ARTICLES

The Criminal Character: A Critique of Contemporary Risk Assessment and Preventive Detention of Criminal Offenders in New Zealand

HUGH MAGEE*

The use of criminal offending risk assessment technology is a problematic area of criminal justice in New Zealand. The root of most problems associated with risk assessment technology lie in its inherently limited ability to predict future criminal offending and its inability to take into account the rehabilitation of offenders. The treatment of risk assessment technology by courts and parole boards is another consideration, given an apparent tendency by courts to regard risk assessments as tantamount to predictions of future conduct. These problems have concerning implications for the application of risk assessment technology in the context of preventive detention. Preventive detention is a sentence designed to incarcerate offenders indefinitely, based on an assumption that the offender is too "dangerous" to be released. Nevertheless, if the basis for that assumption is a potentially flawed prediction of future conduct, a sentence of preventive detention will contravene the freedom from arbitrary detention.

I INTRODUCTION

In *Fardon v Attorney-General for the State of Queensland*, the High Court of Australia approved the use of criminal offending risk assessment technology in imposing indefinite detention on "dangerous" offenders.[1] The judgment is a sweeping endorsement of the use of risk assessment technology to purportedly "predict" an offender's risk of reoffending and to justify their preventive detention. In the decade since, the Court's judgment has continued to attract criticism from those who object to the notion that the state can and should predict risk of future criminal offending and take action to prevent it from occurring.[2]

---

* BA/LLB(Hons). The author would like to thank Associate Professor Julia Tolmie and Kris Gledhill of the University of Auckland Faculty of Law for their invaluable assistance in drafting this article and Associate Professor Bernard Brown of the University of Auckland Faculty of Law for his inspiration, as well as Rosemary and Philip Magee, extended family, friends and colleagues for their support.

1 *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46, (2004) 223 CLR 575 at [12].

2 See Bernadette McSherry "Indefinite and preventive detention legislation: From caution to an open door" (2005) 29 Crim LJ 94.

The *Fardon* case lays the foundation for a critique of risk assessment and preventive detention in New Zealand. The approval of the purported prediction and prevention of "dangerous" behaviour in *Fardon* raises two questions in the New Zealand criminal justice context. First, to what extent does the New Zealand criminal justice system attempt to predict risk of criminal offending and prevent that risk from eventuating? Secondly, how satisfactorily are those tasks fulfilled? New Zealand's attempts at predicting and preventing criminal conduct from coming to fruition to date have been fraught with problems. The Government's proposal to implement changes to New Zealand's preventive detention scheme has heightened the need to inquire into this area.[3] Under the Public Safety (Public Protection Orders) Bill (PS(PPO) Bill) civil detention may be imposed on offenders, not as a sentence, but rather, once an offender has completed their sentence.[4]

This article begins by considering the problem of predicting an offender's "risk" of recidivism through the use of risk assessment technology (RAT). This article aims to highlight the limitations of various risk assessment tools used by the Department of Corrections. These include: the inaccuracy of risk prediction, inappropriate reliance on RAT and the potential for creating a cycle of incarceration. An examination of risk prevention (the corollary of risk prediction) follows, focusing on preventive detention under s 87 of the Sentencing Act 2002. The preventive sentence is critiqued in light of human rights concerns generated by preventive detention's reliance on predictions of future criminal conduct. This article then examines the statutory criteria for imposing a preventive sentence under s 87. The article concludes that the model under s 87 has its own problems, which must be dealt with before contemplating implementing aggressive changes to New Zealand's preventive detention scheme.

II RISK ASSESSMENT IN NEW ZEALAND

The Background to Contemporary Risk Assessment

Since the 1970s, criminal offending RAT has played an increasingly important role in criminal justice and corrections in New Zealand[5] and abroad.[6] RAT is often treated as a recent phenomenon.[7] Nevertheless, attempts to predict criminal offending, offender recidivism, risk of re-imprisonment and other characteristics "associated with criminality" are by

3 Hon Judith Collins "New orders deal with highest risk offenders" (press release, 18 September 2012).

4 Public Safety (Public Protection Orders) Bill 2012 (68-1).

5 Nicol John Wilson "The Utility of the Psychopathy Checklist — Screening Version for Predicting Serious Violent Recidivism in a New Zealand Offender Sample" (PhD thesis, University of Waikato, 2003) at 59–63.

6 John Monahan and Henry J Steadman (eds) *Violence and Mental Disorder: Developments in Risk Assessment* (University of Chicago Press, Chicago, 1994).

7 David Brown "Recurring themes in contemporary criminal justice developments and debates" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis NZ, Wellington, 2007) 7 at 16.

no means new.[8] Ernest Burgess employed an early form of actuarial risk prediction in the 1920s,[9] while much earlier forms of "predicting criminality" date back to the eugenics-based criminological work of Cesare Lombroso,[10] the social control theories of Jeremy Bentham and Cesare Beccaria[11] and the legal-anthropological criminological theories of William Herbert Sheldon.[12] While modern offender risk assessment has a stronger scientific basis, the margin of error continues to belie the apparent infallibility of contemporary risk assessment.[13]

The post-1970s expansion in the use of offender risk assessment[14] is part of a sociological reorientation of the anglophone world towards "risk assessment and risk management".[15] This expansion of RAT is also symptomatic of the rise of "penal populism" — a phenomenon which has seen the public in Western, Anglophone countries become more demanding of intrusive and pre-emptive treatment for criminal offenders in an attempt to be "tough on crime".[16] Notwithstanding this enthusiasm,[17] this article calls for careful consideration of the limitations of RAT and preventive detention in New Zealand's criminal justice system. In turn, this article calls for a sober assessment of whether these two measures are "satisfactory".

What is Meant by "Satisfactoriness" of Risk Assessment?

This article adopts the "reliability of risk assessment" criterion used by the Department of Corrections to assess its predictive tools.[18] The "satisfactoriness" of risk prediction will be assessed according to how soundly RAT fulfils its objective of isolating "dangerous" offenders. The accuracy of how key parts of the Department of Corrections' risk prediction scheme operate in practice will also be considered. Subsequently, the satisfactoriness of risk prevention will be assessed on the extent to which preventive detention meets due process aims,[19] including assessing the

8 DA Andrews and James Bonta *The Psychology of Criminal Conduct* (3rd ed, Anderson, Cincinnati, 2003).

9 Bernard E Harcourt *Against Prediction: Profiling, Policing and Punishing in an Actuarial Age* (University of Chicago Press, Chicago, 2007) at 1–2.

10 Wilson, above n 5, at 3–4.

11 Russell Hogg "The causes of crime and the boundaries of criminal justice" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis NZ, Wellington, 2007) 73 at 81–83.

12 Nicole Rafter "Somatotyping, Antimodernism, and the Production of Criminological Knowledge" (2007) 45 Criminology 805.

13 John Petrila "Emerging Issues in Forensic Mental Health" (2004) 75 Psychiat Q 3 at 10.

14 Howard E Barbaree and others "Evaluating the Predictive Accuracy of Six Risk Assessment Instruments for Adult Sex Offenders" (2001) 28 Crim Justice Behav 490 at 491.

