SYMPOSIUM PAPER

IS IT BETTER TO BE SAFE THAN SORRY?
A Comparative Analysis of Preventive Detention Schemes

25 November 2012

I Introduction

This symposium paper is based on the Civil Detention Orders Symposium run by the Equal Justice Project (EJP) Human Rights team on 26th September 2012. The symposium was organised as an overview of preventive detention and the human rights implications of such regimes, in light of the introduction of the Public Safety (Public Protection Orders) Bill 2012 (the Bill).

The EJP is a student-run pro bono initiative that has been operating out of the University of Auckland's Faculty of Law since 2005. The Human Rights team within EJP is dedicated to developing human rights discourse within New Zealand through engagement with both governmental and non-governmental organisations. The team endeavours to promote awareness of and encourage student participation in debates about issues affecting fundamental human rights. EJP maintains a politically neutral position on the issue of Public Protection Orders, and recognises that such provisions may be necessary to ensure public safety. However, New Zealand's proposed regime contains numerous human rights concerns, which EJP believes must be thoroughly considered and explored before any further legislative action is taken. This paper is intended to be informative and provide an overview of the issue of preventive detention in New Zealand and international jurisdictions.

This paper will proceed in two parts. Part I will provide an overview of preventive detention schemes in several jurisdictions so as to provide a frame of reference for the Bill. Part II will set out the existing preventive detention scheme in New Zealand and the major changes to this scheme proposed by the Public Safety (Public Protection Orders) Bill. We conclude with some brief comments as to the human rights implications of the Bill.

Part I: Comparative Jurisdictional Analysis

I. Australia

A Legislation: Implementing Preventive Detention

Australia has extensive preventive detention schemes operating in Victoria (Vic), New South Wales (NSW), Queensland (Qld) and Western Australia (WA). The schemes all involve the continuing detention of high-risk sex offenders in prison or community supervision at the end of an offender's prison sentence.

1 Victoria

The Community Protection Act 1990 was the first legislation passed in Australia aimed at preventing the commission of *future* crime. The legislation was targeted at a particular offender, Gary David, who suffered multiple mental disorders. The Act granted the Victorian Supreme Court the power to detain him for the purpose of protecting the community from harm. Victoria has also passed the Serious Sex Offenders Monitoring Act 2005 as amended by the Serious Sex Offenders (Detention and Supervision) Act 2009.

2 New South Wales

The first legislation implementing preventive detention that was passed in New South Wales was the Community Protection Act 1994, which was also specifically targeted at a particular offender, Gregory Wayne Kable. In 1996 the High Court declared the legislation was constitutionally invalid in *Kable v Director of Public Prosecutions*.[1] The High Court held that the New South Wales Supreme Court had no authority to imprison someone in the absence of a criminal conviction. Justice William Gummow emphasised that "not only is such an authority non-judicial in nature, it is repugnant to the judicial process in a fundamental degree."[2]

The most recent legislation is the Crimes (Serious Sex Offenders) Act 2006. The Act's primary purpose is to "ensure the safety and protection of the community".[3] The legislation only covers defendants who are "sex offenders" and in custody for "serious sex offences".

3 Queensland

Queensland's preventive detention scheme was introduced by the Dangerous Prisoners (Sexual Offenders) Act 2003. The legislation empowers the Attorney General to apply to the Queensland Supreme Court for the detention of an offender who is serving a prison term for a serious sexual offence. The Court requires evidence from two psychiatrists concerning the relative risk the offender may pose to the public when released from prison.[4]

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[1] *Kable v Director of Public Prosecutions* (NSW) 189 CLR 51 (HC)
[2] Above n1, at 123.
[3] Section 3
[4] Section 9.

4 Western Australia

Western Australia has also enacted a preventive detention scheme through passing the Dangerous Sexual Offenders Act 2006.

