sex offenders are one of the most detested groups of people in society. Their behaviour evokes very strong reactions. The mention of paedophilia causes some people to recoil in disgust, while others vocally proclaim their deep hatred of such offenders. These responses and the somewhat 'taboo' nature of the topic make reasoned debate about controlling child sex offenders very difficult. Despite this, the fact remains that *something* must be done. The issue cannot be ignored.

The New Zealand public is very concerned about the risks posed by child sex offenders<sup>1</sup> and wants to be protected from them. However, it must be ensured that a fair balance is struck between protecting the community from harm and protecting the rights and interests of offenders. Exactly where this balance lies is difficult to determine. It has shifted throughout history. A worrying trend is beginning to emerge though. In the past decade, controls have increasingly becoming more restrictive and severe.

Child sex offenders in New Zealand can be made subject to extended supervision orders without committing any further offences. In the international context it has become common for the personal details of child sex offenders to be kept on registries. The information contained on these registries is often made public. In some countries, offenders can be kept in prison indefinitely after they have completed their original sentence. Some jurisdictions place restrictions on the movement of child sex offenders, while others permit chemical castration. Such extreme measures no longer appear to offend society's cultural sensitivities. It seems to have become more important for the Government to ease the community's fear than to ensure the protection of basic civil liberties and human rights.

If child sex offenders are to be controlled effectively in this country then a better balance must be struck. The current trend of disregarding the rights of offenders must be halted. Any controls that are used must be based on actually reducing recidivism,

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<sup>1</sup> Ministry of Justice "Extended Supervision of Child Sex Offenders" (2003) cited in *Belcher v Chief Executive of the Department of Corrections* (CA184/05, 19 September 2006, Young P, Hammond, Chambers, O'Regan and Robertson JJ) at para. [30].

rather than simply responding to moral panic. The protections that they offer society must justifiably outweigh the negative effects that they have on offenders.

## Chapter One – The Problem of Child Sex Offenders in New Zealand

### **Extent and effects of child sexual abuse**

The extent of child sexual abuse in New Zealand is unknown because it cannot be easily studied. Retrospective studies from around the world have reported prevalence rates ranging from 3 percent to 62 percent.<sup>2</sup> Some of these variations can be accounted for by the differences in the definitions of ‘abuse’ that were used and the survey methods that were employed.<sup>3</sup> Other variations may be due to the sexual-political agendas of the researchers.<sup>4</sup> However, even if all the known variables are standardised, the results of such studies will always be tainted by the unknown and unknowable variables of over-reporting and under-reporting.<sup>5</sup> Some children may make false allegations,<sup>6</sup> while others may not report abuse because they fear the consequences of doing so.

The effects of sexual abuse are also unknown. One overseas study claimed that sexual abuse causes long-term problems for victims including fear, anxiety, depression, anger, hostility, inappropriate sexual behaviour, poor self esteem, tendency towards substance abuse, and difficulty forming close relationships.<sup>7</sup> In contrast, a study conducted at the University of Otago found there to be no relationship between non-contact<sup>8</sup> or non-genital<sup>9</sup> sexual abuse in childhood and poor mental health in adulthood. The study also reported that poor mental health among women, who were seriously sexually abused in childhood, was the exception rather than the rule. Moreover, the researchers suggested that the long terms effects of

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<sup>2</sup> L Hood *A City Possessed* (Longacre, 2001) 69.

<sup>3</sup> Hood above n 2.

<sup>4</sup> Hood above n 2, at 70

<sup>5</sup> Hood above n 2.

<sup>6</sup> For example, one of the complainants in *R v Ellis* [1994] 12 CRNZ 172 admitted 14 months later that she had lied about indecent touching and forced contact with Ellis’s penis because she thought that is what her mother wanted her to say. See above n 2, 4 at 25.

<sup>7</sup> D Finkelhor and A Browne “Impact of child sexual abuse: a review of the research” (1986) 99 *Psychological Bulletin* 66-77.

<sup>8</sup> Such as exposure, spying, indecent suggestions and pornography.

<sup>9</sup> Such as touching of breasts or buttocks and inappropriate kissing.

childhood sexual abuse are difficult to determine because it usually occurs in association with other detrimental childhood factors.<sup>10</sup>

### **Public attitudes towards child sex offenders**

The methods used to control child sex offenders have changed throughout history to reflect the cultural values and normative standards of society.<sup>11</sup> In the 19<sup>th</sup> century criminals were thought to be deficient and irrational creatures that were to be ‘hated’.<sup>12</sup> Habitual criminals were described as being ‘wild beasts’.<sup>13</sup> The Habitual Criminals and Offenders Act 1906 allowed judges to impose indeterminate sentences of detention following a finite prison term for sex offenders who were declared to be ‘habitual’.<sup>14</sup>

Over time it was gradually realised that child sex offenders should not be permanently expelled from society. Instead, it was thought that the modern state had a duty to rehabilitate them, as it did with its other sick or deficient citizens.<sup>15</sup> Condemnations of offenders lost their moral and emotive overtones. The previous imagery of wild beasts was replaced with concepts of inadequacy and the need for psychiatric treatment.<sup>16</sup> The Criminal Justice Act 1954 replaced habitual offender declarations with the more strictly controlled sentence of preventive detention.<sup>17</sup> These

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<sup>10</sup> Poor mental health was found to be more common in women from dysfunctional families who had experienced some combination of serious physical, emotional and sexual abuse. See P Mullen and others “Childhood Sexual Abuse and Mental Health in Adult Life” (1993) *British Journal of Psychiatry* 163.

<sup>11</sup> J Pratt “Sex Crimes and the New Punitiveness” (2000) 18 *Behavioral Sciences and the Law* 135 at 137.

<sup>12</sup> Justice Stephen *History of the English Criminal Law* (Butterworths, 1883).

<sup>13</sup> W Tallack *Penallogical and Preventive Principles* (London, 1889).

<sup>14</sup> PM Webb *A History of Custodial and Related Penalties in New Zealand* (Government Printer, 1982) 19.

<sup>15</sup> Pollens’ comments in 1938 are typical of this attitude: “. . . sex crimes are merely the superficial rash on our civilisation. They are mere symptoms indicative of an underlying condition which produces not only sex crimes but . . . is at the bottom of many sociological and political problems” See B Pollens. *The Sex Criminal* (Putnams, 1938) 21.

<sup>16</sup> Pratt above n11 at 140.

<sup>17</sup> Child sex offenders had to have at least one similar previous conviction. Offenders also had to be 25 years or older and only convictions since the age of seventeen were counted. The Court had to be satisfied that it was expedient for the protection of the public that the offender should be detained in custody for a substantial period. See Ministry of Justice “Sentencing of Persistent Offenders” (1997) (Internet) <[http://www.justice.govt.nz/pubs/reports/1997/sentence\\_guide/chapter\\_6.html](http://www.justice.govt.nz/pubs/reports/1997/sentence_guide/chapter_6.html)> accessed 04/10/06.

indeterminate sentences were rarely used though.<sup>18</sup> The legal profession was suspicious of them because they seemed better suited to totalitarian regimes than modern societies.<sup>19</sup> By the 1960's there was a growing culture of tolerance and social solidarity.<sup>20</sup>

Punishment came to be associated with the 'grand narrative' of reform, progress, and humanitarianism.<sup>21</sup> Modern society incorporated qualities such as civility, tolerance and respect for individual liberties and freedoms into its punishments used to control child sex offenders.<sup>22</sup> It was expected that the punishment imposed would not be arbitrary or excessive, or cause any unnecessary or undue suffering.<sup>23</sup> It was not to be ordered according to mere emotive public sentiment. The goal of imposing sanctions on child sex offenders was to reduce reconviction rates, rather than seek vengeance.<sup>24</sup>

In the past decade, this culture of tolerance appears to be receding against the force of a renewed focus on punitive measures. Child sex offenders are once more being referred to as being sub-human. Labels such as 'freak' 'animal', 'creature' and 'monster' are commonly used to describe them.<sup>25</sup> Some people argue that child sex offenders should not have any rights at all. It is contended that since they do not respect the rights of their victims then they should not receive any rights themselves. For example, United Future MP Marc Alexander has argued in Parliament that sex offenders have no right to any humanity at all. He contended that the New Zealand Bill of Rights Act 1990 and privacy legislation should not protect such 'predators'.<sup>26</sup>

There is often vocal opposition to the release of child sex offenders from prison. While killers, fraudsters, and thieves can generally be re-accepted into the community, child sex offenders are in a class of their own. It seems that no one wants

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<sup>18</sup> Pratt above n 11, 5 at 141.

<sup>19</sup> Pratt above n 11, 5 at 141.

<sup>20</sup> Pratt above n 11, 5 at 142.

<sup>21</sup> L Radzinowicz "Penal regressions" (1991) 50(4) Cambridge Law Journal 422 at 423.

<sup>22</sup> Pratt above n 11, 5 at 137.

<sup>23</sup> Pratt above n 11, 5 at 138.

<sup>24</sup> Pratt above n 11, 5 at 138.

<sup>25</sup> B Ansley "Small Town Rules" (2005) 198 NZ Listener.

<sup>26</sup> M Alexander "Parole (Extended Supervision) Amendment Bill: Second Reading" *Hansard*, 30 June 2004.

them.<sup>27</sup> Communities may stage pickets, stake out houses and threaten violence in an attempt to drive a child sex offender out of town.<sup>28</sup> Such vigilantism is often applauded as being a courageous stand to keep children and the community safe.<sup>29</sup>

### **Child sex offender recidivism**

The proclivity that child sex offenders have towards repeat offending (or recidivism) is the primary argument in favour of imposing strict controls on them. Child sex offenders are commonly viewed as being repeat offenders, who prey on strangers. In reality though, less than 10% of all child sexual abuse is committed by strangers. The most common offenders are fathers (20%), stepfathers (29%), other relatives (11%), and acquaintances of the family (30%).<sup>30</sup>

Many people think that imprisoning child sex offenders indefinitely is the only effective way to protect society. This ‘lock the door and throw away the key’ mentality is based on the idea that sex offenders cannot be rehabilitated. Incapacitation is argued to be the only safe option.<sup>31</sup>

Many studies have shown that child sex offenders can be rehabilitated though. Alexander reviewed 79 sex offender treatment studies from around the world in a meta-analysis that included nearly 11,000 sex offenders. Child sex offenders who had participated in treatment programmes were found to have an overall recidivism rate of 14.4%, whereas untreated child sex offenders re-offended at a rate of 25.8%.<sup>32</sup> However, the accuracy of these figures is somewhat questionable. They suffer from

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<sup>27</sup> M Griffin “A Crime Too Difficult to Cope With” *The New Zealand Herald*, 18 May 2005.

<sup>28</sup> Bruce Ansley “Small Town Rules” *NZ Listener*, May 28 2005, Vol 198.

<sup>29</sup> P Jenkins, Sensible Sentencing Trust “Paedophilia”, <<http://www.safe-nz.org.nz/Articles/paedos.htm>> (Internet) accessed 31/07/06.

<sup>30</sup> J R Conte & J R. Schuerman “Factors Associated with an Increased Impact of Child Sexual Abuse” (1987) 11 *Child Abuse & Neglect*, 201.

<sup>31</sup> Peter Jenkins, the webmaster of the Sensible Sentencing Trust (a New Zealand lobby group that advocates for tougher sentences and better protection of victim’s rights), advocates for this approach. He claims that it is in everybody’s best interests to have child sex offenders locked up permanently. According to Jenkins this would not only protect children, but also the offenders themselves, who will always need to resist the temptation to re-offend. See above n 29.

<sup>32</sup> M Alexander “Sexual offender treatment efficacy revisited” (1999) 11 *Sexual Abuse: A Journal of Research and Treatment* 101.

being highly dependant on the definitions of ‘sexual offence’, outcome measures, client groups and information sources that were used in the individual studies.<sup>33</sup> It has been argued that by selectively combining various studies, one can conclude anything one wants about the recidivism rates of child sex offenders.<sup>34</sup>

Individual studies provide a more accurate indication of the effectiveness of treatment programmes. The Kia Marama treatment programme<sup>35</sup> has been shown to have a significant effect on reducing the likelihood of re-offending for child sex offenders in New Zealand.<sup>36</sup> Of the first 300 offenders who had completed the programme and who had been in the community for an average of two years and nine months, only eight (less than 3%) had re-offended.<sup>37</sup> The conviction rate after a five year follow up period was only 8%.<sup>38</sup> In another New Zealand study, Lambie and Stewart analysed three community based child sex offender treatment programmes.<sup>39</sup> They found an overall recidivism rate of 8.1% after a four year follow-up period for offenders who attended the programmes. In comparison, the control group’s re-offending rate was 19%.<sup>40</sup> Increased recidivism for those who participated in a treatment programme was only associated with completion status<sup>41</sup> and the total number of and offender’s previous victims. It was not related to any other offender or treatment characteristics.<sup>42</sup> In light of these studies, it appears that it is indeed possible to rehabilitate most child sex offenders.

Some child sex offenders do re-offend, although their rate of recidivism is still

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<sup>33</sup> I D Lambie & M W Stewart “Community Solutions for the Community’s Problem: An outcome evaluation of three New Zealand Community Child Sex Offender Programmes” (2003).

<sup>34</sup> M E Rice and G T Harris “What population and what question? (Sex offenders’ recidivism)” (2006) 48.1 Canadian Journal of Criminology and Criminal Justice 95(7).

<sup>35</sup> Kia Marama is one of two sex offender treatment programmes that are run by the Department of Corrections (the other programme is Ti Piriti). The course was described by the Director of Psychological Service in *R v Kitching* (CA 55/03, 30 June 2003, Glazebrook, Heath and Doogue JJ) at para. [15] as “skills based being designed to assist offenders to understand and identify their own risk factors associated with their own offence cycle, develop strategies to manage the risk, and skills for use on release”.

<sup>36</sup> For example, see L Bakker, S Hudson, D Wales, & D Riley, Department of Corrections “And there was light: Evaluating the Kia Marama Treatment Programme for New Zealand Sex Offenders against children” (1998).

<sup>37</sup> Cited by Hardie-Boys in *R v P* (CA 86/95, 10 August 1995, Eichelbaum CJ, Hardie Boys and Henry JJ) and by Richardson P in *R v Leitch* [1998] 1 NZLR 420.

<sup>38</sup> Cited by Chambers J at para. [37] in *R v Dawson* (HC, Rotorua T 58/99, 14 April 2000).

<sup>39</sup> These were the SAFE Network Inc. Auckland, STOP Wellington Inc., and STOP Christchurch.

<sup>40</sup> Bakker et al above n 36.

<sup>41</sup> The recidivism rate of those offenders that actually completed the treatment was only 5.2%.