15 Bernadette McSherry and Patrick Keyzer *Sex Offenders and Preventive Detention* (Federation Press, Annandale (NSW), 2009) at 27; and John Pratt and Marie Clark "Penal populism in New Zealand" (2005) 7 Punishment & Society 303 at 304–307.

16 Petrila, above n 13, at 15.

17 Franklin E Zimring "Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on 'Three Strikes' in California" (1996) 28 Pac LJ 243 at 254.

18 Department of Corrections *What Works Now? A review and update of research evidence relevant to offender rehabilitation practices within the Department of Corrections* (December 2009) at 12–24.

19 New Zealand Bill of Rights Act 1990 [NZBORA].

criteria for imposing a sentence of preventive detention.

III RISK PREDICTION IN NEW ZEALAND

How is Risk Assessment Technology Used in New Zealand?

The Ministry of Justice and the Department of Corrections employ numerous risk assessment technologies to detect "risk" of criminal offending.[20] As such, this article will often refer to RAT collectively, with a particular focus on the Risk of Reconviction/Risk of Re-imprisonment (RoC*RoI) tool. RoC*RoI is arguably the most important of New Zealand's risk assessment tools; it has been used at sentencing and parole hearings, in allocating rehabilitation services[21] and in attempting to identify those at the highest risk of offending.[22]

The history of modern RAT in New Zealand began in about 1998 when the Department of Corrections and qualified professionals, using developments in risk assessment technology from overseas jurisdictions, set out to develop an "offender management process".[23] This eventually morphed into an umbrella project covering all of the Department's available risk assessment measures.[24] Today, the Department of Corrections continues to use tools to produce information indicating the risk to the community posed by offenders, including an offender's likelihood of reoffending.[25] In many respects the Department's risk assessment toolbox is "foreign". The risk assessment research and technology is largely based on the "what works" literature — British and North American correctional research that indicates correctional services are best utilised on offenders at the greatest risk of reoffending.[26]

A "what works" concept that frequently rears its head in New Zealand is the clinical/actuarial technology dichotomy.[27] Clinical tools are those that require a psychiatrist or psychologist to ask non-standardised questions of, or about, offenders or use an interview format to complete a checklist. In contrast, actuarial and structured-clinical assessments use standardised questions and fixed variables developed from datasets to determine risk. Whereas standardised (usually actuarial) assessments of offender data including criminal history are relatively reliable, unstructured clinical

20 Department of Corrections, above n 18, at 12–24.

21 At 14.

22 Veerle Poels *Risk Assessment of Recidivism of Violent and Sexual Female Offenders* (Department of Corrections, September 2005) at 21–25.

23 Department of Corrections, above n 18, at 9.

24 At 9.

25 Department of Corrections *Statement of Intent: 1 July 2013–30 June 2016* (Department of Corrections, Wellington, 2012) at 20.

26 Emma J Palmer and others "The Importance of Appropriate Allocation to Offending Behaviour Programmes" (2008) 52 Int J Offender Ther Comp Criminol 206.

27 Stephen D Gottfredson and Laura J Moriarty "Statistical Risk Assessment: Old Problems and New Applications" (2006) 52 Crime & Delinq 178 at 180.

assessments are generally accepted as less reliable in New Zealand.[28] In assessing risk, the Department has focused on "static data" — criminal history and demographic information that remains constant or is slow to change over time.[29]

The 1998 project coincided with the development of RoC*RoI. RoC*RoI is an actuarial tool for assessing the risk of recidivist offending. Being an actuarial instrument, it is based on a computerised dataset of the criminal histories of 133,000 offenders and targets correlating fields of data generated by offenders. These included basic demographic information, previous offence types, length of sentence and a measure of the seriousness of offending.[30] RoC*RoI compares the variables of an individual offender's criminal history to the dataset and produces a numeric score indicating the likelihood that the offender will be reconvicted and re-imprisoned in the near future.[31]

Prima facie, RoC*RoI has strong predictive capabilities; there is a strong correlation between risk scores and rates of re-imprisonment.[32] Nicol Wilson has endorsed RoC*RoI's ability to compute an enormous amount of information about an offender.[33] This may indicate a development in the reliability of RAT when compared to older, less reliable forms of risk prediction. The question is whether that hypothesis is true.

Identifying "Dangerousness"

The main objective of the Department of Corrections in employing RAT is to locate "dangerous" offenders before deciding on an appropriate course of action. This often involves incarceration for the protection of society.[34] In this context, "dangerousness" refers to different types of crime-related risks (for instance, reconviction, re-imprisonment and seriousness of offending) and personal characteristics apparently coinciding with a likelihood of criminal offending (for example, psychopathy). Unfortunately, the process of locating "dangerous" offenders in New Zealand is inherently subjective.

First, the Department has failed to acknowledge that personality trait-based risk assessment instruments are not calibrated to isolate an objective standard of "dangerousness" and are often based on subjective and contestable concepts. These tools simply highlight those offenders whose characteristics correlate with the variables that the author of the tool has

28 Christopher T Lowenkamp, Alexander M Holsinger and Edward J Latessa "Risk/Need Assessment, Offender Classification and the Role of Childhood Abuse" (2001) 28 Crim Justice and Behav 543 at 544–545.

29 Branko Coebergh and others *A Seein' "I" to the Future: The Criminogenic Needs Inventory (CNI)* (Department of Corrections, Wellington, 2001) at 2.

30 Leon Bakker, James O'Malley and David Riley *Risk of Reconviction: Statistical Models which predict four types of re-offending* (Department of Corrections, Wellington, 1999) at 13.

31 Department of Corrections, above n 18, at 14.

32 Arul Nadesu *Reconviction patterns of offenders managed in the community: A 60-months follow-up analysis* (Department of Corrections, 2009).

33 Wilson "The Utility of the Psychopathy Checklist", above n 5, at 78.

34 Jean Floud and Warren Young *Dangerousness and Criminal Justice* (Heinemann, London, 1981) at 20.

selected as indicia of "dangerousness".

For example, the term "psychopath"— the cornerstone of Hare's Psychopathy Checklist Revised (PCL-R)[35] (a structured-clinical tool used in New Zealand)[36] — is a construct developed by Hare, not an objective standard of a "dangerous" personality type.[37] The Department of Corrections has failed to acknowledge this. Indeed, the PCL-R's definition is just one of several medical definitions of a "psychopath".[38] The PCL-R's "psychopathy score" is based on a number of subjective criteria, such as "social deviancy", "parasitism", "promiscuous sexual behaviour" and "short-term marital relationships".[39] To produce a seemingly objective statement about the offender, the PCL-R compares these factors to offender history and information from a semi-structured interview.[40] Given the risk of a PCL-R score being treated as an objective statement, the failure to acknowledge its subjectivity is concerning.

This problem is not limited to PCL-R. The sex offender risk assessment instrument, Static-99 features 10 inquiries based on offender history.[41] These include asking whether the offender has "deviant sexual interests"[42] in determining probability of sexual recidivism.[43] What constitutes a "deviant sexual interest", however, cannot be objectively defined.[44] Sexual offender risk prediction tools are often characterised by subjective inquiries of this kind, typically being based on sexual interests, fantasies and sex drive.[45] Static-99 is also triggered by "abnormal" relationships — those that are less than two years in length and not between two adults.[46] To make matters worse, a number of qualitative instruments are based on similar instruments, allowing the same lack of objectivity to simultaneously pervade multiple tools.[47]

Although subjectivity is a concern in itself,[48] it may be unavoidable, especially when using qualitative terms like "psychopathy". After all, it is

---

35 Robert D Hare *Without conscience: the disturbing world of psychopaths among us* (Guilford Press, New York, 1999).

36 Department of Corrections, above n 18, at 16.

37 David McCallum *Personality and Dangerousness: Genealogies of Antisocial Personality Disorder* (Cambridge University Press, Cambridge, 2001) at 28.