5 Case Law: The Legitimacy of Preventive Detention Schemes

The Australian High Court was faced with determining whether the Dangerous Prisoners (Sexual Offenders) Act 2003 (DPSOA) was constitutionally valid in the case of *Fardon v Attorney-General*.[5] The applicant, Robert Fardon, argued that Sections 8 and 13 of the DPSOA breached Chapter III of the Constitution since it authorised the Supreme Court to order the detention of a person in prison in the absence of any criminal conviction, it focussed on a class of prisoners not the individual, and the detention amounted to double punishment. The majority (Kirby J dissenting) dismissed Fardon's appeal and held the DPSOA is constitutionally valid since even though predictions about the commitment of future crime may be wrong, they may also be right.[6] The Court held the primary purpose of the legislation is to protect the community from "dangerous sex offenders" who are at "high risk" of reoffending. The majority did not think that detention in prison had to be characterised as punitive if the detention is ordered for non-punitive reasons – such as preventing future crime. Kirby J provided a strong dissent and held:[7]

> The DPSO ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed 'guess'.

His Honour argued that the DPSOA amounted to double punishment and is therefore "offensive to the fundamental tenets of our law".[8] After his appeal was dismissed by the High Court, Fardon brought a case in the United Nations Human Rights Committee, which is considered below.[9]

II. United Kingdom

In the United Kingdom (UK) there are three forms of detention sentences that, depending on the facts, may be characterised as preventive: Discretionary Sentences of Life Imprisonment, Indeterminate Sentences for Dangerous Offenders and Extended Sentences.

A Discretionary Sentences

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[5] *Fardon v Attorney-General* (2004) 233 CLR 575 (HC).
[6] Gleason CJ at [12].
[7] Kirby J at [125]
[8] 101.
[9] See at below at Part I, VII, B.

Discretionary life sentences are governed by section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 (UK). As part of the sentencing procedure, a judge imposing a discretionary life sentence must specify in open court the tariff that is to be served to meet the requirements of retribution and deterrence.[10] Once the tariff period expires the applicant's case is referred automatically to the Parole Board who must hold an oral hearing before a Discretionary Lifer Panel, at which the applicant is legally represented and has a right to give evidence.[11]

B Indeterminate Sentences for Dangerous Offenders

Under the now-abolished Section 225 of the Criminal Justice Act 2003 (UK), a court could impose an indefinite sentence of Imprisonment for Public Protection (IPP) if the court believes the offender poses a "significant risk to members of the public occasioned by the commission by him of further specified offences".[12] It should be noted that the IPP is structurally and effectively similar to the Public Protection order that is to be introduced under the Public Safety Bill in New Zealand. IPP sentences were abolished in May 2012 by the enactment of Legal Aid, Sentencing and Punishment of Offenders Act 2012.

C Extended Sentences

Section 227 of the Criminal Justice Act 2003 (UK) enables the court to impose an extended sentence for a certain class of violent or sexual offences. These extension orders are intended to provide greater protection to the public from offenders considered to pose a significant risk of harm.

According to Schedule 18 of the Criminal Justice Act 2003 (UK) an offender who has been granted an extended sentence under section 227 or an indeterminate sentence under section 225 may be released on 'license'. A parole officer will then supervise the offender and certain conditions may accompany the license.

D Sexual Offences Prevention Orders

The police may apply to a sheriff or magistrate for a 'sexual offences prevention order' under sections 104 to 113 of the Sexual Offences Act 2003. The order sets out certain prohibitions and restrictions on the defendant. A breach of an order is punishable by up to five years of imprisonment.[13]

III. Scotland

[10] Section 34(1) and (2).
[11] Section 34(5)(b).
[12] Criminal Justice Act 2003, s225(1).
[13] Section 113.

The new Orders for Lifelong Restriction were introduced in Scotland in June 2006 following recommendations from the MacLean Committee on Serious Violent and Sexual Offenders. This scheme enables the lifelong supervision of high-risk sexual and violent offenders either in prison or on licence in the community. These offenders will undergo a Risk Assessment Report that will assist the court in deciding whether the offender still poses a danger to the community.