<sup>42</sup> Bakker et al above n 36.

relatively low compared to other types of offenders. According to the Ministry of Justice, only 3% of all sex offenders were reconvicted for another sex offence within two years of their release from prison, while within five years the percentage was only 7%.<sup>43</sup> Of these most dangerous offenders who had been convicted of more than five sex offences, only five 20% were reconvicted of another sex offence within two years.<sup>44</sup> In contrast, violent offenders were found to have a much higher rate of recidivism. Over a quarter (28%) of violent offenders were reconvicted of another violent offence within two years of their release, while a little under half (45%) were reconvicted of a further violent offence within five years.<sup>45</sup> Nearly half the offenders with more than five prior convictions for violent offences were reconvicted of another violent offence within two years.<sup>46</sup>

### **Influence of moral panic**

The prevalence of sex offending in New Zealand has reduced considerably in the past decade. Convictions for ‘violent sexual offences’<sup>47</sup> dropped more than 28% between 1995 and 2004, while in the same time period convictions for ‘non-violent sexual offences’<sup>48</sup> reduced by over 26%.<sup>49</sup> Despite this, the media still gives a lot of attention to the risks posed by child sex offenders.<sup>50</sup> The dangers of offending are often exaggerated and stories not always put into context.<sup>51</sup> High profile cases often result in intense publicity even though they tend to be anomalies.<sup>52</sup> This sort of coverage results in the public being misinformed about the true risks that child sex offenders actually pose.

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<sup>43</sup> Ministry of Justice “Reconviction and Reimprisonment Rates for Released prisoners” (2002) (Internet) <<http://www.justice.govt.nz/pubs/reports/2002/reconviction-imprison-rates/chapter-1.html>> accessed 01/08/06.

<sup>44</sup> Ministry of Justice above n 43.

<sup>45</sup> Ministry of Justice above n 43.

<sup>46</sup> Ministry of Justice above n 43.

<sup>47</sup> ‘Violent sexual offences’ are rape, unlawful sexual connection, attempted sexual violation, and indecent assault.

<sup>48</sup> ‘Non-violent sexual offences’ include unlawful sexual intercourse, doing an indecent act with another person, doing an indecent act in a public place, or obscene exposure in a public place, are less likely to be sentenced to imprisonment.

<sup>49</sup> Ministry of Justice “Conviction and sentencing of offenders in New Zealand: 1995 to 2004” (2005).

<sup>50</sup> Ministry of Justice above n 2, 4 cited in *Belcher v Chief Executive of the Department of Corrections* above n 1, 2 at para. [30].

<sup>51</sup> B Radford “Predator Panic: Reality Check on Sex Offenders” *The Sceptical Inquirer*, 16 May 2006.

<sup>52</sup> For example, the media has comprehensively covered the Christchurch Civic Creche case involving Peter Ellis (above n 6, 4) for almost 15 years.

The Chief Justice Dame Sian Elias has described New Zealand's political climate as being dominated by anxiety about crime.<sup>53</sup> A referendum held on criminal justice in 1999 illustrates this anxiety. 92% of the public voted in favour of hard labour, longer prison terms, mandatory minimum sentences and better recognition of victims' rights.<sup>54</sup> However, this overwhelming response was probably due to the public's inaccurate knowledge and negative view of crime statistics.<sup>55</sup> The Ministry of Justice had conducted a comprehensive national survey six months prior to the referendum. It found that most respondents wrongly believed there to be much higher levels of crime than official figures indicated.<sup>56</sup> In addition, 83% of respondents wrongly believed crime rates to be increasing.<sup>57</sup>

This misinformed anxiety has resulted in a moral panic. Private and public policies in New Zealand are being unduly driven by headline-making anecdotes of horrible individual cases, rather than by refined data-driven policy analysis. For example, the Peter Ellis case<sup>58</sup> led to numerous changes in the in the education sector. Until recently, primary teachers were banned from touching from children, even in a positive and affirming way, because it may have been misconstrued as sexual abuse.<sup>59</sup> In November last year Air New Zealand and Qantas prevented men sitting next to unaccompanied children on flights for 'safety' reasons.<sup>60</sup> In July, the Kaiapoi Aquatic Centre banned caregivers dressing their toddlers by the poolside to guard against the possibility of the children being filmed.<sup>61</sup> Meanwhile at the recent national gymnastics championships all spectators were required to register and label their cameras to combat the risk of paedophiles taking inappropriate photographs of young gymnasts.<sup>62</sup>

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<sup>53</sup> Dame Sian Elias "Criminology in the age of talkback", Address given to the Australian and New Zealand Society of Criminology conference at Victoria University, 10 February 2005.

<sup>54</sup> Sensible Sentencing Trust "The Law and Order Referendum – and other related issues in New Zealand" <<http://www.laworderreferendum.org.nz/>> (Internet) accessed 02/08/06.

<sup>55</sup> Ministry of Justice "Attitudes to Crime and Punishment: A New Zealand Study" (2003)

<sup>56</sup> Ministry of Justice above n 55.

<sup>57</sup> Ministry of Justice above n 55.

<sup>58</sup> *R v Ellis* above n 6, 4.

<sup>59</sup> Sarah Farquar, an early childhood education advocate, claims that this 'paedophile hysteria' is the reason why just one percent of early childhood workers are male. See C Trevett "Teachers can touch children, says union" *The New Zealand Herald*, September 26 2006.

<sup>60</sup> K Taylor "Ban on Men Sitting Next to Children" *The New Zealand Herald*, November 29 2005.

<sup>61</sup> J Booker "Mum in Hot Water at Public Pool over Child Nudity Ban" *The New Zealand Herald*, July 18 2006.

<sup>62</sup> NZPA "Camera Crackdown at Gymnastics Champs" *The New Zealand Herald*, 25 September 2006.

## **Chapter Two - Controls available in New Zealand**

The controls that are currently used to control child sex offenders in New Zealand include imprisonment, preventive detention, parole and extended supervision orders (ESOs). Each control does have its own distinct advantages in protecting the public from harm, but these benefits must be carefully balanced against the equally important task of protecting the rights of offenders. Controls should only be used if they can strike a fair balance between these two competing interests.

### **Imprisonment**

#### *Overview of control*

Imprisonment protects society by incapacitating child sex offenders and deterring them from re-offending in the future. The term of imprisonment varies according to the severity of the offence that has been committed and the threat that the offender is thought to pose.<sup>63</sup>

Imprisonment is commonly used to control offenders who commit violent sexual offences. In 2004, 99% of convictions for rape, 96% of convictions for unlawful sexual connection, 89% of convictions for attempted sexual violation, and 58% of convictions for indecent assault resulted in sentences of imprisonment being imposed.<sup>64</sup> This rate of imprisonment is notably higher than at any other time in the previous decade.<sup>65</sup> The length of the sentences that are being imposed for these offences has also significantly increased in the past ten years.<sup>66</sup>

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<sup>63</sup> Incapacitating an offender on the basis of their future dangerousness is easier said than done. The ability to predict future risk is currently limited to findings that certain categories of offenders are more likely to commit further offences than others. However this broad assessment may not be accurate in individual cases. See G Hall, *Hall's Sentencing*, (Lexis Nexis NZ, 1993) para. I.3.4, (service 70).

<sup>64</sup> 73% of the victims for these offences were under 17 years of age (40% were aged under 12 years of age). See, Ministry of Justice above n 49, 9.

<sup>65</sup> For example, in 1995, sentences of imprisonment were only imposed for 93% of convictions for rape, 76% of convictions for unlawful sexual connection, 87% of convictions for attempted sexual violation, and 42% of convictions for indecent assault. See, Ministry of Justice above n 49, 9.

<sup>66</sup> In 2004, convictions for rape resulted in an average sentences of 8.32 years imprisonment, unlawful sexual connection 5.25 years imprisonment, attempted sexual violation 3.68 years imprisonment, and indecent assault 1.1 years imprisonment. In contrast, the average term of imprisonment imposed for rape in 1995 was only 7.28 years, unlawful sexual connection 4.48 years, attempted sexual violation 3.65 years, and indecent assault 1.68 years. See, Ministry of Justice above n 49, 9.

Offenders who commit non-violent sexual offences such as unlawful sexual intercourse, doing an indecent act with another person, doing an indecent act in a public place, or obscene exposure in a public place, are less likely to be sentenced to imprisonment. In 2004 only 39% of such offenders received sentences of imprisonment.<sup>67</sup> but once again this figure is higher than any other time in the previous decade.<sup>68</sup>

### *Problems with control*

The current trend of increasing the use of imprisonment is problematic. Firstly, it must be ensured that the sentence imposed bears a reasonable relationship to the gravity of the offence that has been committed.<sup>69</sup> The Court is required to impose the least restrictive outcome that is appropriate in the circumstances.<sup>70</sup> Unnecessarily long sentences of imprisonment must be avoided.

The deterrent effect of imprisoning child sex offenders is questionable. Deterrence has little effect on impulsive<sup>71</sup> or compulsive actions. It is based on foresight and the ability of an offender to control their actions.<sup>72</sup> Not all child sex offenders have such control. Many of their crimes are committed without any contemplation of the possible consequences.

Imprisonment also does little to rehabilitate the offender. Most child sex offenders do not participate in treatment programmes while they are in prison.<sup>73</sup> This means that many child sex offenders are released into the community upon the expiry of their prison sentences even though they still pose a risk of re-offending.<sup>74</sup>

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<sup>67</sup> 95% of victims of violent sex offences were under 17 years of age (49% were aged under 12 years of age). See, Ministry of Justice above n 49, 9.

<sup>68</sup> For example, in 1997 only 25% of offenders who were convicted of a non-violent sexual offence were sentenced to imprisonment. See, Ministry of Justice above n 49, 9.

<sup>69</sup> *R v Myers* [1931] NZLR 594, 597.

<sup>70</sup> Section 8(g) Sentencing Act 2002.

<sup>71</sup> See *R v Osborne* (CA45/72, 24 August 1972, Turner P, McCarthy and Richmond JJ) in the context of culpable homicide committed in the heat of the moment.

<sup>72</sup> G Hall, *Hall's Sentencing*, (Lexis Nexis NZ, 1993) para. I.3.3, (service 78).

<sup>73</sup> Bakker et al above n 36, 8.

<sup>74</sup> Approximately 240 child sex offenders are released from prison every year. See D Riley "Assessing risk of re-offending among sex offenders" *Judges' Update*, December 2004.

## Preventive detention

### *Overview of control*

One way to prevent child sex offenders from re-offending upon their release is to simply keep them in prison. An indefinite sentence of preventive detention is now available for offenders over 18 years of age<sup>75</sup> who have committed sexual crimes that are punishable by seven or more years' imprisonment.<sup>76</sup> When the Court imposes a sentence of preventive detention, it sets a minimum term of imprisonment. However, the offender's actual date of release is determined thereafter at the discretion of the New Zealand Parole Board.<sup>77</sup> This discretion to release the offender provides some incentive for offenders to reform. Successful participation in treatment programmes will be determinative of the offender's final release date.<sup>78</sup> Once an offender who has been sentenced to preventive detention is released from prison they remain subject to recall for the rest of their life.<sup>79</sup> This extended control provides further incentive for the offender to rehabilitate themselves. They will not want to return to prison indefinitely.

As the name of the sentence suggests, the sentence can only be used for preventative purposes. It cannot be used to punish offenders.<sup>80</sup> Before the sentence can be imposed the offender must be shown to have a 'substantial' risk of re-offending and pose a significant and ongoing risk to the safety of the community.<sup>81</sup> Preventive detention cannot be used as a 'street-cleaning' exercise to indefinitely incarcerate those offenders whose conduct, although a nuisance, does not qualify as being

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<sup>75</sup> This continues the lowering of the age from 25 under the Criminal Justice Act 1985 to 21 under the Criminal Justice Amendment Act 1993.

<sup>76</sup> Section 87(2) Sentencing Act 2002.

<sup>77</sup> Sections 82(3) and 28 of the Parole Act 2002.

<sup>78</sup> *R v Bryant* (CA 236/03, 16 December 2003, Elias CJ, Blanchard and Pankhurst JJ) at para. [23].

<sup>79</sup> Section 6(4)(d) Parole Act 2002. The importance of this section in protecting the public was recognised in *R v Leitch* above n 37, 8.

<sup>80</sup> Section 87(1) of the Parole Act 2002 provides that the purpose of the sentence is to protect the community from those who pose a significant and ongoing risk to the safety of its members. That this purpose only allows preventive, rather than punitive sentences was recognised in *R v Johnson* [2004] 3 NZLR 29.

<sup>81</sup> See *R v C* [2003] 1 NZLR 30 (CA).

sufficiently serious.<sup>82</sup> However, it may be warranted in cases of persistent, deliberate behaviour where there have been prior warnings and the cumulative harm from present and past offending is serious.<sup>83</sup> The statutory test is not to be burdened by the notion that preventive detention is a sentence of last resort.<sup>84</sup>

### *Problems with control*

Indefinitely imprisoning an offender for what they are likely to do is, by its very essence, predictive of what may or *may not* occur in the future.<sup>85</sup> Since there is a possibility that the predicted offence may never happen, preventive detention must be restricted to the most exceptional cases. Public confidence in the criminal justice process could not be maintained if the Court routinely deprived child sex offenders of their liberty, not on the basis that they have breached any law, but because there is a risk that they will offend in the future.<sup>86</sup> It would also be economically inefficient to increase the use of preventive detention. It is very expensive to keep offenders in prison. On average it costs over \$59,000<sup>87</sup> per year.<sup>88</sup> Using these figures, it would cost almost \$1.5 million<sup>89</sup> to keep an offender in prison for 25 years. If preventive detention was routinely used to control child sex offenders then it may also logically be used to manage other types of serious offenders as well. The costs of imprisonment would increase exponentially if this were to occur.

The Court of Appeal indicated in *R v Mist*<sup>90</sup> that a determinate sentence of imprisonment combined with the possibility of an extended supervision order being imposed at a later date is to be preferred to preventive detention if it would provide

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<sup>82</sup> *R v Parahi* [2005] 3 NZLR 356 at para. [86].

<sup>83</sup> *R v Liddell* (CA372/04, 8 April 2005, Chambers J).

<sup>84</sup> *R v Rameka* (CA78/97, 18 June 1997, Thomas, Blanchard and Cartwright JJ) [1997] BCL 801.

<sup>85</sup> P Keyzer and S Blay "Questions Regarding the International Validity of Mr Fardon's Communication to the UNHRC" (2006) Melbourne Journal of International Law, forthcoming.

<sup>86</sup> *Kable v The Director of Public Prosecutions for New South Wales* (1997) 189 CLR 51, at para. [98] and [107].

<sup>87</sup> Actual cost: \$59097.15, see Department of Corrections "Facts and Statistics" (Internet) <[www.corrections.govt.nz](http://www.corrections.govt.nz)> updated 02/06.

<sup>88</sup> Department of Corrections above n 87.

<sup>89</sup> Actual cost: \$1,477,428.75 see, Department of Corrections above n 87.