38 See Gerald P Koocher "American "Sex Psychopath" Laws: Injustice in Practice" (1973) 17 Int J Offender Ther Comp Criminol 148 at 148–150.

39 Howard Becker "Outsiders" in Eugene McLaughlin, John Muncie and Gordon Hughes (eds) *Criminological Perspectives: Essential Readings* (2nd ed, Sage, London, 2003) 239 at 242–245.

40 Hare, above n 35.

41 *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) at [65] [*Belcher*].

42 McSherry and Keyzer, above n 15, at 29.

43 *Belcher*, above n 41, at [65].

44 Becker, above n 39.

45 David Thornton "Constructing and Testing a Framework for Dynamic Risk Assessment" (2002) 14 Sex Abuse 139 at 142.

46 Andrew Harris and others *STATIC-99 Coding Rules Revised - 2003* (Public Safety and Emergency Preparedness Canada, 2003) at 11.

47 Barbaree, above n 14, at 491–492. For example, the Sex Offender Risk Appraisal Guide and Violence Risk Appraisal Guide tools derive from the PCL-R.

48 Christie D Hill, Craig S Neumann and Richard Rogers "Confirmatory Factor Analysis of the Psychopathy Checklist: Screening Version in Offenders with Axis I Disorders" (2004) 16 Psychol Assessment 90.

questionable whether there can be an objective standard of "dangerousness"; at what point does an offender become unacceptably "dangerous"?[49] Rather, the problem lies in those utilising RAT failing to acknowledge that the instruments are often based on subjective constructs while proceeding on the basis that the tools represent objective mechanisms for classifying offenders.[50] It needs to be acknowledged that RAT classifies as "dangerous" those people who meet the instrument's own definition of "dangerousness". This is the first step in overcoming the assumption that determining a risk of reoffending is simply a mechanical exercise that produces an infallible prediction of future conduct.

Secondly, the risk prediction discipline tends to rely on an assumption that "dangerousness" necessarily entails physically violent offending. In doing so, the discipline ignores the fact that other types of offending may equally be classified as "dangerous" or "predatory". This assumption inadvertently creates the illusion that there is an objective definition of "dangerousness", namely repetitive violent and sexual offending.[51] By way of example, the Department of Corrections' 2009 Risk Assessment Review focuses on physically violent and sexual offenders, without any mention of other types of offending.[52] The problem also manifests itself within RoC*RoI. "Seriousness" of offending in RoC*RoI terms is based on the average number of days an offender has spent in prison. RoC*RoI thus gives greater weight to offences punishable by imprisonment and omits those offences that are not.[53] As will be discussed below, preventive detention in New Zealand endorses this assumption because it only applies to violent and sexual offenders.[54]

While undoubtedly dangerous, physically violent offending is not the only form of dangerous, predatory offending. Nor does it represent an objective definition of a "dangerous" offender.[55] Criminal offending under the Securities Act 1978, for example, may have devastating consequences when inflicted on vulnerable victims such as elderly or otherwise vulnerable investors. Of course, physically violent offences seem intuitively "worse" than economic crimes. This may explain why white collar criminals are usually omitted from discussions of risk assessment. Nevertheless, such offenders still pose a "risk" to the community. In the absence of an ability to correct this problem, it is necessary to at least acknowledge that it is difficult to conceive of objective definition of "dangerousness".

Thirdly, treating those offenders with high RoC*RoI or PCL-R scores

---

49 Nick J Wilson *New Zealand high-risk offenders: Who are they and what are the issues in their management and treatment?* (Department of Corrections, July 2004) at 15.

50 Department of Corrections, above n 18, at 20.

51 Floud and Young, above n 34, at 20.

52 Department of Corrections, above n 18.

53 Bakker, O'Malley and Riley, above n 30, at 14–15.

54 See Sentencing Act 2002, s 87(5); and PS(PPO) Bill, above n 3, cl 7.

55 Harry L Kozol, Richard J Boucher and Ralph F Garofalo "The Diagnosis and Treatment of Dangerousness" (1972) 18 Crime & Delinq 371.

as a threat to the wider community — as some popular conceptions have suggested[56] — is misguided. An offender with a high RoC*RoI score is not necessarily a threat to the wider community or inevitably likely to reoffend.[57] Empirical research shows that members of the public are more likely to suffer crime at the hands of people who consume alcohol or drugs, or those with whom they are well acquainted (particularly in the case of sexual offending) than at the hands of a "risky" archetype.[58] Nevertheless, these archetypes can inspire law reform. The Criminal Justice Amendment Act (No 2) 1987 and the Criminal Justice Amendment Act 1993 (see part IV below) resulted from a moral panic in the 1980s surrounding violent and sexual offending.[59] Despite public perceptions (of sex offenders), empirical research demonstrates that such offenders are no more likely to reoffend than other prisoners.[60] Although many offenders who produce high-risk scores in New Zealand do commit further offences, the offences are often minor, while other offenders never offend again.[61] So, for example, while a murderer will have a relatively high RoC*RoI score (owing to the seriousness of the offence), research shows, in fact, a great number of murderers do not reoffend.[62]

The Margin of Error in Actuarial and Clinical Assessment

Although the concept of "dangerousness" is difficult to define, that alone does not determine the reliability or otherwise of the RAT currently used by the Department of Corrections.

As is noted above, RoC*RoI has shown considerable accuracy in predicting whether an offender poses a risk of reoffending and will be re-imprisoned for that offence. But this does not mean a RoC*RoI score is an infallible measure to determine which offenders will reoffend and will be re-imprisoned.[63] This is inherent in the actuarial method of predicting likelihood of reoffending upon which RoC*RoI relies.[64] The scores produced by actuarial risk assessment tools are merely numeric probabilities.[65] So, despite an offender being within a group that has, for instance, an 80 per cent probability of being re-imprisoned, there is no way of knowing whether that offender will be one of the 20 per cent of offenders with similar scores who will not be re-imprisoned.[66] RoC*RoI's authors acknowledge that RoC*RoI

56 Garth McVicar *Justice: Speaking Up for Crime's Silent Victims* (Penguin, Auckland, 2011).

57 McSherry and Keyzer, above n 15, at 41.

58 Maclean Committee on Serious Violent and Sexual Offenders *Report of the Committee on Serious Violent and Sexual Offenders* (SE/2000/68, June 2000) at 5.