IV. Germany

The German penal code distinguishes between penalties and measures of correction and prevention. The purpose of preventive detention must be to rehabilitate dangerous offenders or for the protection of the public. This becomes particularly significant in assessing state compliance with Article 5 of the European Convention on Human Rights, which will be discussed below. Preventive detention may be ordered under certain conditions, in addition to their punishment, at the time of the conviction.[14] Under s 66 of the Criminal Code, preventive detention shall be imposed in addition to the term of imprisonment if the person is sentenced for an intentional offence with prison term of no less than two years. The offender must also have been sentenced twice, each time with a term of imprisonment of no less than one year's imprisonment to intentional offences. The offender must have served a prison sentence and a comprehensive assessment of the offender must reveal that he or she presents a danger to the public.[15] For certain specified offences, if evidence comes to light indicating that the convicted person presents a significant risk to the general public, the court may make subsequent (retrospective) incapacitation orders if comprehensive evaluation of the convicted indicates a high likelihood of his/her committing a series offence.[16] In cases where the preventive detention is not executed immediately after the judgment ordering them becomes final, the court responsible for the execution of the sentence must review, before the completion of prison term, whether preventive detention is still needed in light of the objectives.[17]

V. Canada

Part XXIV of the Canadian Criminal code establishes the Dangerous Offender and Long-term Offender regime, which aims to protect the public from dangerous offenders who pose a continued threat to society.[18]

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[14] Art 66 of the Criminal Code.
[15] Art 66(1) of the Criminal Code.
[16] Art 66b of the Criminal Code.
[17] Art 67 of the Criminal Code.
[18] Dominique Valiquet "The Dangerous Offender and Long-Term Offender Regime" (4 November 2008) PRB 06-13E.

A Dangerous Offenders and Long-term Offenders

Dangerous offenders are considered more likely to reoffend than are long-term offenders, and therefore are sentenced to an indeterminate length of imprisonment. A "dangerous" offender application may be presented after an offender has been convicted, but before sentencing. An exception to this rule is that an application can be made up to six months *after* sentencing, in the event that new evidence is found. In contrast, long-term offenders may be released after being sentenced to two or more years of imprisonment, under the conditions of a long-term supervision order.

1 Procedural Safeguards

The Crown Attorney making the application must obtain the consent of the province's Attorney General. The offender must also be given seven days' notice before the application hearing, which must contain the grounds for the application.[19]

2 Offender Assessment

(a) Dangerous Offender

Section 754(2) of the Criminal Code establishes that, firstly, the offence committed must constitute either a "serious personal injury offence," such as the use or attempted use of violence against another person, or an offence or attempt to commit a sexual offence mentioned in ss 271, 272 or 273. Secondly, the prosecution must prove that the offender is a danger to society. This is established either through demonstrating either: (1) that the offender is a threat to the life, safety or mental well-being of others through a failure to restrain his or her behaviour and the demonstration of indifference to the consequences of his or her behaviour; or (2) the likelihood to cause injury, pain or other evil to other persons through a failure to control his or her sexual impulses.[20]

From July 2, 2008, s 753(1) states that the court *shall* find the offender to be a dangerous offender when either s753(1)(a) or (b) is established. This is in contrast to the previous position where a sentencing judge had the discretion as to whether or not to apply a dangerous offender designation if a sentence other than indeterminate imprisonment would sufficiently protect the public.[21] However, the current position retains the court's discretion to determine the appropriate *sentence* for a dangerous offender, thereby respecting the principles enunciated in *R v Johnson* of public protection.[22]

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[19] Criminal Code (Canada), s 754(1)(a) and (b).
[20] Section 753(1)(a) and s753(1)(b).
[21] *R v Johnson* 2003 SCC 46.
[22] Public Safety Canada "The Investigation, Prosecution and Correctional Management of High-Risk Offenders: A National Guide" (December 2009) <http://publicsafety.gc.ca> at 30.