<sup>90</sup> *R v Mist* (2005) 21 CRNZ 490 (CA).

adequate public protection.<sup>91</sup> This is a sensible approach. There is little benefit in incapacitating an offender who can be monitored safely in the community. Nevertheless, sometimes offenders do pose an unacceptable risk of re-offending. In these exceptional cases the protective features of preventive detention, including the availability of recall, provide the most desirable method of managing the risk that such offenders pose.<sup>92</sup>

## **Parole**

### *Overview of control*

Parole is the conditional release of an offender from prison prior to the expiry of their sentence. It is designed to assist in the offender's rehabilitation and reintegration into society. Supervising the offender in the community is thought to be of more value to both society and the individual than continued imprisonment.<sup>93</sup> Parole avoids the expense of imprisonment (including hidden costs such as the payment of benefits to dependants) and the waste of offenders' own human resources.<sup>94</sup> The possibility of being granted parole also provides offenders with an incentive to behave themselves while they are in prison and participate in treatment programmes.<sup>95</sup>

Child sex offenders who are sentenced to imprisonment for more than 24 months currently become eligible for parole after serving one-third of their sentence, unless a minimum non-parole period has been set by the Court.<sup>96</sup> This will be done when the Court believes that the standard release provisions would not protect the community from the offender.<sup>97</sup> The Parole Board will only grant child sex offenders parole if it is satisfied on reasonable grounds that their release will not pose an undue risk to the

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<sup>91</sup> This reflects section 87(4)(e) of the Sentencing Act 2002 which provides that when considering whether to impose a sentence of preventive detention the Court must take into account the principle that a lengthy determinate sentence is preferable if it provides adequate protection for society.

<sup>92</sup> *R v Flesher* (CA12/05, 25 August 2005, Anderson P).

<sup>93</sup> *Hawkins v District Prisons Board* (1994) 12 CRNZ 563, 569 cited in G Hall, above n 63, 11 at para. I.3.3, (service 78).

<sup>94</sup> Hall above n 93.

<sup>95</sup> New Zealand Law Commission "Sentencing Guidelines and Parole Reform" (2006).

<sup>96</sup> Section 20 Parole Act 2002, section 86 Sentencing Act 2002.

<sup>97</sup> Section 86 of the Sentencing Act 2002 requires the length of the determinate sentence to be two years or more. The minimum period can be up to two-thirds of the sentence, or ten years, whichever is the lesser period.

safety of the community or any person or class of persons.<sup>98</sup> It must have regard to the support and supervision available to the offender and the public interest in the reintegration of the offender into society.<sup>99</sup>

Child sex offenders that are granted parole are made subject to release conditions. There are two types of parole conditions: standard conditions and special conditions. Standard conditions apply to all offenders that are granted parole.<sup>100</sup> They may include reporting to the Community Probation Service, restrictions on living and work arrangements and restrictions on associating with people.<sup>101</sup> Special conditions can be imposed to reduce the risk of re-offending, to facilitate rehabilitation and reintegration, or to provide for the reasonable concerns of the offender's victims.<sup>102</sup> Such conditions may include requiring the offender to participate in a treatment programme.<sup>103</sup>

The Community Probation Service ensures that child sex offenders comply with parole conditions. They are required to regularly report to their Probation Officer. The Probation Officer monitors the offender and the progress that they are making. If an offender is not complying with their parole conditions then the Probation Officer may take enforcement action. They can prosecute the offender for a breach of parole.<sup>104</sup> Alternatively the Probation Officer may apply to the Parole Board to recall the offender to prison.<sup>105</sup>

### *Problems with control*

There are numerous problems associated with using parole to control child sex offenders. Firstly, there is an absence of any direct supervision. There is little scope

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<sup>98</sup> Section 28(2) Parole Act 2002.

<sup>99</sup> Section 28(2) Parole Act 2002.

<sup>100</sup> Section 29 Parole Act 2002.

<sup>101</sup> Section 14 Parole Act 2002.

<sup>102</sup> Section 15(2) Parole Act 2002.

<sup>103</sup> Section 15(3) Parole Act 2002.

<sup>104</sup> The penalty for such a breach is a term of imprisonment not exceeding one year or a fine not exceeding \$2000. See section 71 Parole Act 2002.

<sup>105</sup> Sections 60 and 61(b) Parole Act 2002.

for the Probation Officer to investigate the offender's behaviour or truthfulness.<sup>106</sup> They must rely on the offender being open and honest about their behaviour, which may not always occur. Consequently, child sex offenders may commit further offences while they are on parole that could go unnoticed. There is also a danger of child sex offenders not reporting to their Probation Officer at all. This is very difficult to guard against. The penalties for breaching release conditions do act as a deterrent, but some offenders may still abscond regardless of the consequences. A further problem with using parole to control child sex offenders is that it can only be imposed for a brief period of time. Parole conditions can only operate for a maximum of six months upon the expiry of the original determinate sentence.<sup>107</sup> The offender cannot be monitored beyond this time. This may not be long enough to maximise the rehabilitation and reintegration of child sex offenders.

## **Extended supervision orders**

### *Overview of control*

Extended supervision orders (ESOs) allow for child sex offenders to be supervised for up to ten years after the expiry of their finite sentences.<sup>108</sup> The purpose of ESOs is to protect the community from offenders that still pose a 'real and ongoing risk of committing sexual offences against children or young persons'.<sup>109</sup> ESOs are obtained by the Chief Executive of the Department of Corrections, who must apply to the Court.<sup>110</sup> Before the Court can grant an ESO application it must be 'satisfied' that the offender is 'likely' to commit another sexual offence of the relevant type<sup>111</sup> once their original sentence expires.<sup>112</sup> There must be a real and ongoing risk of re-offending that cannot sensibly be ignored having regard to the nature and gravity of the likely

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<sup>106</sup> The Community Probation Service manages approximately 40,000 new community-based sentences and orders per year amongst many other duties. See Department of Corrections "Probation and Offender Services" (Internet) <[www.corrections.govt.nz](http://www.corrections.govt.nz)> accessed 06/10/06.

<sup>107</sup> Section 18(2) Parole Act 2002.

<sup>108</sup> Section 107A(b) Parole Act 2002.

<sup>109</sup> Section 107I(1) Parole Act 2002. This protective purpose was emphasised in *Chief Executive of the Department of Corrections v Steven* (HC, Rotorua CRI 2004-463-130, 27 April 2005, Allan J).

<sup>110</sup> Section 107F(1) Parole Act 2002.

<sup>111</sup> As specified by section 107B of the Parole Act 2002.

<sup>112</sup> Section 107I(2) Parole Act 2002.

future offending.<sup>113</sup> In deciding whether an offender poses such a risk the Court must have regard to the report that has been prepared by the health assessor.<sup>114</sup> This report addresses the nature of any likely future sexual offending, including the age and sex of likely victims; the ability of the offender to control their sexual impulses; predilection and proclivity for sexual offending; and acceptance of responsibility or remorse for prior offending.<sup>115</sup> ESOs must only be imposed for the minimum period of time that is required to keep the community safe in light of the level of risk that the offender poses, the seriousness of the harm that might be caused to victims, and the likely duration of the risk.<sup>116</sup>

ESOs can contain a number of different controls. All offenders that are made subject to an ESO must comply with standard conditions. These include reporting to a probation officer, living at a designated address, not associating with specific people and undertaking a rehabilitative and reintegrative needs assessment if required.<sup>117</sup> Additionally the Parole Board may impose special conditions, such as requiring the offender to reside at a specific address as if they were on home detention, 24 hour person-to-person supervision and electronic monitoring.<sup>118</sup> An offender who breaches the conditions of their ESO may be imprisoned for up to two years.<sup>119</sup>

### *Problems with double punishment*

A major problem with ESOs is that they appear to punish the offender twice for the same offence. Section 26(2) of the New Zealand Bill of Rights Act 1990 (NZBORA) protects an offender against double punishment. It provides that no one who has been finally convicted of an offence shall be punished for it again. This provision reflects Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR).<sup>120</sup> Child sex offenders are initially sentenced to a finite term of imprisonment and such parole conditions as may follow from that. The imposition of an ESO is not

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<sup>113</sup> *Belcher v Chief Executive of the Department of Corrections* above n 1, 2.

<sup>114</sup> Section 107I(2) Parole Act 2002.

<sup>115</sup> Section 107F(2) Parole Act 2002.

<sup>116</sup> Section 107I(5) Parole Act 2002.

<sup>117</sup> Section 14 Parole Act 2002.

<sup>118</sup> Section 107J(1)(b) and section 107K Parole Act 2002.

<sup>119</sup> Section 107T Parole Act 2002.

<sup>120</sup> Article 14(7) provides that no one shall be tried or punished again for an offence for which he has been acquitted or convicted in accordance with the law and penal procedure of each country.

considered at the time of sentencing. ESOs are only applied for towards the end of an offender's original sentence.

The Courts have demonstrated an aversion to laws or legal remedies that breach the broad concept of double jeopardy. In *Daniels v Thompson*<sup>121</sup> the Court of Appeal prevented a civil trial for damages being brought after a criminal trial. The Court of Appeal also made a firm stance against double jeopardy in *R v Poumako*<sup>122</sup> and *R v Pora*.<sup>123</sup> In these cases it was held that retrospectively amending the minimum period of imprisonment for the offence contravened section 26(2) of the NZBORA, despite the amendment not affecting the overall length of the sentences.

The Supreme Court was recently less firm in *Morgan v Superintendent, Rimutaka Prison*.<sup>124</sup> It was held that the removal of an automatic right to parole after serving two-thirds of the sentence did not violate section 25(g) of the NZBORA.<sup>125</sup> The maximum penalty for the offence had remained the same. Therefore, while the amendments had altered the way that sentences were administered, it did not affect the sentencing process itself. The ESO regime is distinguishable from this situation though. ESOs are ordered by the Court and extend the maximum time that the offender may be subject to controls. Thus, they go beyond the simple administration of the sentence and can rightfully be classified as an integral part of the sentencing process.

The key question in deciding whether ESOs breach section 26(2) of the NZBORA is whether they actually constitute further 'punishment'. The distinction between criminal penalties and preventative measures has been considered worldwide in a number of different contexts.<sup>126</sup> The issue was recently settled in New Zealand by the

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<sup>121</sup> *Daniels v Thompson* [1998] 3 NZLR 22 (CA).

<sup>122</sup> *R v Pora* [2001] 2 NZLR 37 (CA).

<sup>123</sup> *R v Poumako* [2000] 2 NZLR 695 (CA).

<sup>124</sup> *Morgan v Superintendent, Rimutaka Prison* [2005] 3 NZLR 1 (Elias CJ dissenting).

<sup>125</sup> Section 25(g) provides that everyone convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.

<sup>126</sup> In the United Kingdom the Court has classified sex offender orders as being protective measures, rather than criminal penalties (see *B v Chief Constable of Avon and Somerset* [2001] 1 All ER 562 (QB)). The UN Human Rights Committee did not view changes to parole laws requiring mandatory supervision as being a penalty for the purposes of Article 15(1) of the ICCPR because of the supervision's social assistance objectives (see *A.R.S. v Canada* Communication No.91/81). The European Court of Human Rights held that the supervision of a suspected Mafioso was acceptable

Court of Appeal in *Belcher v Chief Executive of the Department of Corrections*.<sup>127</sup> The Court acknowledged that the aim of the ESO regime was to reduce re-offending. ESOs were also recognised as not being direct sanctions for the purposes of denunciation, deterrence or holding the offender to account. Although, this was not thought to be decisive because the same is true (or partly true) of many other criminal law sanctions, such as preventive detention and supervision, which are nonetheless regarded as penalties.<sup>128</sup> Thus, the Court concluded that imposing significant restrictions on child sex offenders through ESOs amounts to punishment.<sup>129</sup> Accordingly, this second punishment appears to breach section 26(2) of the NZBORA. The only way that ESOs can be consistent with the NZBORA is if their use can be demonstrably justified in a free and democratic society.<sup>130</sup>

The New Zealand Attorney-General has indicated that imposing ESOs retrospectively on current inmates and parolees would not be justified.<sup>131</sup> Yet she did not specifically address the issue of double punishment for *all* offenders. This issue was dealt with by the New Zealand Law Society. It was submitted that if, as the Attorney-General says, it is unjustifiable to impose ESOs on current inmates and parolees, then the same must apply for all *future* offenders as well.<sup>132</sup> This seems to be a valid argument. Both categories of offenders are being subjected to a further penalty that was not legitimately imposed at the time of sentencing.

The Justice and Electoral Committee analysed these concerns when it considered the Parole (Extended Supervision) and Sentencing Amendment Bill. It placed a lot of weight on the regime only imposing eligibility status.<sup>133</sup> The Committee noted that an ESO can only be imposed after both a health assessor and the Court deem an offender

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because it was designed to prevent the commission of offences and did not involve the determination of any criminal charge (see *Raimondo v Italy* (1994) 18 EHRR 237).

<sup>127</sup> *Belcher v Chief Executive of the Department of Corrections* above n 1, 2.

<sup>128</sup> *Belcher v Chief Executive of the Department of Corrections* above n 1, 2 at para. [48].

<sup>129</sup> *Belcher v Chief Executive of the Department of Corrections* above n 1, 2 at para. [49].

<sup>130</sup> Section 5 New Zealand Bill of Rights Act 1990.

<sup>131</sup> M Wilson “Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill” (2004).

<sup>132</sup> New Zealand Law Society “Submissions on Parole (Extended Supervision) and Sentencing Amendment Bill (2004).

<sup>133</sup> Justice and Electoral Committee “Explanatory Note to the Parole (Extended Supervision) and Sentencing Amendment Bill” (2004).

to pose a risk of re-offending.<sup>134</sup> Consequently, only the most dangerous individuals were thought to have rights infringed. The Committee concluded that the risk of these dangerous offenders committing further crimes against children justified any objections to double punishment.<sup>135</sup> The difficulty with this position is that ESOs are *not* restricted to only the most dangerous offenders. ESOs can be ordered for any offender who poses a ‘real and ongoing’ risk of re-offending.<sup>136</sup> This is not a high standard to meet. Moreover, many other types of offenders also pose a danger to the safety of the community once they are released from prison.<sup>137</sup> However this risk is not thought to justify breaching their human rights.<sup>138</sup> Child sex offenders should not be treated any differently. The NZBORA is intended to protect the rights of everyone, including sex offenders. The unsavoury nature of their offending does not negate this. The rights of offenders would be very hollow indeed if they could be ignored whenever there is a real and ongoing risk to the safety of the community.

The Committee also claimed that ESOs could be justified because some child sex offenders may actually welcome the protections that they afford.<sup>139</sup> They may recognise that the intensive monitoring will help them to remain in the community, and provide an element of self protection.<sup>140</sup> This view is flawed. While it is true that some offenders may wish to be supervised, others will not. Furthermore, the opinions of offenders should not even be a relevant consideration when determining the validity of the ESO regime. If the opinions of offenders were relevant to a law’s validity, then by analogy a law could just as easily be classified as breaching the NZBORA because that is how some offenders perceive it. This would be absurd. The validity of a law may be judged against Parliamentary intent, its effect, other laws and prior judicial decisions. However, taking into account the opinions of *some* of the *offenders* that it applies to is illogical and inconsistent with accepted legal reasoning.

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<sup>134</sup> Justice and Electoral Committee above n 133, 20.

<sup>135</sup> Justice and Electoral Committee above n 133, 20.

<sup>136</sup> Section 107I(1) Parole Act 2002.