59 Geoff Hall "Sentencing" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis NZ, Wellington, 2007) 249 at 267.

60 McSherry and Keyzer, above n 15, at 41.

61 Wilson, above n 49, at 15.

62 Maclean Committee, above n 58, at 3.

63 Department of Corrections, above n 18, at 23.

64 Gottfredson and Moriarty, above n 27, at 183–184.

65 See *McGarry v The Queen* [2001] HCA 62, (2001) 207 CLR 121 at [63]–[64].

66 Department of Corrections, above n 18, at 23.

features this margin of error.[67]

The root of the inaccuracy problem appears to be the use of group data to make actuarial predictions. A risk prediction tool is only as good as its data set. RoC*RoI, for example, is based on criminal history data from 133,000 convicted offenders, with the score for any individual based largely on their criminal history.[68] Nevertheless, as the Department of Corrections itself acknowledges, the criminal history data against which an offender is being compared may have accumulated over many years. Accordingly, the data may be out of date owing to changes in society, policing and sentencing policy over time.[69] RoC*RoI is based on the criminal histories of those offenders convicted of imprisonable offences during the years 1983, 1988 and 1989.[70] As well as being out-dated, this dataset is restricted to the histories of only those offenders who were sentenced to imprisonment.

With any actuarial tool there is the potential that the dataset will fail to represent the true nature of criminal offending from the outset.[71] This makes for an incomplete profile of who really poses a "risk" to the community. It is well recognised that official criminal offending statistics reflect only those apprehended.[72] This is true of RoC*RoI, which only represents those crimes that result in prosecution, conviction and incarceration. This indicates the limited ability of RoC*RoI to capture the true scope of violent and sexual offending, given that only around 10 per cent of crimes result in a sentence of imprisonment.[73] The same information limitation also frequently arises in structured-clinical risk predictions.[74] Because many offenders adjust their answers and behaviour during an interview to avoid potential negative consequences (including denial of parole) the information on which correctional services will later rely may be skewed.

Are the Limitations Worsened by the Application of RAT by Courts and Parole Boards?

The greatest limitation of risk prediction results from applying such predictions in the context of a courtroom or Parole Board hearing.[75] In New Zealand, commentary based on RoC*RoI scores has been included in pre-sentence reports provided to sentencing judges and reports to the Parole Board.[76]

---

67 Bakker, O'Malley and Riley, above n 30, at 21–25.

68 Department of Corrections, above n 18, at 14.

69 At 23.

70 Bakker, O'Malley and Riley, above n 30, at 13.

71 Gottfredson and Moriarty, above n 27, at 183.

72 Reece Walters and Trevor Bradley *Introduction to Criminological Thought* (Pearson, Auckland, 2005) at 55.

73 Nataliya Soboleva and Jin Chong *Conviction and Sentencing of Offenders in New Zealand: 1996 to 2005* (Ministry of Justice, December 2006) at 64.

74 Gill Attrill and Glenda Liell "Offenders' views on risk assessment" in Nicola Padfield (ed) *Who To Release? Parole, Fairness and Criminal Justice* (Willan Publishing, Devon, 2007) 191 at 195.

75 McSherry and Keyzer, above n 15, at 31.

76 Department of Corrections, above n 18, at 14.

Under s 87 of the Sentencing Act 2002, a sentencing court must consider information that indicates an offender's tendency to commit serious offences in the future.[77] This requires the court to examine clinical and actuarial assessments of an offender's "risk of reoffending", which could include a psychopathy score under PCL-R or a risk score under RoC*RoI.[78] Unfortunately these risk assessment tools may be misinterpreted in a courtroom or by a Parole Board.[79]

The risks of misinterpretation include the following: giving undue weight to certain variables used to assess an offender (see the criticism of static predictors used by RoC*RoI below);[80] the potential for considerable variation among professionals in their assessment of any given offender (a problem highlighted in relation to PCL-R's subjective nomenclature);[81] giving undue weight to some of the findings of a Departmental evaluator;[82] being unaware of or ignoring the limitations in the risk prediction (consider the criticism above of RoC*RoI being wrongly considered as definitive);[83] and the arbitrary selection of different risk predictions, thereby unfairly treating some offenders.[84]

Wilson notes that the potential for misinterpreting a RoC*RoI score in imposing a sentence of preventive detention is more real than hypothesis.[85] A "high-risk score" when screened with RoC*RoI would intuitively suggest an offender's high-risk of reconviction and risk of re-imprisonment — after all, the measure is called "Risk of Reconviction/Risk of Re-imprisonment". Nevertheless, as Wilson points out, RoC*RoI actually conflates an offender's risk of reconviction and risk of re-imprisonment. Thus, it will not be immediately apparent that, for example, an offender has a high chance of reoffending (90 per cent) but a low chance of being imprisoned for that offence (10 per cent).[86]

Australian and New Zealand cases dealing with RAT have demonstrated the awkward relationship between the law and risk assessment — the former demands definitive answers but the latter can only provide estimations. In *Fardon*, the majority of the High Court of Australia accepted that it was constitutional for a court to decide that an offender poses an unacceptable risk to society,[87] even though that decision may be based on inherently limited risk assessment.[88] This demonstrates the gap between

77 Sentencing Act 2002, s 87(4)(c).

78 *Belcher*, above n 41, at [64]–[66].

79 Gottfredson and Moriatry, above n 27, at 180.

80 James Bonta "Risk-Needs Assessment and Treatment" in Alan T Harland (ed) *Choosing Correctional Options That Work: Defining the Demand and Evaluating the Supply* (Thousand Oaks(CA), Sage, 1996) 18 at 19.

81 McSherry and Keyzer, above n 15, at 28–29.

82 Gottfredson and Moriarty, above n 27, at 180.

83 Petrila, above n 13, at 10.

84 Kelly Hannah-Moffat and Paula Maurutto "Re-contextualizing pre-sentence reports: Risk and race" (2010) 12 Punishment and Society 262 at 279.

85 Wilson, above n 5, at 79.

86 At 78–79.

87 *Fardon*, above n 1, at [97]–[98].

88 At [229].

the certainty demanded by sentencing laws and the uncertainty offered by RAT. Indeed, it was left to Kirby J to remind the majority that predictions of risk are estimations, not conclusive evidence.[89] Similarly, in *Belcher*, the New Zealand Court of Appeal, while acknowledging that there are limitations in most risk predictions,[90] shoehorned in an overall assessment that Belcher was a "risk". Nevertheless, in *R v Peta*, the Court of Appeal clearly acknowledged the limits of RAT.[91] Indeed, Kris Gledhill notes that, while they are not immune from the problem, New Zealand courts are at least more introspective than courts in other jurisdictions regarding the limitations of RAT.[92]

Problems with Static Predictors

Out of date information about offenders may be held on file and repeatedly used in risk prediction.[93] This creates a cycle of inaccurate risk scores.[94] Relying on static "risk" variables (such as an offender's age when the offender was first convicted) and ignoring developments (such as responses to offender treatment programmes) can lead to cyclical punishment of offenders.[95] These conclusions are likely to apply in the New Zealand context because of the inability to change many of the factors used by RoC*RoI through individual effort.[96] But even if it is accepted that this is a problem, should "dynamic" risk predictors be employed to take account of developments in offenders? Some may question whether this is even possible.

Setting that aside, however, a question that remains is whether this problem can realistically be corrected by removing historical data from an offender's record. Removing "aggravating factors" from an offender's history is problematic because instruments such as RoC*RoI rely on retaining as much information about an offender's background as possible.[97] At the same time, however, retaining old information poses the problem of turning risk assessments into self-fulfilling prophecies.[98] In light of the latter problem, it seems a realistic option may be to focus on regularly updating the sample datasets on which RoC*RoI scores are based.[99] The Department of Corrections' risk prediction strategy cannot be considered acceptably reliable unless this is done regularly.

