

Treatment of offending behaviour: Is it a legal right?

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This chapter analyses whether inmates have a legal right to receive and complete the sort of treatment that will be regarded by Parole Boards as reducing the risk of releasing a prisoner. In other words, is it not only a good idea but something to which there is an entitlement? This is an important question to ask because the statutory regime in New Zealand indicates that any provision of treatment programmes designed to secure rehabilitation is limited to where it is 'appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available.'¹ It will be suggested that when this is placed in its proper context, the Department of Corrections does not have the discretion to provide treatment or not but is in fact obligated to make treatment programmes available, so long as they are validated and can be provided in practical terms. The chain of reasoning involves looking to the purposes of detention, particularly incapacitation, and examining the context, including the overlap with the mental health system, and international standards.

The purposes of detention

Detention is one of the range of dispositions available to the criminal justice system.² It is used for at least two different reasons.³ One is to

1 Corrections Act 2004, s5.

2 See section 10A of the Sentencing Act 2002 for the hierarchy of sentences, with discharge at the bottom, then financial penalties, community-based sentences, home detention and imprisonment.

3 There is also pre-trial detention, namely when bail is withheld, which may be designed to prevent further offending or also to protect the integrity of the trial process by ensuring that

mark the past misbehaviour of which an offender has been convicted. Here, the court takes the traditional view that detention is a necessary response to the seriousness of the crime committed.⁴ The traditional aims of punishment may also include forward-looking purposes, typically the need to deter further criminal conduct by the individual offender or by other potential offenders.

The second reason for detention is also forward-looking but rests on the assumption that the deterrent power of punishment is not adequate to prevent crime. Detention under this rationale is a means of incapacitating a person so that he or she cannot commit further crimes.⁵

The New Zealand Parliament has decided to announce the purposes of sentencing in a statute rather than allowing them to be elucidated by the judiciary. So section 7 of the Sentencing Act 2002 states:

- (1) The purposes for which a court may sentence or otherwise deal with an offender are —
- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
 - (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
 - (c) to provide for the interests of the victim of the offence; or
 - (d) to provide reparation for harm done by the offending; or
 - (e) to denounce the conduct in which the offender was involved; or
 - (f) to deter the offender or other persons from committing the same or a similar offence; or
 - (g) to protect the community from the offender; or
 - (h) to assist in the offender's rehabilitation and reintegration; or
 - (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).

defendants attend their trials and that witnesses are not subject to improper interference. This chapter is concerned with post-conviction detention.

- 4 Implicit in the hierarchy of sentence in section 10A is that detention will only be when the other sentences available are not adequate: section 16 makes this clear (though with the proviso in section 17 that imprisonment can be imposed if an offender will not comply with other sentences).
- 5 Or, given that various crimes can be committed in a prison setting, so that he or she cannot commit a crime that directly affects the public.

It will be seen that this is a mixture of purposes, some of which look backwards and others of which look forward. In the context of the discussion about whether those who are incarcerated have a right to be treated for any underlying condition that is linked to their offending behaviour, the most important purposes of punishment are those set out in section 7(1)(g) and (h), namely the protection of the community and assisting rehabilitation and reintegration. These two aims may be linked, since rehabilitating a prisoner by reducing the risk of reoffending allows the prisoner to be reintegrated into society in a manner that protects the community. As a matter of simple common sense, if the offender is going to be released at some stage, then the needs of the public are best served if that offender is released in a rehabilitated form. But does that mean the offender has a right to be treated?

The premise in purpose (h) that an offender will be released at some stage is not, in fact, always true. It is possible to be sentenced to life imprisonment⁶ for murder or manslaughter,⁷ and also for treason,⁸ piracy in aggravated circumstances⁹ and dealing with Class A drugs.¹⁰ Preventive detention, under which a person is detained until released by the Parole Board, is the sentence by which a person is imprisoned for an indeterminate period to protect the community. The imposition of preventive detention is governed by section 87 of the 2002 Act and has its purpose set by section 87(1), namely 'to protect the community from those who pose a significant and ongoing risk to the safety of its members'. The significant restriction to section 87 is that it is only concerned with those who pose a risk from certain sexual or violent offending, namely those which carry a sentence of seven years or more.¹¹

6 Section 81 of the Sentencing Act 2002 makes plain that this is the maximum sentence and that a lesser sentence may be imposed.