<sup>137</sup> For example, violent offenders have a very high rate of recidivism. See page 9.

<sup>138</sup> For example, the rights of the offenders in *R v Pora* above n 122, 19 and *R v Poumako* above n 123, 19 were protected despite them committing murder in the context of a home invasion.

<sup>139</sup> Justice and Electoral Committee above n 133, 20.

<sup>140</sup> Justice and Electoral Committee above n 133, 20.

The issue of any double punishment being justified was discussed in *Chief Executive of Department of Corrections v Rimene*.<sup>141</sup> It was noted that the problem of double punishment was known to Parliament at the time that it was considering the Bill.<sup>142</sup> Consequently, it was concluded that section 4 of the NZBORA requires the Court to apply the law as dictated by Parliament.<sup>143</sup> No final decision was made on whether the double punishment was justified or not though. This leaves open the possibility of a declaration of inconsistency being made in a later case if ESOs are found to be unjustified.<sup>144</sup> Such a declaration would send a message to Parliament that it is not acceptable to breach the rights of child sex offenders in this way. This could possibly lead to the ESO regime being amended so that it no longer breaches the rights of offenders in this way. Such a result would be very desirable.

#### *Problems with electronic monitoring*

Electronic monitoring may be imposed as a special condition of an ESO.<sup>145</sup> This is intended to deter them from breaching conditions that relate to their whereabouts and to monitor compliance with those conditions.<sup>146</sup> It can also be used to provide evidence of the commission of offences.<sup>147</sup> The Department of Corrections estimates that over a quarter of all offenders on ESOs will eventually be monitored electronically.<sup>148</sup>

The electronic monitoring devices that are presently being used can only confirm whether the offender is at a specific location, such as their house. However the governing provisions were drafted to allow for monitoring by Global Positioning Systems (GPS), once the technology is developed. GPS tracking uses satellites and a

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<sup>141</sup> *Chief Executive of Department of Corrections v Rimene* (HC, Wellington CRI 2004-485-174, 8 March 2005, Gendall J).

<sup>142</sup> Minister of Justice Phil Goff had said that a breach of the NZBORA was justified because the right of children to be protected should override the right of child sex offenders to total freedom once they are released from prison. Above n 26, 6.

<sup>143</sup> *Chief Executive v Rimene* n 141, 22 at para. [27].

<sup>144</sup> The ability to do this has not finally decided. It was contemplated by the Court of Appeal in *Belcher v Chief Executive of the Department of Corrections* above n 1, 2 where section 26(2) was breached because the penalty imposed had been retrospective. However, the Court reserved the issue of being able to order a declaration of inconsistency for further consideration at a later date because the Crown had not sought to justify the breach.

<sup>145</sup> Section 15A Parole Act 2002.

<sup>146</sup> Section 15A(1) Parole Act 2002.

<sup>147</sup> Section 15A(2)(c) Parole Act 2002.

<sup>148</sup> Justice and Electoral Committee above n 133, 20.

GPS locating unit carried by the offender to record their exact whereabouts. This information can be used to monitor compliance with any inclusion or exclusion zones that are specified in an offender's conditions.<sup>149</sup> For example, it can ensure that offenders are remaining in their homes, not visiting victims or not going to prohibited areas such as schools. Contrary to some public perception, no tracking is proposed to be done in real time. All monitoring will be done through passive tracking.

Passive tracking involves data being uploaded on a regular basis and being analysed at a later time.<sup>150</sup> There is no opportunity to stop an offender from committing an offence or to respond to any breaches as they occur.<sup>151</sup> Breaches can only be reported retrospectively and subsequent enforcement action taken when appropriate.<sup>152</sup> The threat of this enforcement action is expected to deter most child sex offenders from breaching their conditions.<sup>153</sup> The data that is collected may also be useful when investigating reports of child sexual abuse. Investigators will be able to know if any monitored offenders were in the area at the time the offence was committed.

The Department of Corrections conducted a successful initial trial of passive monitoring in 2005 using around 60 staff and volunteers.<sup>154</sup> A second phase of trials using up to 40 offenders has recently been completed.<sup>155</sup> Results for this phase are expected by early 2007.<sup>156</sup> These results will help determine whether GPS can be used to manage child sex offenders in New Zealand.<sup>157</sup>

The Attorney-General reported that 24 hour electronic monitoring of child sex offenders interferes with their reasonable expectations of privacy and constitutes a prima facie breach of section 21 of the NZBORA (the right to be secure against unlawful search or seizure).<sup>158</sup> She felt that offenders on ESOs had already 'done

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<sup>149</sup> Department of Corrections "GPS tracking" (Internet) <[www.corrections.govt.nz](http://www.corrections.govt.nz)> accessed 23/08/06.

<sup>150</sup> Department of Corrections "Corrections goes high-tech" *Corrections News* March 2006.

<sup>151</sup> Department of Corrections above n 149.

<sup>152</sup> Department of Corrections above n 150.

<sup>153</sup> Department of Corrections above n 149.

<sup>154</sup> Department of Corrections "Electronic monitoring trials" (Internet) <[www.corrections.govt.nz](http://www.corrections.govt.nz)> accessed 23/08/06.

<sup>155</sup> Department of Corrections above n 154, 23.

<sup>156</sup> Department of Corrections above n 154, 23.

<sup>157</sup> Department of Corrections above n 154, 23.

<sup>158</sup> Wilson above n 131, 20.

their time' and accordingly extra caution must be taken in permitting continuous surveillance of their movements.<sup>159</sup> The New Zealand Law Society disagreed with this view. It submitted that if ESOs are justified at all, then using electronic monitoring to ensure compliance with their conditions must be a permissible aspect of them.<sup>160</sup> This view seems correct. The very reason that offenders are made subject to ESOs is so they can be closely monitored. The entire ESO regime is based on intensive supervision. Electronic monitoring is simply a means used to achieve the invasions of privacy that are inherent in the regime itself.

While using electronic monitoring to control child sex offenders may be justified, it does represent a significant departure from the current standard of civil liberties enjoyed in New Zealand. The Attorney-General warned that this erosion of civil liberties must be carefully circumscribed.<sup>161</sup> Restrictions were suggested by the Select Committee in response to this concern. A clause was inserted into the Parole (Extended Supervision) and Sentencing Amendment Bill that tightly restricted the scope of electronic monitoring.<sup>162</sup> Yet despite the Attorney-General's warning, this clause was removed by Parliament. The Parole (Extended Supervision) Amendment Act authorised electronic monitoring for all parolees, regardless of their offence. The Parole Board can now impose it just as easily as any other special condition of parole. All that must be shown is that the electronic monitoring is designed to reduce the risk of re-offending, facilitate or promote rehabilitation or reintegration, or to provide for the reasonable concerns of victims.<sup>163</sup> It is not difficult to satisfy these criteria.

Introducing electronic monitoring of ordinary parolees under the guise of controlling dangerous child sex offenders is an unjustifiable intrusion into civil liberties. Parolees do not pose the same level of risk as offenders who are on ESOs. Prisoners are released on parole because it is thought that they no longer endanger the safety of the community.<sup>164</sup> In contrast, offenders on ESOs are thought to be likely to commit

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<sup>159</sup> Wilson above n 131, 20.

<sup>160</sup> New Zealand Law Society above n 132, 20.

<sup>161</sup> Wilson above n 131, 20.

<sup>162</sup> Clause 6A of the Parole (Extended Supervision) and Sentencing Amendment Bill restricted electronic monitoring to those offenders who were subject to an ESO or a sentence of preventive detention, and parolees that posed an undue risk to safety of the community.

<sup>163</sup> Section 15(2) Parole Act 2002.

<sup>164</sup> Section 7 Parole Act 2002.

another sexual offence upon their release.<sup>165</sup> It is this risk of further offending that justifies monitoring them electronically, but this justification is not applicable to ordinary parolees.

Such loose restrictions on the scope of electronic monitoring may become a gateway for the Government to impose further restrictions on people in an unjustified manner.<sup>166</sup> The expansion of DNA sampling illustrates the dangers of not controlling the scope of new technologies. Only a narrow category of offenders were required to give a DNA sample when the technology was first introduced. Now people who are only suspects must give DNA samples.<sup>167</sup> The Police have also begun to use a number of questionable tactics to get other people to ‘voluntarily’ give a DNA sample for their databank.<sup>168</sup> The scope of electronic monitoring has already been expanded beyond its (already wide) original scope. It now also applies to those people remanded in custody awaiting trial, who wish to remain at living at home.<sup>169</sup> Further expansion must be vigilantly avoided.

#### *Ethical problems with risk assessments*

ESOs restrict the liberty of child sex offenders based on subjective assessments of their future dangerousness. This restriction raises ethical concerns. The offender’s new sentence is not based on them committing any further offences, but is imposed on the basis of their *likely future* behaviour. For the Court to grant an ESO it must form an opinion as to whether the offender’s liberty should be restricted where no further breach of the criminal law is alleged or any determination of guilt has been made.<sup>170</sup> The New Zealand Council for Civil Liberties submitted that this process marks an unjustifiable departure from a system based on conviction for past offences beyond

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<sup>165</sup> Section 107I(2) Parole Act 2002.

<sup>166</sup> For example, it could be used in the future to restrict the movement of political protesters. Bail conditions are already used in this way. See K Locke, N Tanczos above n 26, 6.

<sup>167</sup> Auckland Council for Civil Liberties “Submissions on the Parole (Extended Supervision) and Sentencing Amendment Bill” (2004).

<sup>168</sup> Recently a 17 year old was reported to have been offered a deal by the Police under which he would not be fined for driving contrary to the terms of his licence if he ‘voluntarily’ gave a DNA sample. See TVNZ “Law – DNA and your rights” (Internet) <<http://tvnz.co.nz/view/page/410965/760446>> updated 22/06/06.

<sup>169</sup> R Jeremy “Defendants Able to be Monitored at Home” *The New Zealand Herald*, 26 September 2006.

<sup>170</sup> Anthony Gray “Detaining Future Dangerous Offenders: Dangerous Law” (2004) 9 Deakin Law Review 245.

reasonable doubt, to one based on a form of effective detention, justified by qualitative estimates of future dangerousness.<sup>171</sup> In doing this, the ESO regime arguably erects a shadow criminal law.<sup>172</sup> It is tantamount to replacing the presumption of innocence by a presumption of guilt. A person who is thought to be dangerous, but has not yet committed a further offence, seems less well protected than an actual offender.<sup>173</sup>

Controlling offenders in this way does not appear to breach the NZBORA. The right to be presumed innocent until proven guilty under section 25(c) only applies to offenders that are ‘charged’ with an offence. ESO applications are not a criminal ‘charge’. Section 22 protects offenders from being arbitrarily detained. However ESOs are unlikely to qualify as a detention. While ESOs can place a number of restrictions on an offender’s movement, there is an absence of direct control.<sup>174</sup> In addition, the controls are not arbitrary as they serve the legitimate need of protecting the community from sexual offenders who pose a risk of re-offending.

ESO is offensive to other key constitutional principles though. The separation of powers requires the judiciary to protect the individual from arbitrary punishment and the abrogation of rights.<sup>175</sup> The ESO regime requires the Court to do the antithesis of this. Judges are forced to punish offenders without them committing any further illegal acts. The rule of law dictates that a person may be punished for a breach of the law, but he cannot be punished for anything else.<sup>176</sup> Accordingly, an offender who commits no further crimes should not be subjected to any additional punishments. Yet the ESO regime permits further controls on the basis that some child sex offenders have a ‘criminal mind’.

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<sup>171</sup> New Zealand Council for Civil Liberties “Submission on the Parole (Extended Supervision) and Sentencing Amendment Act” (2004).

<sup>172</sup> New Zealand Council for Civil Liberties n 171, 26.

<sup>173</sup> Communication No. 1090/2002: New Zealand. 15/12/2003. CCCPR/C/79D/1090/2002.

(Jurisprudence) Individual Opinion of Committee members Mr. Prafullachandra, Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Glele Ahanhanzo and Mr. Hipolito Solari Yrigoyen (15 December 2003).

<sup>174</sup> In *R v M* [1995] 1 NZLR 242; (1994) 12 CRNZ 268; 3 HRNZ 393 the Court held that detention requires the offender to have the reasonably held belief that they are not free to leave that is induced by the conduct of a public official.

<sup>175</sup> *Kable v The Director of Public Prosecutions for New South Wales* above n 86, 14 at para. [106] and [107].

<sup>176</sup> A Dicey *An Introduction to the Study of the Law of the Constitution* (1885)202.

Punishing people for their thoughts, rather than their conduct sets a dangerous precedent. Criminal thoughts have traditionally not been punishable.<sup>177</sup> Preventive detention is an exception to this. However, the ESO regime is a much more significant intrusion into civil liberties than preventive detention. The availability of preventive detention is tightly controlled. It is only imposed for the most dangerous offenders.<sup>178</sup> In contrast, the Court only needs to be satisfied that there is a ‘real and ongoing risk’ before it can grant an ESO<sup>179</sup>. Sentences of preventive detention are also fastened to a set of facts that are carefully established beyond reasonable doubt in the judicial process and involve a judgment regarding the relative weight of all the principles of sentencing.<sup>180</sup> The process of granting an ESO is quite the opposite. ESOs are granted on the basis of psychiatric reports that are rarely scrutinised,<sup>181</sup> and community protection is the only principle of sentencing that is considered.<sup>182</sup>

The present situation in the United States illustrates the consequences of punishing people for their thoughts. The United States Court of Appeal upheld an order that had placed a lifetime ban on a convicted sex offender from all public parks. The basis for this ban was that the offender had informed his psychologist that he went to a park and had thought about having sexual contact with the children there.<sup>183</sup> If the same reasoning is applied to other offenders it could mean that a person who stands in front of a bank and thinks about robbing it could be forbidden from ever entering a bank again.<sup>184</sup> The logical conclusion of this type of punishment is to imprison citizens who are tested as being prone to criminal behaviour, but who have not yet been charged with any offence (or indeed committed any crime).<sup>185</sup> Furthermore, if a sex

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<sup>177</sup> As Oliver Wendel Holmes Jr. put it, “When a man buys matches to fire a haystack, or starts on a journey meaning to murder at the end of it, there is still a considerable chance that he will change his mind before he comes to the point ... If a man starts from Boston to Cambridge for the purpose of committing a murder when he gets there, but is stopped and ... goes home, he is no more punishable than if he had sat in his chair and resolved to shoot somebody, but on second thoughts had given up the notion. See O Wendel Holmes Jr, *The Common Law* (1881) 68-69.

<sup>178</sup> The offender must be shown to have a ‘substantial’ risk of re-offending and pose a significant and ongoing risk to the safety of the community. See *R v C* n 81, 13.

<sup>179</sup> As specified by section 107B of the Parole Act 2002.

<sup>180</sup> P Keyzer and S Blay above n 85, 14.

<sup>181</sup> Most (79%) ESO applications are not challenged in court. See Department of Corrections “Extended Supervision – implementation update” *Judges’ Update*, June 2005.

<sup>182</sup> Section 107I(1) Parole Act 2002.