A closely related problem is the overemphasis that most RAT places on

89 At [169].

90 *Belcher*, above n 41, at [87]–[94].

91 *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at 631–640.

92 Kris Gledhill "Preventive Sentences and Orders: The Challenges of Due Process" [2011] JCCL 78 at 101–102.

93 Attrill and Liell, above n 74, at 196.

94 At 196.

95 Paul Gendreau, Claire Goggin and Tracy Little *Predicting Adult Offender Recidivism: What Works!* (Ministry of the Solicitor General of Canada, Public Works and Government Services, 1996) at 6.

96 Wilson "The Utility of the Psychopathy Checklist", above n 5, at 76.

97 At 78.

98 Attrill and Liell, above n 74, at 197–198.

99 Department of Corrections, above n 18, at 23.

factors that increase risk, typically because such factors cannot be removed from an offender's records. In light of this, the Department of Corrections has indicated that it may be beneficial to incorporate countervailing factors that reduce risk in order to make risk assessment instruments fairer and more accurate.[100] Deciding what factors should be incorporated is not an easy task, although improved social skills and supportive social relationships are common suggestions. Bernadette McSherry and Patrick Keyzer argue that illness or frailty should also be included,[101] while Attrill and Liell consider "preparedness to change" and taking of responsibility for one's actions are potential positive factors.[102]

Nonetheless, the most obvious reason for not including such factors in New Zealand risk prediction is the Department of Corrections' heavy reliance on actuarial risk prediction (such as RoC*RoI), which can only compute data and does not allow for clinical input. For example, RoC*RoI is incapable of taking account of "preparedness to change". The Department of Corrections has emphasised its ability to invoke "professional override" when RoC*RoI is used. Regrettably, in practice this tends to be reserved for situations where a heightened risk is perceived.[103] In light of this, it is likely that the practice of "recycling" offenders will persist in New Zealand.

Is Risk Prediction Amplifying a Cycle of Incarceration?

Building on the above analysis, this section examines the ways in which RAT may, more broadly, cause a cycle of incarceration. A convenient departure point is the introduction of offenders to risk assessment at a young age.

Intervention with youth offenders is widely accepted as an effective means of preventing recidivism.[104] Nevertheless, youth offending risk assessment remains a fraught area because RAT, such as RoC*RoI[105] cannot be applied to youth offenders with no recorded criminal history,[106] when it is this history that gives actuarial risk prediction its accuracy.[107] RAT specific to young people typically relies on the "events and processes" in the offender's youth — the kind of inquiries made during less reliable clinical assessments.[108] For example, in New Zealand, Child, Youth and Family and the Police have utilised an "events and processes" instrument called the Youth Offending Risk Screening Tool (YORST) as a routine screening process. Unfortunately, YORST's "events and processes" inquiries consist of qualitative questions about peers, education, employment, family life,

100 At 22.

101 McSherry and Keyzer, above n 15, at 30.

102 Attrill and Liell, above n 74, at 194.

103 Department of Corrections, above n 18, at 14.

104 Wilson, above n 5, at 5.

105 At 79.

106 Department of Corrections, above n 18, at 19.

107 Wilson, above n 5, at 78–79.

108 R Karl Hanson and Kelly E Morton-Bourgon *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis* (Public Safety and Emergency Preparedness Canada and Department of Justice, 2007).

and alcohol and drug use, allowing subjective conclusions to be drawn depending on the person carrying out the assessment. The Department of Corrections' indication that the tool may operate in the future as a "targeted approach to the roots of youth offending" is to be encouraged, but this must be accompanied by a search for more precise methods of youth risk assessment.[109]

While the notion that Western criminal justice systems fail to rehabilitate offenders is not novel,[110] the idea that risk prediction may actually amplify the cyclical problem is still relatively new. If it is approximated that an offender poses a high-risk of reoffending, this assessment may result in the offender being denied parole or being given a harsher sentence.[111] This may further inflate an offender's risk score and lead to the same outcome the next time the offender is sentenced or is eligible for parole. Because part of a RoC*RoI score is calculated on the average number of days an offender has spent in prison, a return to prison will further inflate the offender's risk score.[112]

In addition, Sutherland's theory of differential association purports that being incarcerated with more serious offenders may mean that offenders are at "at risk" of "learning" criminal behaviour.[113] A high-risk score then will lead to a higher chance of an offender returning to prison and, as a result, being exposed to further opportunities for learned criminality.

IV RISK PREVENTION IN NEW ZEALAND: THE PREVENTIVE SENTENCE

Introduction

The above analysis demonstrates that there are significant problems with "predicting" the future conduct of offenders.[114] These problems may lead to inaccurate predictions. With that in mind, attention now turns to considering the implications of those problems when RAT is applied in the context of preventive detention.

Preventive Detention: A Practical Application of Risk Prediction

The growing prominence of RAT has been accompanied by the increasingly widely held belief that preventive criminal justice measures need to be

109 Department of Corrections, above n 18, at 20.

110 Sam Garkawe "Crime Victims and Prisoners' Rights" in David Brown and Meredith Wilkie (eds) *Prisoners as Citizens: Human Rights in Australian Prisons* (Federation Press, Annandale (NSW), 2002) 257 at 262–263.

111 Department of Corrections, above n 18, at 24.

112 Bakker, O'Malley and Riley, above n 30, at 27.

113 Edwin H Sutherland *Principles of Criminology* (4th ed, JB Lippincott Co, Philadelphia, 1947) at 5–9; see also Wilson, *New Zealand high-risk offenders*, above n 54, at 15–16.

114 Andrew Carroll, Mark Lyall and Andrew Forrester "Clinical hopes and public fears in forensic mental health" (2004) 15 Journal of Forensic Psychiatry & Psychology 407 at 413.

implemented in respect of "dangerous offenders".[115] The sentence of preventive detention under s 87 of the Sentencing Act 2002 (s 87 sentence) is an archetypal example of risk prevention in action.

Section 87 permits a court to impose on an offender an indefinite prison sentence, provided the offender is convicted of a qualifying offence under s 87(5). The purpose of the sentence under s 87(1) is to prevent the ongoing danger purportedly posed by some offenders until it can be demonstrated that the offender no longer presents a risk to society.[116] This is provided for by the indefinite length of the sentence. Risk assessment is incorporated by presupposing a risk prediction on which the sentence is based.

But how does s 87 require a court to import the concept of "risk"? A sentencing court that is contemplating a s 87 sentence is required to consider risk of reoffending by the requirement to consider patterns of serious offending in the offender's history,[117] information indicating a tendency to commit serious offences in the future,[118] and the failure of the offender to address the causes of their offending.[119] There is also consideration of risk in the requirement that a court must consider (non-determinative) reports[120] from at least two psychologists[121] on the likelihood of an offender committing further offences[122] if a finite sentence is imposed.[123]

A Framework for Analysis of Risk Assessment's Limitations

1 The Problem of Acting on Predictions of Risk

The use of RAT in imposing a s 87 sentence may be problematic. The use of a technology that cannot be guaranteed to accurately predict risk of reoffending is at best concerning. But given the state of our present knowledge in respect of RAT, it would be immensely difficult to identify the point at which RAT becomes unacceptably inaccurate.[124] So long as a margin of error exists, however, the use of RAT poses international human rights concerns (the focus of sentencing inquiries will shift from the offending towards the offender).