7 Sections 172 and 177 of the Crimes Act 1961.

8 Section 74 of the Crimes Act 1961.

9 Sections 92 and 94 of the Crimes Act 1961.

10 Section 6 of the Misuse of Drugs Act 1961.

11 See part 7 of the Crimes Act 1961. The offences covered are sexual violation (s128), attempted sexual violation (s129), sexual contact with consent induced by certain threats (s129A), incest (s130), sexual connection or attempted sexual connection with a dependent family member under 18 (s131), meeting a young person under 16 following sexual grooming (s131B), sexual conduct with a child under 12 (s132) or under 16 (s134), indecent assault (s135), sexual exploitation of a person with a significant impairment (s138), compelling an indecent act with an animal (s142A), bestiality (s143), sexual conduct with children and young people outside New Zealand (s144A) and organising or promoting child sex tours (s144C).

A sentence of preventive detention may be imposed if there has been a conviction of one of these serious sexual or violent offences, the offender was 18 or over at the time of the offence, and the court concludes that the defendant is likely to commit another such offence if a sentence other than preventive detention is imposed. This final part of the test, set out in section 87(2), is clarification of what is meant by 'a significant and ongoing risk' to the public in section 87(1). Namely, it is a level of risk that satisfies the court that further offending is likely in the absence of preventive detention. To assess this, section 87(4) of the 2002 Act indicates that the court should take into account various factors, including any pattern of offending, 'information indicating a tendency to commit serious offences in future', and any refusal or failure to address the cause of offending. This information is likely to come to light as a result of the procedure set out in section 88, which requires that health assessor reports be prepared.

Murder, however, is not included in this list of offences. This is presumably because, as noted above, the maximum sentence for murder is life imprisonment. Indeed, life imprisonment is the required sentence, unless that would be manifestly unjust.¹² This presumption differentiates the sentencing for murder from that for manslaughter, which carries a life sentence but without the indication that it is the normal sentence for that offence. Sentences of preventive detention and life imprisonment are both subject to the same regime for release. In the Parole Act 2002, the term 'indeterminate sentence' is used to cover both life sentences and preventive detention,¹³ which means that there is no sentence expiry date.¹⁴ As a result, release is only possible if the prisoner has served the period specified before becoming eligible for parole and the Parole Board is satisfied that the prisoner does not pose an undue risk to the safety of the community (section 28); and if the prisoner is released he or she is subject to recall for life (section 6(4)).

At first sight, these indeterminate sentencing options allow a 'throw away the key' approach, which indicates that reintegration into society is not a matter about which there should be any concern. Before assessing whether a right to treatment be found in this situation, the growth of incapacitation as a purpose of sentencing will be explored further.

¹² Section 102 of the Sentencing Act 2002.

¹³ Section 4 of the Parole Act 2002.

¹⁴ Section 82 of the Parole Act.

Incapacitation as a sentence

When the aim of sentencing is incapacitation, the focus is on the dangerousness of the offender rather than the need to mark the particular offence. The index offence is a necessary prerequisite, and the sentence is imposed for that offence, but it is more a procedural matter than the matter of substance on which the judge has to make a decision. As such, the imposition of preventive detention arises because of the risk posed by the offender.

Risk-based sentencing has grown more prevalent in recent decades, and not just in New Zealand. The preventive detention provisions outlined above have their origin in section 75 of the Criminal Justice Act 1985, when they were limited to serious sexual offending, particularly with child victims. An even greater expansion of the use of preventive detention has been put in place in England and Wales, and this has also been subject to significant extension in recent years.¹⁵ For some time, the courts there have been able to impose a discretionary life sentence¹⁶ for those who have committed a serious example of an offence for which that was the maximum sentence available (which was much wider than the limited list noted above in relation to New Zealand)¹⁷ and who posed a risk of further serious offending over a timescale that could not adequately be assessed by the court, making them unsuitable for a determinate sentence.¹⁸ Release from a life sentence depends on the Parole Board in England and Wales finding that the risk posed by the prisoner no longer warrants detention.¹⁹

The UK legislature intervened in this process in the Crime (Sentences) Act 1997 by deciding that the repeated perpetration of one of the crimes

15 For reasons developed below in the assessment of whether there is a right to be treated, the English regime is described in some detail.

16 As distinct from the mandatory life sentence for murder: in English law, there is no discretion in this regard.

17 Many of the more serious offences covered by the preventive detention provisions in New Zealand carry a life sentence in England and Wales, for example rape (section 1 of the Sexual Offences Act 2003 (UK)) or wounding or causing grievous bodily harm with intent (section 18 of the Offences Against the Person Act 1864 (UK)).

18 See *R v Chapman* [2000] 1 CrAppR 77 for a recent restatement of the approach to the imposition of a discretionary life sentence.