<sup>183</sup> *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004).

<sup>184</sup> K Wivlott “Sex Offender Laws: A sex offender may be banned from parks because of his thoughts” (2005) 33:2 *Journal of the American Academy of Psychiatry and the Law* 276.

<sup>185</sup> A Gray above n 170, 24.

offender can be punished simply because the Government does not approve of their thoughts, then there may be a chilling effect on anyone who wishes to voice an unpopular idea or opinion.<sup>186</sup> This would limit freedom of expression.<sup>187</sup> Such restrictions on civil liberties must be prevented as far as it is practicable.

### *Practical problems with risk assessments*

It is very difficult to accurately predict the risk of child sex offenders re-offending. It was recognised in *Belcher v Chief Executive of the Department of Corrections* that attempts at prediction have tended to over-estimate recidivism when compared to later offender behaviour.<sup>188</sup> For example, Probation and Parole Officers in an Australian study were found to have overestimated the base rate of recidivism among sex offenders by a factor of two.<sup>189</sup> Other overseas studies indicate that subjective predictions of an offender's propensity to re-offend only have a one-third accuracy rate.<sup>190</sup> This tendency to overestimate risk means that there is a danger of imposing conditions that are unnecessarily restrictive. Society gains no benefit from placing controls on someone who is not going to re-offend, especially given the high financial and personal costs involved.<sup>191</sup>

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<sup>186</sup> E Cloud “Banishing sex offenders: Seventh Circuit upholds sex offender's ban from public parks after thinking obscene thoughts about children” 28 *University of Arkansas at Little Rock Law Review* 119.

<sup>187</sup> Freedom of expression is guaranteed under section 14 of the New Zealand Bill of Rights Act 1990.

<sup>188</sup> *Belcher v Chief Executive of the Department of Corrections* above n 1, 2 at para. [61]. One problem that was identified at para. [91] as being particularly material was that serious sexual offending against children is comparatively rare and its occurrence is likely to be dependent upon coincidences associated with both the offender's state of mind and the circumstances which provide an opportunity for offending.

<sup>189</sup> R J Parker “Intersource agreement on the prediction of recidivism” (2002). Referred to by D Biles in “Report prepared for the ACT Government on Sentence and Release Options for High-Risk Sexual Offenders” (2005).

<sup>190</sup> B Steinbock “A Policy Perspective. (New Jersey)(Megan's Law: Community Notification of the Release of Sex Offenders)” (1995) 14 *Criminal Justice Ethics* 6.

<sup>191</sup> D Biles above n 189, 28.

Health assessors use objective actuarial instruments<sup>192</sup> to help combat the problems associated with over prediction. These instruments combine a number of factors that are correlated with recidivism to give an indication of the offender's risk of re-offending. The Courts have affirmed that these actuarial assessments are more accurate and reliable than evaluations that are based on interview or file information alone.<sup>193</sup> Even though actuarial instruments may increase the objectivity and accuracy of predictions on the level of risk that an offender poses,<sup>194</sup> they do not provide any objective assistance on the likely duration of their risk. This problem was recognised in *Chief Executive of Department of Corrections v Rimene*.<sup>195</sup> It was noted that past behaviour can sometimes be a reliable predictor of what the future might bring, but there is no self-evident objective method to determine the likely duration of an offender's risk. This leaves the health assessor with a lot of discretion when they recommend what the length of an ESO should be.

#### *Problems with health assessors' recommendations*

Health assessors have demonstrated a tendency to exercise their discretion irresponsibly. The health assessor in *Chief Executive of the Department of Corrections v Steven*<sup>196</sup> acknowledged that it was the policy of the Department of Corrections to seek the maximum term of ten years in every case. This policy was also acknowledged by the health assessor in *Chief Executive of the Department of*

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<sup>192</sup> The first instrument that is used is called RoC\*RoI (risk of reconviction times risk of imprisonment). This instrument determines the general risk of conviction and the likelihood of re-offending based on static risk factors. The second instrument that is used is called Static-AS. It assesses the probability of sexual recidivism based on a number of unchangeable aspects about the offender and their history, such as specific features of their offences and age of offending. The third instrument is the Sex Offender Needs Assessment Rating (SONAR). This instrument distinguishes between sexual recidivists and non-recidivists based on dynamic, or changeable, aspects about the offender, such as personality disorders and responses to treatment. See *Belcher v Chief Executive of the Department of Corrections* above n 1, 2.

<sup>193</sup> *Chief Executive of the Department of Corrections v Belcher* (High Court, Auckland, CRI 2004-404-000444, 22 April 2005, Keane J).

<sup>194</sup> All three instruments have been recognised as providing a valid means of accurately determining the risk of sexual re-offending. See *Belcher v Chief Executive of the Department of Corrections* above n 1, 2. The Waitangi Tribunal has also reported that the accuracy of assessments using RoC\*RoI instrument is not lower for Maori offenders. See Waitangi Tribunal "The Offender Assessment Policies Report" (2005).

<sup>195</sup> *Chief Executive of the Department of Corrections v Rimene* above n 141, 22.

<sup>196</sup> *Chief Executive of the Department of Corrections v Steven* above n 109, 17.

*Corrections v H*.<sup>197</sup> The rationale of this policy is that the risk of re-offending does not decrease over time.<sup>198</sup> However, the Court rejected this theory in *Chief Executive of the Department of Corrections v Taha*<sup>199</sup> where it accepted that the duration of Taha's risk was not long term and imposed an ESO of only five years duration. A similar approach was taken by the Court in *Chief Executive of the Department of Corrections v H*<sup>200</sup> where the duration of H's ESO was reduced from 10 years to five. Moreover, in *Chief Executive of Department of Corrections v Rimene*<sup>201</sup> it was observed that when Parliament fixed the maximum term of ESOs at ten years it could not have intended for every order to be for that duration. This view is reinforced by the Chief Executive having the power to apply for an ESO to be cancelled if the offender is no longer likely to re-offend within the term of their order.<sup>202</sup>

The policy of seeking the maximum term in every case may be an unlawful fetter on the report writer's discretion. When an authority is entrusted with discretionary powers they must consider each case on its merits and not allow a fixed rule of policy to displace personal judgment.<sup>203</sup> Their discretion must always be exercised in 'a real and genuine sense'.<sup>204</sup> This does not appear to be occurring. In *Chief Executive of the Department of Corrections v Steven*<sup>205</sup> the health assessor recommended the maximum ten year term despite the significant rehabilitative progress that Steven had made.<sup>206</sup> The health assessor admitted that she would always be reluctant to recommend anything less than ten years, except where the risk of further offending was 'greatly diminished'. This approach reflects the Department of Corrections' view that imposing the maximum term in each case is the best way to protect the public.

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<sup>197</sup> *Chief Executive of the Department of Corrections v H* (CA359/05, 12 April 2006, Hammond, Goddard and Priestly JJ) at para. [7].

<sup>198</sup> *Chief Executive of the Department of Corrections v H* above n 197 at para. [6].

<sup>199</sup> *Chief Executive of the Department of Corrections v Taha* (HC, Timaru CRI 2005-476-000004, 30 September 2005, Panckhurst J).

<sup>200</sup> *Chief Executive of the Department of Corrections v H* above n 197.

<sup>201</sup> *Chief Executive of the Department of Corrections v Steven* above n 109, 17.

<sup>202</sup> Section 107M Parole Act 2002.

<sup>203</sup> Philip Joseph, "Constitutional and Administrative Law in New Zealand (2<sup>nd</sup> ed, Brookers, 2001) 801.

<sup>204</sup> *Hamilton City v Electricity Distribution Commission* [1972] NZLR 605 at 639 (CA).

<sup>205</sup> *Chief Executive of the Department of Corrections v Steven* above n 109, 17.

<sup>206</sup> He had made positive therapeutic progress in the Ti Piriti treatment programme, complied with reporting obligations to the Probation Service, attended a Child Sexual Offender Relapse Prevention Group, had a sensible safety management plan and a growing network of adult friends.

However, the desirability of a policy is irrelevant to whether it unlawfully fetters a decision maker's discretion.<sup>207</sup>

If an offender's risk is 'greatly diminished' it is questionable whether an ESO would even be applied for in the first place. An ESO may only be imposed if the offender is 'likely' to re-offend upon release.<sup>208</sup> There must be a real and ongoing risk of re-offending.<sup>209</sup> Yet, if the risk is 'greatly diminished' then the offender is no longer likely to qualify as posing such risk. Consequently it appears that ESOs are effectively being applied for in an all or nothing manner. If an offender poses some risk of re-offending then the maximum term will be recommended,<sup>210</sup> whereas if the risk is low enough to be 'greatly diminished' then the order will not normally be applied for.

Even though health assessors are following the Department of Corrections policy of seeking the maximum term in *almost* all cases (88%)<sup>211</sup> there have been exceptions where a lesser term has been recommended.<sup>212</sup> It was held in *R v Mansfield JJ, ex p Sharkey*<sup>213</sup> that it is not necessarily unlawful to make the same decision over 90 per cent of the time. The instances where the policy was departed from were thought to demonstrate that there must necessarily be room for judgment and discretion. Thus, while the policy of recommending the maximum term may be an inefficient method of controlling child sex offenders, it is unlikely to be an unlawful fetter on the health assessor's discretion.

A related objection to the health assessor's recommendations is that they may be biased. The offender cannot choose the psychologist that assesses them. The health assessment must be prepared by the Department of Corrections Psychological

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<sup>207</sup> In *Vickerman Fisheries Ltd v A-G* 26/08/94, Neazor J, HC Wellington CP1007/91; CP655/87 it was irrelevant that a policy of not granting new fishing licences was reasonable and generally supported in the industry.

<sup>208</sup> Section 107I(2) Parole Act 2002.

<sup>209</sup> *Belcher v Chief Executive of the Department of Corrections* above n 1, 2.

<sup>210</sup> 88% of the first 26 undefended ESO applications were for the recommended maximum term. The Court has the power to depart from this recommendation, but ESOs are rarely defended in court (79% are not defended). See Judges' Update "Extended Supervision – implementation update" June 2005.

<sup>211</sup> See above n 210.

<sup>212</sup> One report recommended a five year duration, while another two reports recommended a two year duration. See Judges' Update "Extended Supervision – implementation update" June 2005.

<sup>213</sup> *R v Mansfield JJ, ex p Sharkey* [1985] QB 613 (DC).

Services.<sup>214</sup> However it is also the Psychological Services that initially identifies offenders as being candidates for ESOs.<sup>215</sup> Then it is the Director of Psychological Services that makes the final recommendation to the General Manager, who decides whether an application for an ESO should proceed.<sup>216</sup> Hence, the same people are not only investigating the risk that offenders poses, but also assessing and evaluating it.

By being involved at each stage of the process the Psychological Services department may not be leaving its mind properly open to persuasion. No one ought to investigate and adjudicate on the same matter.<sup>217</sup> While the Psychological Services may not have the final say on the length of an ESO, their judgment of the offender's risk is highly influential. The Court only departs from it on rare occasions.<sup>218</sup> Moreover, actual bias does not even have to be established. In *R v Sussex Justices, ex p McCarthy*<sup>219</sup> Lord Hewart famously professed that “[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done.”<sup>220</sup> Thus, the risk assessment process will be biased if there is a real danger (in the sense of a real possibility) of bias.<sup>221</sup>

There does appear to be a real danger of bias in the health assessment process. Before the health assessor prepares their report, another person within the Psychological Services would have already indicated to them that the offender should be subject to an ESO. This suggestion would have been made by someone with similar levels of skill and expertise. Consequently the health assessor would be under a lot of pressure to agree with their prior recommendation. The situation is analogous to that in *Hannam v Bradford*<sup>222</sup> where the Court held that members of a body such as a school board might have a natural inclination to support their colleagues. Moreover, the health assessor knows that their recommendations will be subsequently reviewed by the Director of Psychological Services. A health assessor will not want the Director to see them readily dissenting from the opinions of their colleagues or the policy of

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<sup>214</sup> *Belcher v Chief Executive of the Department of Corrections* above n 1, 2 at para. [98].

<sup>215</sup> Department to Corrections “Application to Court” (Internet) <[www.corrections.govt.nz](http://www.corrections.govt.nz)> accessed 15/04/06.

<sup>216</sup> Department to Corrections above n 215.

<sup>217</sup> See Halsbury's Laws of England (4<sup>th</sup> ed, Butterworths, 1976) at para. [68].

<sup>218</sup> See above n 210, 32.

<sup>219</sup> *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256.

<sup>220</sup> *R v Sussex Justices, ex p McCarthy* n 219.

<sup>221</sup> *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA).

<sup>222</sup> *Hannam v Bradford* [1982] 2 NZLR 108.

seeking the maximum term in each case. They may be fearful of being reprimanded if they do so.

The apparent bias in the health assessment process is not necessarily unlawful. The ‘doctrine of necessity’ allows the party objected to as being biased to be involved in the decision making process if they are the only competent or duly qualified party that can deal with the subject matter.<sup>223</sup> The possibility of offenders choosing their own health assessors was rejected by Parliament because few professionals working outside the Department of Corrections were thought to have sufficient experience with the actuarial instruments that are used.<sup>224</sup> The issue was briefly mentioned by the Court of Appeal in *Belcher v Chief Executive of the Department of Corrections*.<sup>225</sup> It was noted that it is not unknown for expert witnesses to give evidence, even though they may have an association with one of the parties. Since the health assessor is an expert, their association with the Department of Corrections was not thought to disqualify them from providing recommendations.

The problem with this approach is that the health assessors employed by the Department of Corrections do not possess any unique knowledge or experience. The claim that few professionals can use the actuarial instruments is flawed. It is not difficult to learn how to administer these tests.<sup>226</sup> The Government could easily provide training for independent health assessors. It could then certify them as being accredited to undertake health assessments for proposed ESOs. This accreditation would avoid any issues of bias and would not be overly difficult to implement. Thus, it is doubtful that the doctrine of necessity should protect any unlawful bias that may be present under the current regime.

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<sup>223</sup> For example in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex p Pinochet (no 2)* [2000] 1 AC 119 at 132 (HL) the House of Lords held that it has, of necessity, jurisdiction to review its own decisions reached through an unfair procedure. The Law Lords were the ultimate court of appeal and there was no other court which could correct a procedural impropriety at that ultimate level.

<sup>224</sup> Department of Corrections “Extended Supervision Applications in the Courts” *Judges’ Update*, September 2005.

<sup>225</sup> *Belcher v Chief Executive of the Department of Corrections* above n 1, 2 at para. [97].

<sup>226</sup> Effective use of the RoC\*RoI and Static-AS instruments would only require a few hours of training for those who are inexperienced with actuarial scales. Effective use of the SONAR instrument does require at least one days training and guided practice, although it is not difficult to learn. See California Coalition on Sexual Offending “Risk Assessment: A Short Introduction – Part II” Internet <[www.ccoso.org](http://www.ccoso.org)> accessed 22/08/06.