115 Gledhill, above n 92, at 79.

116 Sentencing Act 2002, s 87(1).

117 Section 87(4)(a).

118 Section 87(4)(c).

119 Section 87(4)(d).

120 See, for example, *R v Liddell* CA372/04, 8 April 2005 at [15]–[23].

121 Sentencing Act, s 4.

122 Section 87(5).

123 Section 88(1)(b).

124 Christopher Slobogin "Legal Limitations on the Scope of Preventive Detention" in Bernadette McSherry and Patrick Keyzer (eds) *Dangerous People: Policy, Prediction and Practice* (Routledge, New York, 2011) 37 at 42.

2 Sources of Guidance: New Zealand and Australian Preventive Detention Jurisprudence

New Zealand and Australian courts have been authorised to impose sentences of preventive detention since the Edwardian era.[125] However, in response to public outcry about violent and sexual offending, successive New Zealand governments liberalised the qualifying criteria for preventive detention.[126] Similarly, Australian State governments have attempted to sate public demand for the expansion of indefinite sentencing since the 1980s.[127] Since the early 1990s, Australia has been at the forefront of developing post-sentence detention of the kind now contemplated under the PS(PPO) Bill.[128] An examination of the New Zealand and Australian preventive detention jurisprudence is helpful to determine how the limitations of RAT manifest themselves in the context of s 87.

The New Zealand Court of Appeal has considered preventive detention in the context of Extended Supervision Orders[129] — extended parole conditions imposed on released prisoners.[130] The Court's discussion is useful in assessing risk assessment from a due process standpoint, but nonetheless preventive detention under s 87 remains a relatively unexplored feature of New Zealand penal policy.[131]

In contrast, the Australian preventive detention jurisprudence contains a wealth of debate, particularly in respect of post-sentence detention. In *Kable v Director of Public Prosecutions*, the High Court of Australia held that the post-sentence preventive detention scheme under the Community Protection Act 1994 (NSW) was unconstitutional as the Act authorised continued imprisonment beyond the end of a prison sentence without requiring further offending.[132] The majority considered that the unduly broad risk assessment required to determine an offender's risk of committing further acts of violence potentially contravened the rule of law and the rule against arbitrary detainment.[133] Their Honours held that detention under the scheme amounted to deprivation of an offender's liberty[134] and punishment without proof of an additional offence (double punishment).[135]

In *Fardon* the High Court of Australia reversed its position. The Court held that the post-sentence preventive detention scheme under the

125 See The Habitual Criminals and Offenders Act 1906 6 Edw VII 8; and Habitual Criminals Act 1905 (NSW).

126 Pratt and Clark, above n 15, at 304–307; Criminal Justice Amendment Act 1987 (No 2); Criminal Justice Amendment Act 1993; and Sentencing Act, s 87(5)(a),(b).

127 John Pratt "Dangerousness, Risk and Technologies of Power" (1995) 28 Australian and New Zealand Journal of Criminology 3 at 10–20.

128 McSherry, above n 2.

129 *Peta*, above n 91; and *Belcher*, above n 41.

130 Parole Act 2002, Part 1A.

131 Hall, above n 59.

132 *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51 at 117–121. [*Kable*]. Similar concerns are echoed in Kirby J's dissent in *Fardon*, above n 1, at [169]–[170].

133 *Kable*, above n 132, at 107.

134 At 98.

135 At 132.

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) (DP(SO)A) was constitutionally valid.[136] The majority considered that the court should not be concerned with "policy issues" such as double jeopardy in order to escape applying the ratio in *Kable*.[137] In light of this, it is submitted that Kirby J's dissent in *Fardon*, which affirmed the majority in *Kable*, is to be preferred.

An examination of preventive detention in Australia is also relevant in light of the communications brought before the United Nations Human Rights Committee (HRC) in *Fardon v Australia* and *Tillman v Australia*.[138] Both communications emphasise the due process issues underlying *Fardon v Attorney-General*. The communications are useful because they deal with risk assessment in the context of arbitrary detention more generally and consider the due process implications of indefinite sentencing. Similarly, *Rameka v New Zealand* is useful for examining indefinite sentencing from an international human rights perspective. In *Rameka* three preventive detainees challenged the s 87 scheme under art 9 of the International Covenant on Civil and Political Rights (ICCPR).[139]

It is important to note that the DP(SO)A and the Community Protection Act 1994 (NSW) operated post-sentence, whereas detention under s 87 is imposed as a sentence unto itself.[140] Indeed, it has been argued that this justifies indefinite sentencing as the detention is tied to the criminal trial and sentencing process.[141] Both indefinite sentences and post-sentence detention, however, are predicated on risk assessment with its attendant risk of inaccuracy, so the distinction is less persuasive that it initially seemed.

Does Preventive Detention Accord with Due Process?

1 Arbitrary Detention

The s 87 scheme contravenes the right to freedom from arbitrary detention under art 9(1) of the ICCPR, reflected in s 22 of the New Zealand Bill Of Rights Act 1990 (NZBORA).[142] This is because a s 87 sentence is based on a prediction of future conduct, which may be inaccurate.

Detention will contravene art 9(1) when it is "arbitrary".[143] A breach of art 9(1) will usually occur when the detention contravenes due process. Detention will also be arbitrary where it is unreasonable, unnecessary,

136 *Fardon*, above n 1.

137 At [20]–[23].

138 Patrick Keyzer "The International Human Rights Parameters for the Preventive Detention of Serious Sex Offenders" in Bernadette McSherry and Patrick Keyzer (eds) *Dangerous People: Policy, Prediction and Practice* (Routledge, New York, 2011) 25 at 36.

139 *Rameka v New Zealand* (2003) 7 HRNZ 663 at [7.2].

140 Sentencing Act, s 87(2)(a).

141 *Fardon*, above n 1.

142 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR], art 9(1); and NZBORA, above n 22, s 22.

143 Ronli Sifris "An International Human Rights Perspective on Detention Without Charge or Trial: Article 9 of the International Covenant on Civil and Political Rights" in Bernadette McSherry and Patrick Keyzer (eds) *Dangerous People: Policy, Prediction and Practice* (Routledge, New York, 2011) 13 at 16–17.

inappropriate, unjust or unpredictable.[144]

Because the imposition of a s 87 sentence follows a conviction at trial, due process is logically prior to imposition of the detention. In *Rameka* the Government claimed that a s 87 sentence is not arbitrary because it is issued in reply to prior criminal offending and, as such, is similar to life imprisonment.[145]

Nevertheless, it is difficult to ignore that a s 87 sentence is ultimately premised on a potentially unreliable prediction of risk of reoffending. The dissenting members of the HRC in *Rameka* posited that preventive detention is arbitrary under art 9(1) because it potentially results in the wrongful imprisonment of offenders who may never have reoffended.[146] As the Court held in *Kable*, a s 87 sentence is highly likely to be arbitrary under art 9(1) when an offender's future conduct cannot be determined with accuracy.[147] Arbitrariness is directly related to accuracy of risk prediction; the less accurate the prediction of risk, the weaker the justification for preventively detaining offenders.