The Tackling Violent Crime Act added the provision that an offender who is convicted of a third primary designated offence that would result in a two or more year sentence of imprisonment, is automatically presumed to be a dangerous offender.[23]

A reverse-onus system operates under s 753, whereby it is up to the designated dangerous offender to prove that they are not high risk, on the balance of probabilities.[24]

(b) Long-term Offenders

Section 753.1(1) sets out that the court may find an offender to be a "long-term offender" if it would be appropriate to impose a sentence of imprisonment of two years or more, there is a substantial risk of reoffending and there is a reasonable possibility of eventual control of the risk in the community. Whether there is 'substantial' risk of reoffending depends on the type of offence committed, and whether there is a pattern of repetitive behaviour indicating likelihood to reoffend for non-sexual offenders, or the likelihood of similar offending by sexual offenders.[25]

Whether a sentence other than indeterminate imprisonment would result in the "reasonable possibility of eventual control of the risk in the community" is canvassed in the case of *R. v McCallum,* which stated that there must be evidence of "treatability" – that is, that an offender can be treated within a defined period of time.[26] However, the case of *R v Little* stated that this "reasonable expectation" does not equate to certainty that the offender will be "cured".[27]

3 Effect of Designation

A "dangerous offender" designation will result in an indeterminate prison sentence, unless the court finds that the public will be adequately protected by a less severe sentence. Therefore, a dangerous offender will remain in prison for the rest of his or her life so long as they continue to present an unacceptable risk to society.[28] A dangerous offender is eligible for day parole after four years imprisonment and ordinary parole after seven years. After seven years, the Parole Board will assess the offender every two years.[29] As of May 2005, only 17 of the 336 active dangerous offenders have benefited from some sort of parole.

[23] Criminal Code (Canada), s753(1.1).
[24] Section 753(1.1)
[25] Section 753.1(2)(a) and (b).
[26] *R v McCallum* 2005 ONCA 8674.
[27] *R v Little* 2007 ONCA 548 at [42].
[28] Valiquet, above n17, at 6.
[29] Criminal Code (Canada), s761(1).

A "long-term offender" designation means that the offender remains eligible for parole, but is subject to a long-term supervision order (LTSO) not exceeding 10 years after serving a prison sentence of two or more years.[30] The LTSO ensures that the offender is monitored within society, and imposes conditions set by the National Parole Board such as participation in rehabilitation for sexual offenders and abstention from consuming intoxicating substances.[31] Section 753.3(1) of the Criminal Code establishes that failure to comply with the conditions of the LTSO is punishable by a maximum of 10 years imprisonment.

B Offender Assessment

"Peace bonds," also known as "recognizances," "judicial restraint orders" and "section 810 orders" have existed since 1892. Peace bonds are designed to be *preventive*, rather than punitive, and thus can deal with both offenders and individuals *with no previous criminal record*. Section 810.1(1) of the Code covers those defendants whom a judge has reasonable grounds to fear will commit a listed sexual offence against a child under the age of sixteen. Section 810.2(1) covers those whom the judge has reasonable grounds to believe will commit a "serious personal injury offence," as defined in s 752. Under the "reasonable grounds" test, the provincial judge may order the defendant to abide by conditions that will reduce or remove the threat.

1 The orders

The maximum duration of an 810.1 and 810.2 order is two years, and a judge can impose any conditions that are "reasonable" and that the judge considers necessary to ensure the person's good conduct.[32] Conditions which may be imposed for a s 810.1 order include prohibition from using the internet and attending a public park or public swimming pool where children under the age of 16 are present, or can *reasonably be expected* to be present.[33] Conditions which may be imposed for a s 810.2 order include electronic monitoring, remaining at place of residence for specified periods of time and remaining in a specified geographic area unless written permission to leave is obtained from a provincial court judge.[34]

2 Application for an order

"Any person" can make an application seeking a peace bond, although a police officer is usually the applicant. The process is usually started by police, resulting from concerns raised by victims, members of the community, or information from other police services.[35] The applicant does not have to

[30] Section 753.1(3)(a) and (b).
[31] Valiquet, above n17, at 6.
[32] Criminal Code (Canada), s810.1(3.1); s810.2(3.1.).
[33] Section 810.1(3.02).
[34] Criminal Code (Canada), s810.2(4.1).
[35] Public Safety Canada, above n5, at 65.

personally know the defendant, nor identity specific individuals as their potential victims.