19 Crime (Sentences) Act 1997 (UK), section 28(6) sets the test: a direction for release can be made if the Parole Board 'is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.' The prisoner can apply to the Board only after serving a minimum period to reflect the seriousness of the offence: hence the sentence is of two parts, one punitive and the rest preventive.

in a specified list of serious offences carrying a life sentence should lead to a discretionary life sentence²⁰ unless there were exceptional circumstances that justified avoiding such a sentence.²¹ The legislature then further intervened by introducing the Criminal Justice Act 2003 and its provisions relating to ‘dangerous offenders’.²² This regime rested on a list of ‘specified offences’ that included over 100 sexual or violent offences. Those that carry a maximum sentence of ten years or more are termed ‘serious offences’. Under section 225 of the 2003 Act as enacted, if a serious offence is committed by someone 18 or over and ‘(1)(b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences’, then the court must impose life imprisonment if the criteria for a life sentence are met. If these criteria are not met, then the court must impose ‘imprisonment for public protection’, which is an indeterminate sentence release from which is treated in the same way as a life sentence.²³ If the offence is not a serious offence then the sentence to be imposed on the finding of risk was an extended sentence under section 227, a period of custody plus extended licence supervision in the community for up to five years for a violent offence or eight years for a sexual offence (but not beyond the maximum sentence for the offence). Furthermore, the prisoner may be placed in custody if they are felt to pose too great a risk during their period on licence.

The UK legislature gave guidance on the assessment of dangerousness in section 229 of the 2003 Act. Under subsection (2), the court:

20 This was called an automatic life sentence: the regime was re-enacted as section 109 of the Powers of Criminal Courts (Sentencing) Act 2000 (UK) when sentencing provisions were consolidated.

21 The English courts held that the exceptional circumstances test would be met when the defendant demonstrated the absence of any need for preventive detention. See *R v Offen* [2001] 1 WLR 253: the Court noted at paras 107ff of the judgement that this approach to the question of exceptional circumstances would avoid the risk of a life sentence being disproportionate and arbitrary and so in breach of the right to liberty under Art 5 European Convention of Human Rights. The human rights framework is discussed further infra.

22 Criminal Justice Act 2003 (UK), Part 12, Ch 5, ss224ff.

23 For those under 18, there is a sentence of detention for public protection, but there is an additional requirement, namely that an extended sentence for a serious offence will not be adequate. The only real difference between a life sentence and an IPP sentence is that the former never expires whereas the latter may be brought to an end if the prisoner has been released and after 10 years on licence is judged not to require ongoing supervision: s31(A) of the Crime (Sentences) Act 1997, inserted by para 2 of Sched 18 to the Criminal Justice Act 2003. The test is whether the Parole Board ‘is satisfied that it is no longer necessary for the protection of the public that the licence should remain in force’.

- (a) must take into account all such information as is available to it about the nature and circumstances of the offence,
- (b) may take into account any information which is before it about any pattern of behaviour of which the offence forms part, and
- (c) may take into account any information about the offender which is before it.

Under subsection (3) as enacted, if the offence was committed when the offender was aged 18 or over and had a previous conviction for a specified offence:

the court must assume that there is such a risk as is mentioned in subsection (1)(b) unless, after taking into account-

- (a) all such information as is available to it about the nature and circumstances of each of the offences,
- (b) where appropriate, any information which is before it about any pattern of behaviour of which any of the offences forms part, and
- (c) any information about the offender which is before it,

the court considers that it would be unreasonable to conclude that there is such a risk.

This regime came into force in England and Wales in April 2005. However, it was amended significantly after only a few years by the Criminal Justice and Immigration Act 2008, ss13ff. The presumption of dangerousness from a previous offence has been repealed so that any finding of dangerousness now gives rise to a discretion to impose a sentence of Imprisonment for Public Protection (IPP) rather than a duty. Furthermore, it is a discretion that only arises if the minimum term that the judge finds is required for the offence is at least two years or the offender had a previous conviction for one of a number of particularly grave offences.²⁴ The rationale for these changes was that a larger number of prisoners had been made subject to IPP sentences than had been expected, with the result that treatment options were

²⁴ There is also an option to impose what is called an extended sentence, which involves additional supervision in the community: this was previously not available for serious specified offences, but now is — so the use of the IPP sentence will only be called for if an extended sentence will not be adequate.

not available for them because of a lack of planning for such courses. The implication of this is considered in the analysis below.

Post-sentence monitoring or detention

There is a second component to the trend towards detention on the basis of risk, which is the use of an order for continued detention at the end of the sentence. In other words, the trend to incapacitate or a risk-focused approach involves action taken either at the time of sentencing or after completion of the punitive sentence.