Yet it is not necessary to invoke the necessity exception where Parliament has specifically directed an interested party to decide. Parliament is regarded to have impliedly excluded the rule against bias in such circumstances.<sup>227</sup> The present statutory scheme assumes that health assessments will only be made by staff within the Department of Corrections.<sup>228</sup> Therefore any bias cannot be considered to be unlawful.

The legality of the current process does not make it desirable. ESOs should only be used to restrict the freedom of offenders to the extent that is strictly necessary to protect the public. Therefore it is vital that the health assessments accurately reflect the true dangerousness of offenders. Applying for ESOs in an all or nothing fashion and in an apparently biased way does not achieve this goal.

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<sup>227</sup> For example, see *Jeffs v NZ Dairy Production Marketing Board* [1967] NZLR 1057 (PC) where the marketing board was an interested party by virtue of advancing money to a dairy company. However, as the board was the only body authorised to hear zoning applications, Parliament was held to have created an exception to the disqualification rule.

<sup>228</sup> *Belcher v Chief Executive of the Department of Corrections* above n 1, 2 at para. [98].

## **Chapter Three - Alternative Controls**

Numerous other methods are used to control child sex offenders in other parts of the world. These include registration, community notification, continuing detention orders, residency restrictions, and castration. Introducing these controls into New Zealand could produce some desirable benefits. However, the negative effects of these controls must also be taken into account. Additional controls should only be introduced if they strike a fair balance between safeguarding the public and protecting the rights of offenders.

### **Registration**

#### *Overview of control*

Registration controls child sex offenders by keeping information about them on sex offender registries.<sup>229</sup> These registries can be used by the authorities to monitor the identities, locations, and behaviour of convicted child sex offenders in the community.<sup>230</sup> For example, the Police may consult the registry to ascertain which offenders live in an area where an offence has been reported and potentially identify likely suspects with similar crime patterns.<sup>231</sup> Placing offenders under the constant surveillance of the criminal justice system also theoretically deters them from re-offending.<sup>232</sup>

#### *Use in New Zealand*

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<sup>229</sup> The amount of information contained on a registry varies throughout the world. At a minimum registries generally contain the offenders' name, address, date of birth and details of their offending. Many registries also contain the offender's photograph, employment address, social security number, residence history, vehicle registration number, and DNA profile. See, US Department of Justice - Centre for Sex Offender Management, "Sex Offender Registration: Policy Overview and Comprehensive Practices" (Internet) <<http://www.csom.org/pubs/sexreg.html>> updated October 1999.

<sup>230</sup> R Tewksbury "Sex offender registries as a tool for public safety: Views from registered offenders." (2006) 7(1) *Western Criminology Review* 1.

<sup>231</sup> US Department of Justice - Centre for Sex Offender Management above n 229.

<sup>232</sup> R Tewksbury "Collateral Consequences of Sex Offender Registration" (2005) 21:1 *Journal of Contemporary Criminal Justice* 67.

The possibility of introducing a registration scheme into New Zealand has been mooted for many years. In 1996 Deborah Coddington created an unofficial sex offender registry when she published a book entitled *The 1996 Paedophile and Sex Offender Index*<sup>233</sup>. The book identified over 580 convicted sex offenders by name, age, and town. It also included information on the nature of their crimes and featured photographs of some offenders. The book was available at book stores throughout the country.<sup>234</sup> The Sensible Sentencing Trust<sup>235</sup> created a similar online database from newspaper reports and information available on miscellaneous internet sites.<sup>236</sup>

In 2003, Deborah Coddington introduced the Sex Offenders Registry Bill into Parliament. The purpose of the Bill was to establish a private registry of sex offenders that would assist the Police in their investigations, reduce sexual offending, and contribute to public safety.<sup>237</sup> All sexual offenders would have been forced to register.<sup>238</sup> The registry would have contained a registrant's name, address, date of birth, sexual offending history; and photographs, measurements, DNA profiles, fingerprints, palm-prints and footprints if they are available.<sup>239</sup> The Bill passed its first reading with unanimous support.<sup>240</sup> It was first referred to the Justice and Electoral Select Committee for consideration on 30 July 2003. The Committee finally released its report on the Bill on 29 August 2006.<sup>241</sup> It recommended that the Bill should not be passed because it would not achieve its intended purpose in its current form. The reasoning behind this recommendation was very scarce though.<sup>242</sup>

It can be speculated that the Bill may not achieved its purpose because the registry's scope would have been too wide. It would have included people who had not been

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<sup>233</sup> D Coddington *The 1996 Paedophile and Sex Offender Index* (Alister Taylor Publishers Pty Ltd, 1996).

<sup>234</sup> J Lemin, "To Know or Not to Know? The Privacy Law Implications of the 1996 Paedophile and Sex Offender Index" (1998) 28 Victoria University of Wellington Law Review 415.

<sup>235</sup> A New Zealand lobby group that calls for tougher sentences and better protection of victim's rights.

<sup>236</sup> See Sensible Sentencing Trust "Paedophile and Sex Offender Database" (Internet).

<<http://www.safe-nz.org.nz/sxdb/sxdb.htm>> accessed 29/09/06.

<sup>237</sup> Clause 3 Sex Offenders Registry Bill 2003.

<sup>238</sup> Clause 5 Sex Offenders Registry Bill 2003.

<sup>239</sup> Clause 8 Sex Offenders Registry Bill 2003.

<sup>240</sup> *Hansard* 30 July 2003.

<sup>241</sup> Justice and Electoral Committee "Sex Offenders Registry Bill" (2006).

<sup>242</sup> The report only said that upon receiving advice from the Ministry of Justice and the Police the Committee decided that the Bill would not achieve its intended purpose in its current form. It is not clear exactly what this advice was though, as the submissions made by the Ministry of Justice and the Police have not been made public.

even been charged with an offence, but had only received a caution from the Police.<sup>243</sup> Forcing such people to provide their details for a sex offender registry is not consistent with the Bill's stated purpose of managing 'serious' sexual offending.<sup>244</sup> The Bill did not effectively protect the privacy of offenders either.<sup>245</sup> There were no effective limits on who could access the registry or on how the information could have been used.<sup>246</sup> The New Zealand Law Society submitted that these loose guidelines could conceivably have resulted in the entire register being published in a newspaper.<sup>247</sup> Such invasions of privacy must be prevented.

Even if the technical problems with the Bill were rectified, introducing a registry into New Zealand would do very little to actually protect the community from harm. While it may assist in investigating crimes,<sup>248</sup> it could not prevent child sexual abuse occurring in the first place. Registration has been shown to have little effect on deterring offending.<sup>249</sup> Registries are also often inaccurate.<sup>250</sup> Many sex offenders have a limited education, inadequate personal skills, literacy problems, and mental health difficulties.<sup>251</sup> Consequently they may have trouble providing the necessary information at the required times. Other offenders may deliberately avoid registering their details to prevent their privacy being invaded. The possibility of a fine or imprisonment does not always serve as an effective deterrent against this. Some offenders may feel ostracised by the system and attempt to avoid registration,

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<sup>243</sup> Clause 5(b)(iii) Sex Offenders Registry Bill 2003.

<sup>244</sup> Explanatory Note Sex Offenders Registry Bill 2003.

<sup>245</sup> There are numerous conceptualisations of privacy, such as the right to be left alone, secrecy, anonymity and solitude. See R Gavison "Privacy and the Limits of Law" (1980) 89 Yale Law Journal 421.

<sup>246</sup> Anyone proclaiming to have the desire to 'reduce sexual offending' or to 'contribute to public safety' could have potentially accessed the registry (clause 13(1) and clause 3 Sex Offenders Registry Bill 2003). Once this information was obtained it could be used for any purpose under the Act and for 'law enforcement purposes' generally (clause 13(2) Sex Offenders Registry Bill 2003).

<sup>247</sup> New Zealand Law Society "Draft Submissions on the Sex Offenders Registry Bill" (2003).

<sup>248</sup> A 15 year follow-up study of California's registration scheme reported that the register was effective in assisting investigators with apprehending suspects. See National Institute of Justice, "Registration in California" (Internet) <<http://www.ncjrs.org/txtfiles/162364.txt>> accessed 29/09/06.

<sup>249</sup> An American study found that there was no statistically significant difference in the arrest rates between 90 registered and 90 unregistered offenders (19 percent versus 22 percent). Furthermore, the registers in this study incorporated community notification, so would theoretically have a higher deterrent effect than private registers. See D Schram and C Milloy "Community Notification: A Study of Offender Characteristics and Recidivism" (1995).

<sup>250</sup> Some US States have reported that 45 percent of all sex offenders on their registries have inaccurate or missing information, see S Matson and R Lieb "Sex Offender Registration: A Review of State laws" (1996).

<sup>251</sup> New Zealand Law Society above n 247, 37.

regardless of the consequences.<sup>252</sup> Such behaviour would hamper investigations because it would make it more difficult to locate potential suspects. Offenders who are evading authorities may also move away from their support networks and discontinue treatment programmes.<sup>253</sup> This would significantly interfere with their rehabilitative progress.

These problems suggest that registration is not a desirable method of controlling child sex offenders in New Zealand.

## **Community Notification**

### *Overview of control*

Community notification involves informing the community about the presence of child sex offenders in their area. It is argued such knowledge protects the community because potential victims and their parents are aware of an offender's presence and can guard themselves against any danger.<sup>254</sup> Parents can prevent their children from associating with known offenders, while schools, churches, and children's sports teams can ensure that no one will be putting the children at risk. While information about convicted offenders is normally already in the public domain,<sup>255</sup> community notification makes it easier for parents and other concerned individuals to access it. Community notification can be either active or passive. Active notification involves the authorities alerting those who may be affected by an offender's release, such as youth groups, former victims, or neighbours.<sup>256</sup> Passive notification allows citizens to request information from authorities, or secure information through their own efforts, such as by using telephone 'hotlines' or internet databases.<sup>257</sup>

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<sup>252</sup> For example, half of all sex offenders in Washington State who should have registered fled the state instead, see C Kimball "A Modern Day Arthur Dimmesdale: Public Notification When Sex Offenders are Released into the Community" (1996) 12 Ga. St. U. L. Rev. 1187.

<sup>253</sup> The best results are generated when the released offender gets good support from the community, friends and family. See, Department of Corrections "Managing Offenders in the Department of Corrections" (2002) (Internet) <[www.corrections.govt.nz](http://www.corrections.govt.nz)> accessed 29/09/06.

<sup>254</sup> A Kabat "Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for A Symbol's Sake" (1998) American Criminal Law Review 333.

<sup>255</sup> Assuming that there has not been any suppression ordered by the Court.

<sup>256</sup> A D Scholle "Sex Offender Registration" (2000) 69 The FBI Law Enforcement Bulletin 18.

<sup>257</sup> A D Scholle above n 256.

The amount of information made available to the public varies greatly across different jurisdictions. For example the British Sex Offenders Act 1997 only permits controlled disclosure to other professionals, such as housing officials, schools, social services departments, and selected members of the public, such as direct victims. In contrast, ‘Megan’s law’<sup>258</sup> permits US States to provide whatever information they deem necessary to protect the public.<sup>259</sup> A number of States provide unrestricted internet access to comprehensive sex offender databases. These databases allow the public to search for sex offenders by name or address. Many websites also contain maps that indicate the location of offenders.<sup>260</sup> Other forms of active notification used in the US include leaflets, public meetings, media releases, marking of driver licences, newspaper advertisements, direct mail to residents, special identifying clothing, bumper stickers, self-introductions, signage outside the offenders’ residence, and officially mounted County Fair displays.<sup>261</sup>

#### *Use in New Zealand*

There is currently no official community notification scheme in New Zealand. However the Police have demonstrated a willingness to inform communities of the presence of child sex offenders. For example, in 2005 the Police decided that Barry Brown, a child sex offender on parole, was at risk of re-offending.<sup>262</sup> They distributed fliers within the community that contained Brown’s photograph, address, and information about his offending. This leaflet drop was held to have illegally breached Brown’s privacy and a number of internal Police guidelines.<sup>263</sup>

The desirability of community notification is debatable. Firstly, labelling someone as a child sex offender erodes the government’s monopoly on the power to punish crime.

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<sup>258</sup> ‘Megan’s Law’ is the colloquial term used to denote a number of state laws in the United States that require law enforcement authorities to identify sex offenders to the public at large. It is named after Megan Kanka, who was raped and murdered by a convicted sex offender who was living across the street from her.

<sup>259</sup> Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act 1994, as amended by Megan’s Law.

<sup>260</sup> For example, see State of Iowa “Iowa Sex Offender Registry” (Internet) <<http://www.iowasexoffender.com/>> accessed 13/09/06.

<sup>261</sup> Howard League for Penal Reform “Fact Sheet 28 – Sex Offender Registers Internationally” <[http://www.howardleague.co.nz/factsheets/factsheet\\_28.html](http://www.howardleague.co.nz/factsheets/factsheet_28.html)> (Internet) accessed 14/09/06.

<sup>262</sup> *Brown v Attorney-General* (DC, Wellington CIV-2003-085-236, 20 March 2006, Judge Spear).

<sup>263</sup> *Brown v Attorney-General* above n 262.

It implicitly signals to the public that they can deal with offenders as they see fit.<sup>264</sup> This was evidenced in Barry Brown's case, where he was repeatedly verbally abused and physically assaulted.<sup>265</sup> Even more extreme instances of vigilantism have occurred in other parts of the world that allow community notification.<sup>266</sup> Such vigilantism also extends beyond offenders themselves to their families and innocent citizens who are mistakenly labelled as sex offenders.<sup>267</sup>

Secondly, community notification focuses on 'unknown' child sex offenders being released anonymously into the community.<sup>268</sup> As it has previously been outlined, over 90% of sexual offending on children is committed by someone who is already known to the victim.<sup>269</sup> Thus, notification fails to protect children from the most common kind of sexual abuse, that inflicted by friends and relatives.<sup>270</sup> Indeed, community notification may lull parents into a false sense of security.<sup>271</sup> This danger was recognised in *Brown v Attorney-General*.<sup>272</sup> Judge Spear accepted that 'outing' offenders could well cause the public to become fixated on a specific offender and overlook the risks posed by other child sex offenders. Reminding the parents of the

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<sup>264</sup> J Whitman "What is wrong with inflicting shame sanctions?" (1998) 107(4) Yale Law Review 1055.

<sup>265</sup> Brown was verbally abused whenever he went out in public, received hate mail and was physically assaulted on two occasions. He was then relocated. However the issue had become something of a 'hot topic' in the media after interviews with the Police Officer concerned were published in many newspapers and broadcast on National Radio. Consequently Brown was readily recognisable in his new town. Once again he was verbally abused, received hate mail and was physically assaulted on a regular basis. He was even refused entry at a church hall for Christmas dinner solely because of the public notoriety that surrounded him. See *Brown v Attorney-General* above n 262, 39.

<sup>266</sup> In the United States a man used a list of sexual offenders from that state's internet site to assault child sex offenders. The man, who pleaded guilty to attempted murder, is serving a 10-30 year prison sentence after stabbing a registered sex offender and lighting fires in two buildings where other registered offenders lived. See C Carey "Humiliating offenders will not stop child sexual assault" (Internet) <<http://hrw.org/english/docs/2005/05/24/usdom11006.htm>> updated 03/05/05.