R v Budreo established that s 810.1 of the Criminal Code of Canada did not contravene the rights guaranteed by ss 7, 9, 11 and 15 of the Canadian Charter of Rights and Freedoms.[36] It also held that the restrictions imposed stopped short of detention and that the restrictions imposed on the offender's freedom were proportional to social interests.

However, the restrictiveness of peace bonds is clearly illustrated in the case of LJ, a sex offender from Alberta. The conditions of his peace bond order after release including not coming within 100 metres of children under the age of 14, means that he inevitably risks breaching his conditions on a daily basis. Therefore, the conditions of a s 810.2 bond have been said to be at times incapacitative.[37]

VI International Law

A European Court of Human Rights

In 2009, *M v Germany* held that preventive detention—a 'measure of correction and prevention' that can under certain circumstances be ordered in addition to a prison sentence, if the offender has been shown to be dangerous to the public—fell within the reach of Articles 5 and 7 ECHR.[38] However, the case appears to be the high water mark of the Court's stance towards preventive detention with regards to the Convention.

For the purpose of the Convention, grounds for challenging punitive sentences are relatively low, so there is an important distinction to be drawn between punitive and preventive detention. In relation to sentences for the purpose of prevention ("based solely or partly on some characteristics of the offender which is thought to render him dangerous and not solely to impose punishment for the offence"[39]), it is important to ensure compliance with the Article 5(4) requirement of periodic (judicial) review and other safeguards. Hospital orders are considered to be preventive detention: the position of restricted patients was analysed in *X v United Kingdom*.[40]

1 Periodic Review under Article 5, ECHR

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[36] *R v Budreo* 2000 ONCA 5628.
[37] The John Howard Society of Alberta "Dangerous Offender Legislation Around the World" (1999) The John Howard Society <www.johnhoward.ab.ca>.
[38] *M v Germany* (application no. 19359).
[39] Human Rights and Criminal Justice 2nd Ed, editors Ben Emmerson Q.C, Andrew Ashworth, Alison MacDonald (London: Sweet & Maxwell Limited, 2007), 676.
[40] (1982) 4 E.H.R.R. 188.

Although preventive detention (or any detention) need not immediately *follow* conviction, it must *result* from conviction. There must be a sufficient causal link between the conviction and the deprivation of liberty at issue.[41] The importance of periodic review ties in with the requirement for a causal link. With the passage of time the link between initial conviction and further deprivation of liberty may weaken; the link might eventually be broken if a position were reached in which the decision to not release or to re-detain is based on grounds inconsistent with the objectives in the initial decision, or on an assessment that was unreasonable in terms of these objectives. In these cases a detention that was initially lawful will transform into something that is arbitrary and hence incompatible with article 5.[42]

2 Article 7 ECHR

The second limb of Art 7(1) prohibits a court from imposing a heavier penalty than the one applicable at the time the offence was committed. It is therefore necessary to determine whether the measure amounts to a "penalty" and then whether it is heavier than the one "applicable at the time of offence". If it is purely preventive, it should not be held to be in breach.[43]

In *M v Germany* it was held that detention is punitive when the preventive detention is undertaken in the prison cell with minor changes to the detention regime. In that case, no substantial differences could be discerned between the prison sentence and the preventive detention.[44]

In terms of the non-retrospectivity limb of art 7, the decision whether to classify the measure as penalty or merely preventive is again of great significance, since under art 7 penalties may not operate retrospectively whereas there is no such prohibition relating to preventive orders. The European Court of Human Rights has unanimously held that Germany violated the prohibition under article 7(1) of the European Convention on Human Rights by imposing a period of retrospective preventive detention.[45]

As mentioned previously, the concept of what constitutes as "penalty" is paramount in the determination of whether such detention is a breach of art 7. "Penalty" implies "qualitative requirements, including those of accessibility and foreseeability"[46] and "these qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in

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[41] *Weeks v United Kingdom* 1987 Series A no. 114; *Stafford v. the United; Kingdom* [GC], no. 46295/99, para 64, ECHR 2002-IV; *Waite v. the United Kingdom*, no. 53236/99, para 65, 10 December 2002; *Kafkaris v. Cyprus* [GC], no. 21906/04, para 117, ECHR 2008, *M. v. Germany*, no. 19359/04, para 88, 17 December 2009

[42] Above n37, *Weeks; M v Germany*.