Imprisonment may also be arbitrary where there are no reasonable grounds for detention.[148] It is sometimes argued that risk predictions about preventive detainees provide the "reasonable grounds" for preventive detention of offenders.[149] Unfortunately, this either assumes that the risk predictions in issue are accurate, or ignores the limitations outlined above. Furthermore, even if it were reasonable, preventive detention would nevertheless contravene art 9(1) because its indeterminate length renders the sentence uncertain.[150]

2 Double Punishment

The s 87 scheme may contravene the rule against double jeopardy under art 14(7) of the ICCPR,[151] as reflected in s 26(2) of the NZBORA.[152]

Double punishment involves punishing an offender twice for the same offence. In order to overcome the potential double punishment in *Fardon*, the High Court of Australia characterised preventive detention as "non-punitive".[153] The Court considered that, unlike a custodial sentence, preventive detention is not intended to punish an offender and therefore cannot constitute a second round of punishment. Nevertheless, the Court of Appeal

144 At 17.

145 *Rameka*, above n 139, at [4.11].

146 *Rameka*, above n 139, at 681–686.

147 Greg Newbold "The legality of preventive detention" [2004] NZLJ 205.

148 McSherry and Keyzer, above n 15, at 55.

149 Floud and Young, above n 34, at 49.

150 At 39; and *Rameka*, above n 139, at 681–686.

151 ICCPR, above n 142, art 14(7).

152 NZBORA, above n 19, s 26(2).

153 *Fardon*, above n 1, at [74].

in *Belcher*[154] and the minority in *Rameka* rejected this conclusion.[155] How indeterminate incarceration in a prison cannot be considered punishment is unclear. The non-punitive characterisation dresses indeterminate sentencing in soothing language as a form of "treatment",[156] in order to justify its use as a means of saving offenders from themselves and the community.[157] Preventive imprisonment is not only a state-sanctioned trespass to the person,[158] but in New Zealand it may only be imposed if a person is convicted of a qualifying sexual or violent offence.[159] Moreover, the prison conditions for a custodial sentence or preventive detention are no different, which indicates that both sentences are punitive in nature.[160]

In his Honour's dissent in *Fardon*, Kirby J considered that the DP(SO)A sanctions double jeopardy.[161] Because the punishment under the Act is based, in part, on an offender's prior conviction, "the punishment constitutes an increase to the punishment already judicially imposed".[162] This analysis applies to s 87 which requires a court to have regard to any pattern of serious offending disclosed by the offender's history. This is echoed by s 87(4)(b) which provides that the court must consider the harm to the community caused by prior offending. Nevertheless, a s 87 sentence is primarily imposed as punishment for presently unpunished offending.[163] In *Fardon* Kirby J distinguished between post-sentence detention and indefinite sentencing on this basis; with regard to the latter, the punishment is issued for criminal offending that is unpunished at sentencing so there can be no double punishment.[164] Nevertheless, in *Tillman* the HRC considered that imposing an order for continued detention after an offender had served his original sentence constituted a breach of the prohibition of double punishment.[165] The double punishment analysis in relation to s 87 therefore remains arguable.

3 The Presumption of Innocence

The s 87 sentence nevertheless breaches the right to be presumed innocent under art 14(2) of the ICCPR,[166] as reflected in s 25(c) of the NZBORA.[167]

In *Rameka* it was argued preventive detention contravenes the presumption of innocence because it constitutes "punishment for crimes

154 *Belcher*, above n 41, at [47]–[48].
155 *Rameka*, above n 139.
156 *Fardon*, above n 1, at [178].
157 At [216]–[217].
158 *Regina v Deputy Governor of Parkhurst Prison, Ex parte Hague v Home Office* [1992] 1 AC 58 (HL).
159 Sentencing Act, 87(2)(a).
160 Elizabeth Handsley "Comment" (2008) 30 Syd LR 115 at 116.
161 *Fardon*, above n 1, at [180]–[186].
162 At [182].
163 *R v Moffatt* [1998] 2 VR 229 (SC) at 251–255..
164 *Fardon*, above n 1, at [74] per Gummow J.
165 *Tillman v Australia* CCPR/C/98/D/1635/2007, United Nations Human Rights Committee (12 April 2010) at [5.5].
166 ICCPR, above n 142, art 14(2).
167 NZBORA, above n 19, s 25(c).

which have not yet been, and which may never be, committed".[168] Preventive detention requires an offender to prove that he or she is no longer a risk to the community in order to be released.[169] The dissenting members went further to posit that detention based on an approximation of risk institutes a presumption of guilt.[170] Of course, preventive detention is not the only instance in which the presumption of innocence is reversed by statute.[171] Ultimately though, s 87 cannot be justified in this way. Usually a statutory reversal of the presumption of innocence involves the reversal of an evidentiary onus, whereas preventive detention entails indefinite detention until the onus of disproving a risk to the community can be discharged.[172]

Nevertheless, in *R v Moffatt*, in the Supreme Court of Victoria, Hayne JA considered that indefinite sentencing imposes a reasonable limit on the presumption of innocence, because the detention is imposed at sentencing.[173] Unfortunately, this reasoning risks sanctioning a serious violation of due process merely by imposing preventive detention as a sentence.

4 The "Criminal Character" of the Offender

Preventive detention is premised on preventing a risk of reoffending. This is inferred from a prediction of an offender's future conduct, as opposed to being premised on his or her previous offending, as in the case of a custodial sentence.[174] The detention is, therefore, based on the "dangerous criminal character" of an offender — an estimation of the offender rather than of their offending.

As noted above, in determining whether to impose preventive detention, s 87(4) requires a court to consider an offender's previous offending, other characteristics which may indicate a propensity to reoffend in the future, and assess his or her risk, more generally. Examining similar considerations in the DP(SO)A, McSherry argues that this focus on criminal character contravenes the rule of law — the principle that punishment should attach to crimes, not people.[175] This conclusion is also connected to the principle expressed by Kirby J in *Fardon* that imprisonment is to be reserved exclusively for punishing criminal guilt, not pre-empting offending.[176] This article supports the conclusion of McSherry and Kirby J in this regard. Nevertheless, the author would hasten to add a proviso: because indefinite sentences are issued partly in response to prior offending, they seem to be less heavily driven by "criminal character" than post-sentence

168 *Rameka*, above n 139, at [3.4].
169 Hall, above n 59, at 277.
170 *Rameka*, above n 139, at 681–686.
171 See Misuse of Drugs Act 1975, s 6(6).
172 Hall, above n 59, at 277.
173 *R v Moffatt*, above n 163, at 251.
174 McSherry and Keyzer, above n 15, at 42.
175 McSherry, above n 2, at 107.
176 *Fardon*, above n 1, at [153].

detention such as under the PS(PPO) Bill. This needs to be borne in mind when considering the justifiability of s 87.

Critiquing the Criteria for Imposition of a Preventive Sentence

Attention now turns to the qualifying criteria for imposing a s 87 sentence, including how these criteria interact with the limitations of RAT and the challenges presented to individual liberties discussed above. Ultimately, this article concludes that the criteria under s 87 are problematic.