<sup>267</sup> For example, in Washington the family home of Joseph Gallargo, a convicted child sex offender, was burned down by angry neighbours who were notified that he was about to be released from prison. In New Jersey, a father and son broke into a house, looking for a child sex offender whose address was made public and beat an innocent man who happened to be staying there. While, in Wales a hospital paediatrician was forced to permanently flee her home after vandals mistakenly thought her job title meant that she was a paedophile. See B Steinbock above n 190, 28 and BBC News "Paediatrician attacks 'ignorant' vandals" (Internet) <<http://news.bbc.co.uk/1/hi/wales/901723.stm>> accessed 18/09/06.

<sup>268</sup> A Kabat above n 234, 58.

<sup>269</sup> U.S. Department of Justice "Sex Offences and Offenders: An Analysis of Data on Rape and Sexual Assault" (1997).

<sup>270</sup> B Steinbock above 190, 28.

<sup>271</sup> B Steinbock above 190, 28.

<sup>272</sup> *Brown v Attorney-General* above n 262, 39 at para. [86].

need to ensure that their children are safety conscious and have appropriate safety plans in place would be more effective than focusing on individual offenders.<sup>273</sup>

Finally, notifying the community of a sex offender's presence has a negative effect on rehabilitation.<sup>274</sup> The public shaming associated with community notification invariably places offenders under a great deal of stress. This stress not only inhibits their attempts to reintegrate themselves into the community, but may also increase the risk of them re-offending.<sup>275</sup> It may also drive some child sex offenders underground.<sup>276</sup> This makes it more difficult to ensure that child sex offenders are living and working in conditions that reduce the risk of re-offending.<sup>277</sup> More importantly, if an offender absconds then steps cannot be taken to ensure that they are subject to suitable supervision, and receiving appropriate treatment and support.<sup>278</sup>

Due to these problems, community notification is not desirable in New Zealand.

## **Continuing Detention Orders**

### *Overview of control*

Some child sex offenders still pose a high risk of re-offending when they are due to be released from prison. Normal sentences of imprisonment cannot be extended beyond the term originally imposed at sentencing. However, continuing detentions orders provide a potential solution to this dilemma. They allow for dangerous child sex offenders to be indefinitely 'reincarcerated' if they still pose an unacceptable risk of re-offending upon the expiry of their determinate sentence.

This form of control is available in Queensland, Australia.<sup>279</sup> The Supreme Court of Queensland can make a continuing detention order if it finds to a high degree of

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<sup>273</sup> Opinion of Dr G Maxwell in *Brown v Attorney-General* above n 262, 39 at para. [49].

<sup>274</sup> M L Bell, "Pennsylvania's Sex Offender Community Notification Law: Will It Protect Communities From Repeat Sex Offenders?" (1996) 34 DUQ. L. REV. 635.

<sup>275</sup> Opinion of Dr G Maxwell in *Brown v Attorney-General* above n 262, 39 at para. [49]. This argument was recognised by Judge Spear as being firmly based at para. [86].

<sup>276</sup> *Brown v Attorney-General* above n 262, 39 at para. [92].

<sup>277</sup> *R v Chief Constable of North Wales Police; ex parte Thorpe* [1999] QB 396.

<sup>278</sup> *R v Chief Constable of North Wales Police; ex parte Thorpe* above n 277.

<sup>279</sup> Dangerous Prisoners (Sexual Offenders) Act 2003.

probability that there is an unacceptable risk of the prisoner committing another sexual offence against children if they are released from prison.<sup>280</sup> The Court has very broad powers in making this assessment. It may have regard to psychiatrists' reports, expert opinions, criminal history, pattern of criminal behaviour, participation in rehabilitation programmes, and other 'relevant matters'.<sup>281</sup> The paramount consideration is the protection of the community.<sup>282</sup> Any continuing detention orders that are made must be reviewed annually in accordance with these same criteria.<sup>283</sup>

### *Use in New Zealand*

Continuing detention orders raise serious double punishment concerns. Offenders remain prisoners beyond expiry of the term of their original sentence, without any further determination of criminal guilt.<sup>284</sup> As outlined earlier, a second 'punishment' for the same offence will contravene Article 14(7) of the ICCPR and section 26(2) of the NZBORA. Yet the High Court of Australia somewhat controversially<sup>285</sup> indicated in *Fardon v Attorney-General for the State of Queensland* that continued detention orders should not be classified as being punitive.<sup>286</sup>

This view is unlikely to be followed in New Zealand. Firstly, the reasoning in *Fardon* is questionable. Gummow J relied on the English case of *Giles v Parole Board*<sup>287</sup> to demonstrate the non-punitive nature of continuing detention orders. The issues that were raised in *Giles* were fundamentally different from those in *Fardon* though.<sup>288</sup> The issue in *Giles* concerned a preventative sentence being imposed at the time of conviction. In contrast, the issue in *Fardon* was whether a continuing detention order could be imposed after the sentence had already been completed. Secondly, it is artificial to argue that continued detention orders are not punitive simply because they are based on community protection, rather than punishment. The Sentencing Act 2002 requires community protection to be taken into account at the time of

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<sup>280</sup> Section 13 Dangerous Prisoners (Sexual Offenders) Act 2003.

<sup>281</sup> Section 13(4) Dangerous Prisoners (Sexual Offenders) Act 2003.

<sup>282</sup> Section 13(6) Dangerous Prisoners (Sexual Offenders) Act 2003.

<sup>283</sup> Section 27 Dangerous Prisoners (Sexual Offenders) Act 2003.

<sup>284</sup> *Fardon v Attorney-General (Queensland)* [2003] QCA 416 at para. [80] per McMurdo P.

<sup>285</sup> For a critique of the judgment see P Keyzer and S Blay n 85, 14 .

<sup>286</sup> *Fardon v Attorney-General (Queensland)* above n 284, at para. [74] per Gummow J.

<sup>287</sup> *Giles v Parole Board* [2004] 1 AC 1.

<sup>288</sup> P Keyzer and S Blay above n 85, 14.

sentencing.<sup>289</sup> Community protection consequently forms part of the original punishment that is imposed. The two concepts are not mutually exclusive, but are in fact closely linked.<sup>290</sup> Thirdly, the New Zealand courts have taken a wide view of what constitutes ‘punishment’. For example, extended supervision in the community has been classified as being a punishment.<sup>291</sup> It is almost inevitable that New Zealand courts would also view continuing detention orders as being a punishment. Thus, it appears that imposing continuing detention orders in New Zealand would be a prima facie breach of the NZBORA.<sup>292</sup>

Continuing detention orders may still be made without infringing the NZBORA if their use is justifiable in a free and democratic society.<sup>293</sup> This exception may apply to the double punishment inherent in the ESO regime.<sup>294</sup> However, continuing detention orders are a much more restrictive punishment than ESOs. Offenders who are subject to an ESO can live in the community and ordinarily have significant freedom. In contrast, offenders on continuing detention orders must adhere to the strict conditions of imprisonment. Moreover, ESOs cannot be imposed for a period longer than 10 years,<sup>295</sup> whereas continuing detention orders can be used to restrict an offender’s liberty indefinitely. There are also other means available to protect the community. Preventive detention can be imposed at the time of sentencing.<sup>296</sup> This sentence allows the most dangerous offenders to be detained indefinitely, without violating the NZBORA. It also provides an incentive for comprehensive assessments to be made at the time of sentencing because there is no ‘second chance’ to get it correct. This approach should be preferred over unjustifiably breaching the NZBORA.

Continuing detention orders are not a desirable method of controlling child sex offenders in New Zealand.

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<sup>289</sup> Section 7(1)(g) Sentencing Act 2002.

<sup>290</sup> A Gray above n 170, 24.

<sup>291</sup> *Belcher v Chief Executive of the Department of Corrections* above n 1, 2 at para. [49].

<sup>292</sup> Section 26(2) New Zealand Bill of Rights Act 1990.

<sup>293</sup> Section 5 New Zealand Bill of Rights Act 1990.

<sup>294</sup> See page 22.

<sup>295</sup> Section 107A(b) Parole Act 2002.

<sup>296</sup> Section 87 Sentencing Act 2002.

## Residency Restrictions

### *Overview of control*

Residency restrictions control child sex offenders by diminishing the likelihood of them coming into contact with children that they may victimise. Preventing offenders from entering ‘high-risk’ situations should theoretically result in less offending and fewer victims. Hundreds of jurisdictions across the United States have recently introduced residency restrictions.<sup>297</sup> They fall into two broad categories: child safety zones and distance markers.<sup>298</sup> Child safety zones prevent offenders from loitering within a set distance of designated areas where children congregate, such as schools, childcare centres, playgrounds, school bus stops and video arcades. The distance requirement for child safety zones is typically around 100 metres.<sup>299</sup> Distance markers restrict offenders from permanently residing within a certain distance of these designated areas.<sup>300</sup> Distance marker restrictions typically range from 300 to 750 metres.<sup>301</sup>

### *Use in New Zealand*

Offenders who are currently on parole or subject to an ESO may be prevented from residing at a certain address<sup>302</sup> or forced to live at a particular residence.<sup>303</sup> These measures are less restrictive than those used in the United States. They are only a discretionary measure and do not strictly prevent offenders from residing, or loitering, within certain distances of designated areas. It has not been suggested that further residency restrictions should be introduced into New Zealand. This is pleasing because they appear to breach the NZBORA. Section 18(1) provides that everyone has the right to freedom of movement and residence in New Zealand.<sup>304</sup>

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<sup>297</sup> J Levensen “Sex Offender Residency Restrictions” (2006).

<sup>298</sup> M Nieto “The Impact of Residency Restrictions on Sex Offenders and Correctional Management Practices: A Literature Review” (2006).

<sup>299</sup> M Nieto above n 298.

<sup>300</sup> M Nieto above n 298.

<sup>301</sup> M Nieto above n 298.

<sup>302</sup> This is a standard condition under section 14(1)(f) of the Parole Act 2002.

<sup>303</sup> This restriction can be imposed as a special condition under section 15(3)(a) of the Parole Act 2002.

<sup>304</sup> Section 18(1) New Zealand Bill of Rights Act 1990.

Residency restrictions are analogous to the recent proposal by the Rotorua District Council to trespass repeat criminals from the central business district.<sup>305</sup> The Council was forced to put the regime on hold after receiving legal advice that the bylaw would be an illegal breach of the NZBORA. It would have unjustifiably prevented people from entering public places and freely using the king's highway.<sup>306</sup> The same reasoning can be applied to residency restrictions, which restrict freedom of movement even further. Offenders are not just prohibited from entering a certain area, such as the central business district of a particular town. Residency restrictions ban offenders from living, or loitering, in a number of different areas everywhere they go.

Residency restrictions are unlikely to be a justified limitation on freedom of movement.<sup>307</sup> They can create a shortage of housing options for child sex offenders.<sup>308</sup> These offenders may be left with effectively no place to live in metropolitan areas and be forced to move to more rural regions. This can result in them becoming increasingly isolated, having fewer employment opportunities,<sup>309</sup> a lack of social support,<sup>310</sup> and limited access to social services and mental health treatment.<sup>311</sup> Residency restrictions can also lead to homelessness and transience, which interferes with effective supervision and rehabilitation.<sup>312</sup> Moreover, the restrictions may permanently separate offenders from their families, or force entire families to relocate. The disruptive consequences of this may cause children or their parents to be less likely to report sexual abuse that is perpetrated by members of the household.<sup>313</sup> Critically, residency restrictions do not even appear to be effective in controlling child sex offenders. The proximity of an offender's residence in relation

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<sup>305</sup> J Rowan "Council Taking Bid to Bar Criminals from City Centre to Parliament" *The New Zealand Herald*, September 13 2006.

<sup>306</sup> J Rowan above n 305.

<sup>307</sup> Section 5 New Zealand Bill of Rights Act 1990.

<sup>308</sup> Minnesota Department of Corrections, "Level Three Sex Offender Residential Placement Issues, 2003, Report to the Legislature" (2003).

<sup>309</sup> A 2001 risk-assessment study by Virginia's Criminal Sentencing Commission found employment to be a major factor affecting whether paroled sex offenders relapse and re-offend. See Virginia Criminal Sentencing Commission, "Assessing Risk Among Sex Offenders in Virginia" (2001).

<sup>310</sup> Research in Colorado suggests that sex offenders with positive, informed support have significantly lower rates of recidivism than sex offenders who had negative or no support. See Colorado Department of Public Safety, Sex Offender Management Board "Standards and Guidelines for the Assessment, Evaluation, Treatment, and Behavioral Monitoring of Adult Sex Offenders" (2004).

<sup>311</sup> Minnesota Department of Corrections above n 308.

<sup>312</sup> Minnesota Department of Corrections above n 308.

<sup>313</sup> Jill Levensen above n 297, 44.

to schools, childcare centres or parks has been found to have no correlation with offending.<sup>314</sup>

The ineffectiveness and intrusiveness of residency restrictions means that they should not be used as a control in New Zealand.

## **Castration**

### *Overview of control*

Castration controls child sex offenders by reducing their inappropriate sexual cravings and the frequency of their unacceptable erotic preoccupations.<sup>315</sup> If offenders no longer have the desire to offend then there should theoretically be a lower rate of recidivism and fewer victims. Surgical castration may seem like a step away from modern forms of punishment, although medical advances have turned the use of chemical castration into a viable method of controlling child sex offenders.<sup>316</sup> Chemical castration involves injecting an offender weekly with a drug called Medroxyprogesterone Acetate (MPA), more commonly known as the female contraceptive Depo-Provera.<sup>317</sup> MPA suppresses testosterone production and eliminates it from circulation.<sup>318</sup> This effectively suppresses erections and ejaculations, and reduces the frequency and intensity of erotic thoughts.<sup>319</sup> Castration has been proven to be a successful method of controlling child sex offenders. A study in Denmark found that only 2.2% of the 900 sex offenders who had been chemically castrated relapsed into former deviant behaviour.<sup>320</sup>

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<sup>314</sup> Colorado researchers found that offenders who re-offended while under supervision did not live closer than non-recidivists to schools or child-care centres. They also found that placing restrictions on the location of supervised sex offenders' residences did not deter them from re-offending and was not effective in controlling recidivism. See Colorado Department of Public Safety, Sex Offender Management Board above n 310, 46. In Minnesota, sex offenders' proximity to parks was found to not be associated with recidivism. See Minnesota Department of Corrections n 308, 45.

<sup>315</sup> F S Berlin "The Paraphilias and Depo-Provera: Some Medical, Ethical and Legal Considerations" (1989) 17 Bull. Am. Acad. Psychiatry L. 233.

<sup>316</sup> C Wong "Chemical Castration: Oregon's Innovative Approach to Sex Offender Rehabilitation, or Unconstitutional Punishment?" (2001) 80 University of Oregon Law Review 267.

<sup>317</sup> C Wong above n 316.

<sup>318</sup> C Wong above n 316.