[43] *Ibbotson v UK* (1999) 27 E.H.R.R. CD 332, introduction of registration of sex offenders by the Sex Offenders Act 1997. Held to be purely preventive and not punitive.

[44] *M v Germany*.

[45] *G v Germany* [2012] ECHR 956.

[46] Para [119], *M v Germany*; *Cantoni v. France*, 15 November 1996; *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96

question carries"[47] The starting point of assessment is whether the measure in question was imposed following a conviction of a criminal offence, though severity of measure is not in itself decisive. A distinction must be drawn between "penalty" and a measure that concerns the "execution" and "enforcement" of a "penalty". Where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7.[48]

B The United Nations Human Rights Committee

After the Australian High Court dismissed Robert Fardon's appeal that the DPSO was unconstitutional he initiated a communication with the United Nations Human Rights Committee (the Committee) under the First Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR). The Committee agreed with the dissent of Kirby J in that the DPSOA amounted to arbitrary detention and therefore a violation of Article 9(1) ICCPR. The Committee disagreed with the majority regarding the penal character of prisons – it held imprisonment could only legitimately be imposed following judicial conviction of a criminal offence. The Committee held that the state party needed to prove why less intrusive measures, such as community supervision, were inadequate.

Part II: *New Zealand*

A New Zealand's existing preventive protection regime

1 Preventive Detention Sentence

At present, while New Zealand's regime does not allow applications for preventive detention at the end of a sentence, it does allow for a preventive detention sentence to be imposed if the Defendant poses "a significant and on-going risk to the safety of its members".[49] The preventive detention sentence imposes a minimum of five years imprisonment, and may be given to anyone over the age of 18 at the time of committing an offence, who the court is satisfied is likely "to commit another qualifying sexual or violent offence" if released at the end of any other sentence that would otherwise be imposed.[50] Release from such an indeterminate sentence is a question for the Parole Board, which provides a risk assessment test.[51]

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[47] *M v Germany*.
[48] *Hogben v. the United Kingdom*, no. 11653/85, Commission decision of 3 March 1986, DR 46, p. 231; *Grava v. Italy*, no. 43522/98.
[49] Sentencing Act 2002, s 87(1); Kris Gledhill "Preventive Sentences and Orders: The Challenges of Due Process" [2011] JCCL 78 at 94.
[50] Section 87(2).
[51] Kris Gledhill "Preventive Sentences and Orders: The Challenges of Due Process" [2011] JCCL 78 at 95.

The Sentencing Act reduced the minimum term of imprisonment from ten years to five years in order to ensure greater proportionality between the offending and the sentence imposed.[52] However, the Court of Appeal in *R v Bailey* stated that the lower term should be "seen as providing greater flexibility in sentence administration rather than ground for a reduction in the level of seriousness of the offending as justifying preventive detention".[53]

2 Extended Supervision Orders

Currently New Zealand allows for *community* supervision of those believed to pose a risk of future offending through extended supervision orders (ESO), provided for by Part 1A of the *Parole Act* 2002. The Chief Executive may apply for an 'extended supervision order' for up to 10 years, in respect of an eligible offender who has been convicted of certain sexual offences, and who is believed to pose a real risk of committing a further relevant offence. Section 107I indicates that extended supervision sentences are imposed to "protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing sexual offences against children or young persons."

The relationship between ESOs and the preventive detention scheme was considered in *R v Mist*, where the court stated that a lengthy determinate sentence is to be preferred to an indeterminate preventive sentence if it would provide adequate protection of the public.[54] ESOs are preferred because they allow risk assessment to be conducted close to the release, rather than at the time of sentencing.[55]

High risk offenders under ESO are subject to standard conditions of supervision specified in s 107JA, including requirements to gain prior consent of a probation officer before changing employment, as well as prohibition on communication with children under 16 years without the supervision of an adult who knows their relevant offending and who has been approved by a probation officer as suitable to undertake the role of supervision. Moreover, s 107K authorises the imposition of special conditions, including 24-hour-a-day monitoring at any time before the ESO expires or is cancelled.