In order for a court to impose a s 87 sentence, an offender must have committed a qualifying violent or sexual offence.[177] In that case, a s 87 sentence poses fewer problems than post-sentence detention under the PS(PPO) Bill, which does not require immediately prior offending. As noted above, however, this fact alone does not mean that s 87 complies with art 9(1).

Between 1967 and 1987 detention under the preventive detention scheme could only be imposed on recidivist paedophiles.[178] Under the Criminal Justice Amendment Act (No 2) 1987, however, violent offenders were included within the ambit of preventive detention.[179] Including both violent and sexual offenders is more rational than only allowing preventive sentences in respect of sexual offenders, which tends to endorse the questionable assumption that sexual offenders pose inherently greater risks than other offenders.[180] Nonetheless, because s 87 only applies to violent and sexual offenders, the section gives effect to the assumption that violent and sexual offending is the only kind of offending requiring preventive action.

Despite preventive detention's origins as a punishment for habitual criminals,[181] a s 87 sentence may be imposed without the offender having committed any previous offences, other than the offence for which the offender is being sentenced.[182] Thus, where an offender has only one prior conviction, a court considering a sentence of preventive detention may well have to place considerable reliance on RAT as a substitute for the offender's criminal history. It seems intuitively wrong, however, to have a preventive sentence designed for habitual offenders available for first time offenders, especially since it is generally accepted that one conviction is insufficient to indicate a tendency to reoffend.[183] Nevertheless, given the statement of the Court of Appeal in *R v Leitch* that a sentence of preventive detention must be imposed with caution,[184] an offender's lack of previous convictions would

177 Sentencing Act, s 87(2)(a).

178 Criminal Justice Act 1954, s 24.

179 Criminal Justice Amendment Act (No 2) 1987.

180 McSherry and Keyzer, above n 15, at 23–25.

181 The Habitual Criminals and Offenders Act 1906 6 Edw VII 8.

182 Sentencing Act, s 87.

183 Gledhill, above n 92, at 80.

184 *R v Leitch* [1998] 1 NZLR 420 (CA) at 429–430.

likely militate against a court imposing a preventive sentence.[185]

Once an offender has crossed the "qualifying offence" threshold, under s 87(2)(c) the offender need only pose a risk of being "likely" to commit another qualifying violent or sexual offence upon release for preventive detention to be authorised.[186] This enables a court to detain an offender on the basis that the offender is more likely than not to commit another qualifying offence upon release. In the author's submission, s 87(2)(c) should require a higher level of risk, such as the "serious danger" standard under s 13 of the DP(SO)A. Although it is doubtful that this would render the detention proportionate under art 9(1), it would at least take account of the fact that a s 87 sentence is based on technology which cannot be regarded as foolproof.

In summary, the s 87 preventive sentence is a matter of serious concern. Because the sentence is based on inherently approximative RAT, which can provide no guarantee that a predicted risk posed by an offender is accurate, it is difficult to justify detention under the section. The s 87 sentence is, therefore, contrary to art 9(1) of the ICCPR. On top of this, the s 87 criteria for imposing preventive detention have several problematic aspects which the Government should address before implementing new and unusual measures, such as those under the PS(PPO) Bill.

V SOLVING THE PROBLEMS OF RISK PREDICTION AND RISK PREVENTION

The problems of criminal offending risk assessment are not incurable. Indeed, the dissenting members of the HRC in *Rameka* provide a starting point for a possible way forward.[187] The dissent in that case posited that preventive detention's reliance on predictions of future conduct may be justifiable if the risk prediction has no margin of error. If inaccuracies could be eliminated from tools such as RoC*RoI, the sentence of preventive detention would no longer be arbitrary under art 9(1). The Department of Corrections has, however, conceded that risk prediction is unlikely to ever reach beyond mere approximation.[188] Nevertheless, to go the other way and abolish RAT could be unwise, given its apparent usefulness in criminal justice decision-making, including properly targeting and conserving departmental resources.[189]

Another option, then, is to prevent courts imposing preventive sentences, and delimit their discretion to impose lengthy, but determinate, custodial sentences premised on protection of the community. But this involves putting courts in a position where they are still acting to keep offenders out of society, rather than solely punishing them for prior

185 Hall, above n 59, at 278.

186 Section 87(5).

187 *Rameka*, above n 139 at 681–686.

188 Department of Corrections, above n 18, at 23.

189 Gottfredson and Moriarty, above n 27, at 178–179, and 195.

conduct.[190] Nevertheless, this approach carries the benefit of determinacy; imposing a determinate sentence on the basis of a potentially inaccurate risk prediction does less harm to an offender's liberties than indefinitely detaining an offender on the basis of the same prediction. Although the imprisonment would still be partly premised on the offender's character, the s 87 sentence would no longer be arbitrary under art 9(1). This option may, however, prove practically difficult in seeking the approval of the electorate to agree to abolish preventive detention.[191]

A more modest option may be to tighten the criteria for imposing preventive detention. In limiting the availability of the sentence, greater account may be taken of the limitations of RAT and the civil liberties issues that are associated with such limitations. In response to the loose wording in s 87(2), the degree of risk an offender must pose could be altered to require more than that the offender is simply "likely" to commit further qualifying offences, while s 87 could be altered to require more than one qualifying offence before a preventive sentence can be imposed. Most importantly, the limitations of RAT could be included as a mandatory consideration for a sentencing court under s 87(4).

Despite all of this, as Wilson has noted, reducing risk of criminal offending does not simply come down to the psychological analysis of crime on which most RAT is premised.[192] While many violent and sexual offenders may be driven by psychological disturbance, society needs to address the various causes of recidivist offending such as education, unemployment and substance abuse, which the Department of Corrections alone cannot control. While the public is very much concerned with assessing risk, there is much greater value in addressing why some offenders are at risk of recidivism, rather than simply whether individual offenders are at risk.[193]

VI CONCLUSION

Criminal offending risk assessment is inherently problematic. Although the goal of risk assessment is to locate "dangerous" offenders, "dangerousness" is not an objective standard shared by all RAT. This is often ignored, as is the fact that the technology does not necessarily locate those who pose the greatest risk to the public. Not only may risk assessment tools produce inaccurate predictions, these may also be unduly relied on by decision-makers and potentially create a cycle of incarceration.

It is difficult to justify the use of the preventive sentences under s 87 when such sentences are likely to be based on a prediction of risk that is potentially inaccurate. The use of potentially inaccurate RAT presents

190 Floud and Young, above n 34, at 47.

191 Pratt and Clark, above n 15, at 304–307.

192 Wilson, above n 49, at 15.

193 Attrill and Liell, above n 74, at 199.

challenges to the freedom from arbitrary detention, while the criteria for imposing a preventive sentence in New Zealand are, on balance, insufficiently stringent to restrict the sentence's use.

Alternatives to the status quo include developing foolproof RAT or abolishing preventive detention entirely. Unfortunately, while the former is seemingly unattainable, the latter may be politically unrealistic. The most appealing alternative, then, is to amend s 87 to limit the sentence's use and require courts to consider the limitations of RAT in the process. As the Government proposes to expand preventive detention under the PS(PPO) Bill, this article serves as a reminder for the Government to first address the problems in s 87.