<sup>319</sup> L H Spalding "Florida's 1997 Chemical Castration Law: A Return to the Dark Ages" (1998) 25 Fla. St. U. L. Rev. 117.

<sup>320</sup> D Van Biema "A Cheap Shot at Pedophilia?" *Time*, Sept. 9 1996, 60.

Castration is currently used in many countries throughout Europe and is increasingly becoming available across the United States.<sup>321</sup>

### *Use in New Zealand*

There does not appear to be any Parliamentary support for introducing chemical castration into New Zealand.<sup>322</sup> It would unjustifiably break down legal and cultural prohibitions on inflicting punishment on the human body. Section 9 of the NZBORA protects offenders from being subjected to cruel, degrading, or disproportionately severe treatment or punishment,<sup>323</sup> while section 11 provides offenders with the right to refuse to undergo medical treatment.<sup>324</sup> These protections reflect the value that New Zealand society places upon bodily integrity.<sup>325</sup> Chemical castration causes humiliation, degradation, and has serious side effects.<sup>326</sup> There are other more humane methods of eliminating the deviant desires in child sex offenders, such as treatment programmes. Ordering chemically castration is not justified.<sup>327</sup>

Chemical castration should not be available in other circumstances either. Some offenders may wish to be castrated in an attempt to mitigate their sentence, reduce their ESO eligibility or to increase their chances of being granted parole.<sup>328</sup> It would be difficult for offenders to give true informed consent without any form of coercion

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<sup>321</sup> B Keene "Chemical Castration: An Analysis of Florida's New "Cutting-Edge" Policy Towards Sex Criminals" (1997) 49 Fla. L. Rev. 803.

<sup>322</sup> Its use was mentioned in passing by National MP Judith Collins during debate on the Parole (Extended Supervision) and Sentencing Amendment Bill 2004, but was not seriously considered as an option. See above n 26, 6.

<sup>323</sup> Section 9 New Zealand Bill of Rights Act 1990.

<sup>324</sup> Section 11 New Zealand Bill of Rights Act 1990.

<sup>325</sup> The abolition of the death penalty in 1989 further supports the view that punishments on the human body are no longer acceptable in New Zealand.

<sup>326</sup> Common problems include weight gain, fatigue at the time of injection, hot and cold flashes, headaches, and insomnia. Other reported side effects, although uncommon, include thrombophlebitis, pulmonary thromboembolism, lowered ejaculatory volume, nausea, skin sensitivity reactions, high fever, increased appetite, mental depression, loss of body hair, hyperglycemia, abnormal sperm, nightmares, dyspnea, leg cramps, irregular gall bladder function and gallstones, hypertension, diverticulitis, diabetic sequelae, hypogonadism, malaise, gastrointestinal complaints, and shrinkage of the prostate and seminal vessels. MPA administration may also result in complete impotence and permanently decreased erotic desire. See C Wong n 316, 46.

<sup>327</sup> Section 5 New Zealand Bill of Rights Act 1990.

<sup>328</sup> Other offenders may want to be chemically castrated as part of their rehabilitation, without intending it to have any effect on their sentence. Allowing this would be ethically contentious and is a decision better left to the medical profession.

in these circumstances.<sup>329</sup> It would also have the danger of operating, or appearing to operate, as a ‘get out of jail free card’. Offenders should not be able to select their own sentence in this way.<sup>330</sup> It would undermine public confidence in the sentencing process and could potentially be very dangerous. It has been widely demonstrated that MPA is not a ‘cure’ for child sex offenders. It appears to only be effective in controlling those offenders who use children as stimuli for sexual arousal, fantasy, or fulfilment.<sup>331</sup> It cannot control those offenders who are motivated by anger or hostility, who deny the criminal nature of their actions, or blame non-sexual forces such as drugs, alcohol or stress.<sup>332</sup> These offenders may still commit further offences against children irrespective of being chemically castrated.<sup>333</sup>

In light of these problems, chemical castration should not be introduced into New Zealand.

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<sup>329</sup> A Vachhs “Sex offenders: Is castration an acceptable punishment? No, pragmatically impotent” (1992) 78 ABA Journal 43.

<sup>330</sup> A Vachhs above n 329, 48.

<sup>331</sup> F S Berlin, above n 315, 46.

<sup>332</sup> F S Berlin, above n 315, 46.

<sup>333</sup> For example, in Germany, Klaus Grabowski avoided a life sentence by agreeing to castration. Once he was released he murdered a 7-year-old girl. At trial, his defence was that the castration had removed any sexual feelings, but he had lured the child to his apartment because he loved children and killed her in response to blackmail threats. See A Vachhs above n 329.

## **Chapter Four - Recommendations**

The way that child sex offenders are currently being controlled in New Zealand does not represent a fair balance between protecting the community from harm and protecting the rights of offenders. The New Zealand Government has demonstrated a concerning willingness to follow international trends of imposing restrictive controls with little regard to the rights of offenders.

The Government must reconsider how they are currently controlling child sex offenders in this country. They need to be controlled more *effectively* and more *responsibly*.

### **Changing the public's focus**

Society is very fearful of dangerous strangers having access to their children. They want the Government to protect them against the threat that these offenders pose. However, this attitude ignores the fact that the vast majority (over 90%) of child sexual abuse is actually committed by someone known to the victim.<sup>334</sup> Restrictive laws based on controlling deviant strangers do not protect children from this abuse. There needs to be more focus on prevention. It must be ensured that children are living in a safe home environment where they can easily report any abuse. A public education message is needed to demystify the nature and magnitude of the problem of child sexual abuse in the community. The news media also needs to report the sexual abuse of children more responsibly. Educating the public will allow parents to protect their children more effectively and prevent moral panic unduly influencing the law.

### **Increasing rehabilitation**

Continuing to increase the length of prison sentences that are imposed on child sex offenders is not an effective method of reducing recidivism. Incarceration does not address the causes of offending and does little to reduce the likelihood of re-offending

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<sup>334</sup> J R Conte & J R. Schuerman above n 30, 7.

once the offender returns to the community. There needs to be an increased focus on rehabilitating child sex offenders, rather than simply punishing them.

Participation in treatment programmes can reduce inappropriate sexual tendencies in child sex offenders. If more offenders are rehabilitated then there will be fewer victims and the community will become less dangerous. New Zealand treatment programmes have produced some very encouraging results.<sup>335</sup> In addition to the unquantifiable social savings that would result from rehabilitating offenders, it would also be cost effective. The costs of putting offenders through treatment programmes are far lower than the costs associated with reincarcerating untreated offenders. For example, in Kia Marama's first seven years of operation the Department of Corrections is estimated to have reaped net savings of more than \$3 million from its treatment of 238 offenders.<sup>336</sup>

The Government needs to allocate more resources to rehabilitating child sex offenders and there needs to be more emphasis on rehabilitation at the time of sentencing. Participation in rehabilitation programmes should be more strongly encouraged. Currently offenders must give informed consent before their eligibility to participate in a treatment programme can be assessed.<sup>337</sup> This is too lenient. All child sex offenders should have their eligibility compulsorily assessed before sentencing. This would not be an unjustified interference with their rights. The instruments that are presently used to assess offenders are purely psychological. They involve no interference with bodily integrity.<sup>338</sup> Moreover, forcing offenders to submit to these assessments would not breach the NZBORA because the assessments are unlikely to be classified as 'medical treatment'.<sup>339</sup>

Offenders who are assessed as being eligible to participate in a treatment programme should be strongly encouraged to do so. The benefits of participating need to be stressed to them. There is little use in forcing them to enrol though. Effective

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<sup>335</sup> See page 8.

<sup>336</sup> Bakker et al above n 36, 8.

<sup>337</sup> Bakker et al above n 36, 8.

<sup>338</sup> Bakker et al above n 36, 8.

<sup>339</sup> Section 11 of the New Zealand Bill of Rights Act 1990 only provides the right to refuse to undergo any 'medical treatment'.

rehabilitation requires the offender to fully cooperate.<sup>340</sup> Unless the offender is participating under their own volition it is unlikely that their risk of re-offending will be reduced. If an offender is assessed as being ineligible to participate then the reasons for this should be analysed and taken into account when the offender is sentenced. It would give a more accurate profile of the offender and the risks that they pose. For example, if an offender's ineligibility was due to them not acknowledging the wrongfulness of their actions then incapacitation may be a high priority.

### **Restricting the use of preventive detention**

Only the most dangerous sexual offenders can currently be sentenced to an indefinite sentence of preventive detention. This is a good policy. Incarceration is an effective method of controlling offenders who are not amenable to rehabilitation and continue to pose a high risk of re-offending. Although, it must be ensured that the scope of preventive detention is not extended to less dangerous child sex offenders. There is little benefit in incapacitating them. It would be an unjustified restriction upon their liberty.

### **Using parole effectively**

Parole is a valuable method of controlling child sex offenders once they are released from prison. It is not a soft option that only benefits offenders. Rehabilitated and reintegrated child sex offenders are less likely to re-offend. Parole allows controls to be gradually reduced over time according to the offender's progress. This is more effective in rehabilitating and reintegrating offenders than simply releasing them from all control at the conclusion of their prison sentence. Parole does create the possibility of child sex offenders committing further crimes that could not have occurred had they remained in prison for the full term of their sentence. However, this problem is common to all types of offending and child sex offenders have a comparatively low rate of recidivism.<sup>341</sup>

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<sup>340</sup> Bakker et al above n 36, 8.

<sup>341</sup> See page 9.

The benefits of parole justify it being used for low risk child sex offenders. It is not a suitable control for offenders that pose a higher risk of re-offending though. The need to protect the community from harm outweighs the rehabilitative benefits that parole may offer for these offenders. It is preferable to keep such high risk offenders in prison until their sentence expires.

### **Imposing extended supervision orders responsibly**

ESOs are an effective method of allowing child sex offenders to be released from prison, while simultaneously protecting the community from the risks that they pose. ESOs can be individually tailored to only restrict the liberty of offenders to the degree that is necessary to protect the public. Thus, theoretically ESOs strike a very desirable balance. However there is currently too much emphasis being placed on protecting the community and the interests of offenders are being overlooked. The governing provisions need to be amended to strike a fairer balance.

#### *Double punishment*

The primary flaw in the ESO regime is that it authorises double punishment. The Court is powerless to prevent this occurring because it must apply the law as dictated by Parliament.<sup>342</sup> Even though any double punishment may not be illegal, it is nevertheless undesirable. There needs to be certainty in the punishments that are imposed on child sex offenders. They should only be punished once and this should occur at the time of sentencing. Ordering additional punishments without the offender committing a further offence is not acceptable in a modern society.

The double punishment inherent in the current ESO regime can be quite easily avoided without affecting the practical operation of the orders or the benefits that they offer. All that needs to be done is to amend the penalties of the qualifying sexual offences. They need to include the possibility of ESOs operating beyond the expiry of finite sentences of imprisonment.<sup>343</sup> If this is done, offenders will only need to be sentenced once because extended supervision would be part of the general penalty

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<sup>342</sup> Section 4 New Zealand Bill of Rights Act 1990.

<sup>343</sup> This approach was formulated by the New Zealand Law Society above n 132, 20.

that the offence carries. The health assessor's recommendations could form part of the pre-sentence report. This would allow the sentencing judge to simultaneously sentence an offender to both imprisonment *and* extended supervision (if they thought it was potentially applicable to the offender). The exact terms of the ESO would not have to be determined at the time of sentencing. The ESO could be imposed on the basis that its terms would be determined when the offender is due for release from prison. If it was decided at this later date that it was no longer warranted then the ESO could be abridged or suspended. However, if the offender still did pose a risk of re-offending upon their release then the ESO conditions could be lawfully imposed without any issue of double punishment arising. The crucial point is that the ESO would not be an additional curtailment of the offender's liberty because it would have been part of the original sentence, at least as a possibility.

### *Electronic monitoring*

The ESO regime permits the electronic monitoring of child sex offenders. On its face this appears to be a justified control. It ensures that they comply with their conditions and it may deter them from further offending. However, it appears to be opening the floodgates for electronic monitoring to be unjustifiably imposed in other situations. It has already become available for ordinary parolees and those people remanded in custody awaiting trial. It could lead to much more intrusive invasions of civil liberties in the future. This is unacceptable and must be avoided. The benefits offered by electronically monitoring child sex offenders do not justify creating the gateway to a surveillance state. The provisions that authorise it should be abolished accordingly.

### *Health assessments*

It is inescapable that ESOs will be based on assessments of future dangerousness. The negative implications of this will only be justifiable if ESOs are carefully tailored to reflect the true risk that individual offenders pose. Unfortunately health assessors do not appear to be doing this at the present time. While their recommendations do not appear to be unlawful, they do seem to be imposing unnecessary restrictions on offenders. This must be conscientiously avoided.

The governing provisions of the ESO regime should be amended to address these problems. Health assessors need to be independent from the Department of Corrections. Furthermore, given the extremely influential nature of their recommendations, a second opinion is necessary.<sup>344</sup> Having two reports would hold health assessors more accountable.<sup>345</sup> Any bias or irresponsible use of their discretion could be more easily recognised. Health assessors would be forced to use their best endeavours to ensure that their recommendations are objectively justifiable having regard to the evidence. This would ensure that ESOs more accurately reflect the true dangerousness of offenders and would protect the community from harm more effectively.

### **Avoiding alternative controls**

None of the alternative controls analysed should be introduced into this country. The potential benefits that they offer the community are outweighed by the negative effect that they would have on offenders.

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<sup>344</sup> This was recommended by the New Zealand Law Society above n 132, 20.

<sup>345</sup> The importance of a second opinion was illustrated in *Chief Executive of the Department of Corrections v Taha* above n199, 30. There the health assessor's recommendation of an ESO being for the maximum term was questioned after an independent psychologist suggested that an ESO was not even necessary. After considering both opinions the Court imposed an ESO of five years duration.

## **Conclusion:**

Child sex offenders commit disturbing crimes against some of the most vulnerable members of our society, but we cannot allow the heinous nature of their acts to blind us from the need to control them responsibly. New Zealand is currently at a pivotal moment in time. The rights and liberties of child sex offenders are beginning to be unjustifiably eroded, but with immediate intervention it is possible to halt this worrying trend.

The first, and most important, step is to curb society's descent into moral panic. The current climate of fear and mistrust is fuelling irrational responses and preventing any constructive progress being made. The current myths and misconceptions that surround child sex offenders must be replaced by informed public debate and a better awareness of the true dangers that they pose. This would allow the Government to control child sex offenders without being unduly influenced by the current irrational attitudes of New Zealand society.

The Government must also act more responsibly. It is not acceptable to protect the public at all costs. Public protection is the only a goal. It is not a self-evident justification for violating human rights and intruding upon civil liberties. The need to protect the public must always be balanced against competing interests, including the rights of offenders. Rights do not discriminate between sexual preferences or dangerousness. They apply to everyone, even those people that society may find repulsive. The need to safeguard the rights of offenders must never be lost sight of.

It is possible to control child sex offenders both effectively and responsibly. These two ideals are not mutually exclusive. An efficient balance can only be achieved once this is realised by both the New Zealand public and the Government.

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