While both ESO and Public Protection Orders are justified on the basis of protecting the public from high-risk offenders, the present Government believes that the current ESO scheme does not satisfactorily deal with very

[52] Chris Hurd "The changing face of preventive detention in New Zealand" (paper presented to the Sentencing Conference, Canberra, February 2008).
[53] *R v Bailey* CA102/03, 22 July 2003 at [19].
[54] [2005] 2 NZLR 791 at [101].
[55] [32]-[33].

high-risk offenders, and therefore a detention, rather than supervision based scheme is necessary.[56]

3 Assessment and status of offenders under a civil detention regime

At present, it appears that the Public Protection Orders scheme will establish secure accommodation on prison grounds to detain high-risk offenders in the interest of public protection, rather than deal with them through the existing ESO provision.[57]

The issue of the accuracy and validity of risk assessment undertaken in both current decision making about the imposition of preventive detention sentences and ESO, and in the proposed civil detention order regime, must be highlighted and reviewed. In particular, there needs to be a clear guideline as to the standard of proof, or level of risk of offending, required to impose such a penalty. In assessing applications for ESO, the Court of Appeal in *R v McDonnell*[58] ruled that rather than applying a particular standard of proof, all that is required is that the court is satisfied that the offender is likely to commit a further offence.[59] However, in our view, such an approach does not seem to be appropriate in the context of the possibility of an indeterminate term of detention, and clarity on this issue will be critical if public protection orders are introduced. Moreover, because public protection orders are imposed on those who are no longer prisoners, there are additional issues of delineating the rights and procedures of a *civil* detention regime, which is distinct and separate from *criminal* detention.[60]

B Public Safety (Public Protection Orders) Bill 2012

The objective of the Act is to "protect members of the public from the almost certain harm that would be inflicted by the commission of serious sexual or violent crimes"[61], however the orders made under the Act are not intended to punish persons, and should only be imposed if the risk posed by the respondent justifies the imposition of the order.[62] A person subject to a public protection order must stay in separate and secure residence located within the precincts of the prison.[63] All money earned by residents is to be paid into a trust account, from which deductions may be made to offset the cost of their

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[56] National "Policy 2011: Law and Order: Protecting Communities" (2011) New Zealand National Party www.national.org.nz.
[57] Adam Dudding "Sex offender orders 'might breach rights" (2012) Stuff www.stuff.co.nz.
[58] [2009] NZCA 352.
[59] Kris Gledhill "Preventive Sentences and Orders: The Challenges of Due Process" [2011] JCCL 78 at 95.
[60] Rethinking Crime and Punishment "Civil Detention Order for serious sex offenders" (press release, 16 March 2012).
[61] Public Safety (Public Protection Orders) Bill 2012 (68-1), cl4.
[62] Clause 5.
[63] Clause 99.

care.[64] However, those subject to a public protection order may be detained in a prison (prison detention order) instead of a residence if the court is satisfied that the person poses an unacceptably high risk and that they cannot be safely managed in a residence.[65] The chief executive may apply to the High Court for a public protection order. However the application must be supported by at least two psychiatric reports.[66]

A public protection order may only be imposed upon a person aged 18 years or older if they meet one of the following four threshold criteria established in clause 7. That is, if:

1. They are detained under a determinate sentence for a serious sexual or violent offence and must be released not later than 6 months after the date on which the chief executive applies for a public protection order against the person; or
2. The person is subject to an extended supervision order and is subject to full-time accompaniment and monitoring, or is subject to a condition of long-term full-time placement under the Parole Act 2002; or
3. The person is subject to a protective supervision order; or
4. The person has arrived in New Zealand within 6 months of ceasing to be subject to an order imposed by an overseas court for serious sexual or violent offending.

A public protection order may be imposed under s 13 of the Bill, where the court is satisfied that the respondent meets the threshold for a public protection order (under clause 7), and there is a very high risk of *imminent* serious sexual or violent offending if the respondent is released from prison into the community or if the respondent is left unsupervised.[67] The court may only make a finding that the respondent poses a very high risk if they are satisfied that the respondent exhibits a *severe disturbance in behavioural functioning*, through evidence that they exhibit characteristics such as intense urge to offend, limited self-regulatory capacity, absence of understanding for the impact of their offending and poor interpersonal relationships, *to a high level*.[68]

Public protection orders are to be reviewed annually by a review panel, which may direct the chief executive to apply to the High Court for a review of the order if they consider there is no longer a very high risk of imminent offending.[69] In addition to this direction, the chief executive must apply to the court within 5 years, and each subsequent 5-year or 10-year period for a review of the order.

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[64] Clause 39.
[65] Clause 72.
[66] Clause 8 and 9.
[67] Clause 13(1).
[68] Clause 13(2).
[69] Clause 14.

Where the court is satisfied that a resident no longer poses a very high risk of imminent serious sexual or violent offending, a public protection order may be replaced with a public supervision order.[70] A public supervision order may include any requirements that the court considers necessary to reduce the person's risk of offending, promote their rehabilitation or provide for the concerns of victims.[71]

Public protection orders were considered alongside four additional options in the Regulatory Impact Statement accompanying the Bill, which included strengthened ESOs, compulsory care orders, civil detention orders (with a new facility in the community), and continuing detention orders.[72] On the balance of public safety, rights issues, cost and implementation, it was concluded that public protection orders best meet the policy objective of minimising harm to the public.

However, the Department of Corrections did acknowledge the human rights implications of public protection orders, and in particular their application only to individuals who have been imprisoned for a serious criminal offence or to an intensive ESO. This may lead to courts to find that the orders are *criminal* rather than civil, thus possibly infringing section 26 of the New Zealand Bill of Rights Act 1992 and arts 14 and 15 of the ICCPR. Moreover there are risks of arbitrary detention breaching s 22 of NZBORA and art 9 of the ICCPR by limiting orders solely to offender's risks.[73]

X Conclusion

The aim of the Symposium on Preventive Detention was to both raise awareness of the Bill and to stimulate public debate by drawing together a range of disciplinary perspectives. The purpose of this paper has been to supplement those aims by providing a more thorough and systematic analysis of the existing law both in New Zealand and internationally, with a view to assessing the merits or otherwise of the Bill.

By way of conclusion, we would like to very briefly sketch some of the potential human rights concerns raised by the Bill. We believe that not only the Bill, but the entire preventive detention scheme, will involve a careful and considered balancing of rights. On the one hand, we note the significant human rights concerns at stake for both particular victims and the community more broadly that have formed part of the impetus for the Bill. At international human rights law, the right to life[74] has been held to include positive duty to

[70] Clause 80.
[71] Clause 81.
[72] Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (20 March 2012).
[73] At 20.
[74] International Covenant on Civil and Political Rights, art 6.

protect on the part of the state. The standard is that if the authority knew or ought to have known at the relevant time of the existence of a real and immediate risk to an identified individual from the criminal act of a third party, and failed to take reasonable measures that might have been avoided the risk.[75] States parties therefore have an obligation to prevent harm to citizens in certain circumstances. On the other hand, however, one cannot ignore the existence of human rights that militate against the Bill at both international and domestic law. In particular the rights at stake include the right to liberty and security and freedom from arbitrary detention;[76] the right to be punished not more than once for an offence;[77] and the right to be free from retrospective penalties.[78] Finally, we would like to note the risk that the Bill could be considered *ad hominem*, since it has been explicitly targeted at five to twelve high-risk offenders who are coming up for release in the next decade.

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[75] Osman v UK (1998); Mastromatteo v Italy (2002). Courtesy of Kris Gledhill.
[76] International Covenant on Civil and Political Rights (adopted 16 December, entered into force 23 March 1976), Article 9; New Zealand Bill of Rights, s 22.
[77] Article 14(7); BORA, s 26
[78] Article 15(1); Sentencing Act 2002, s6(1); Interpretation Act 1999, s7; BORA, s26.