There are three prevalent forms of legislative regime. One is the existing notification laws, which themselves may have different forms. A common model is that used in various parts of the USA, under which police forces and similar authorities may be allowed to warn people that a convicted sex offender has been released and is living in their area. Title 42, Section 14071 of the US Code,²⁵ the 'Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program', provides guidance on state level programmes, including permission to release information and, at subsection (e)(2), an obligation that information shall be released where that is necessary to protect the public. The aim behind such warning provisions is to allow potential victims and their families to take safeguards. Another approach is that offenders on release have merely to notify the police so as to allow monitoring of them by the police or other relevant authorities (rather than by members of the public). For example, the Sex Offender Register provisions of ss80–92 of the Sexual Offences Act 2003 in England and Wales requires placement on the register for a period depending on the seriousness of the offence.

The next form of protective action is a requirement that an individual be formally managed at the end of his or her sentence, such as by some form of monitoring in the community. This approach also has as its basis the premise that a prospective sentence is an inadequate deterrent, and that the prevention of offending requires additional action. This is the model that has been adopted in New Zealand, using the Extended Supervision Order regime, regulated by Part 1A of the Parole Act 2002.²⁶

²⁵ Accessible at uscode.house.gov/search/criteria.shtml (last accessed 12 December 2010).

²⁶ This was inserted by the Parole (Extended Supervision) Amendment Act 2004.

The third format adopted is the use of a further period of detention at the end of an existing sentence. This approach involves the use of a determinate sentence in the first place, followed by a preventive-based detention on the basis that the offender still poses an unacceptable risk at the end of the sentence, and that monitoring in the community will not be adequate to meet that risk. Although, there is no such sentence in New Zealand, it is used in other countries. The nearest domestic example is the prospect of making an application under section 107 of the Parole Act 2002 to secure the detention of an offender rather than his or her release under the automatic release provisions that used to apply under the Criminal Justice Act 1985.

The starting point for this post-sentence form of preventive detention is the Sexually Violent Predator laws in the USA. As Janus and Prentky have commented: ‘The decade of the nineties ushered in an unprecedented number of state and federal laws intended to manage sexual offenders.’²⁷

This first of these was the Washington Sexually Violent Predator Law of 1990, located, it should be noted, in the Revised Code of Washington under the Mental Illness title.²⁸ The legislative aim behind this can be garnered from the findings set out by the legislature. It is noted that there is a ‘small but extremely dangerous group of sexually violent predators’ for whom the statute authorising civil commitment for mental health reasons is inadequate because ‘sexually violent predators’²⁹ generally have personality disorders and/or mental abnormalities which are unamenable to existing mental illness treatment modalities and those conditions render them likely to engage in sexually violent

27 Eric S Janus & Robert A Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability* (2003) 40 Am Crim L Rev 1443. In fact, this was the second wave of such legislation: from the 1930s, there were statutes in more than half of the states of the USA designed to deal with ‘sexual psychopaths’ by involuntary detention until the person no longer posed a threat as a result of treatment. See John Kip Corwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators* (1996) 53 Wash & Lee L Rev 1293, for an analysis of this first wave. Many of these statutes were repealed by the end of the 1980s ‘principally due to concerns about civil rights and the apparent lack of success of sex-offender treatment programs’: *ibid* at 1297.

28 The Revised Code of Washington, title 71, Mental Illness, specifically Chapter 71.09, available at apps.leg.wa.gov/RCW/ (last accessed 12 December 2010).

29 Defined in section 71.09.020, Definitions as ‘any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.’

behaviour'. There was also a finding that 'sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high' and this risk is not addressed by the existing civil commitment legislation; and that 'the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the Involuntary Treatment Act'.³⁰

The process leading to the imposition of an order involves the identification of a person potentially to be covered by the legislation three months before his or her identified release date from imprisonment for a sexually violent offence.³¹ An application is filed for the person's categorisation as a sexually violent predator.³² Alternatively,³³ if a person who has committed a sexually violent offence has been released and has committed a recent overt act,³⁴ the process may be commenced. The application leads to a hearing to determine whether there is probable cause, following which the defendant is detained and an evaluation is ordered 'by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services'.³⁵ There is then a trial, which can be in front of a jury, to see whether it is possible to show beyond a reasonable doubt that the person is a sexually violent predator.³⁶ If so,

... the person shall be committed to the custody of the department of social and health services for placement in a secure facility operated by the department of social and health services for control, care, and treatment

³⁰ Section 71.09.010, 'Findings' of the legislature.

³¹ Section 71.09.025; the definition of sexually violent offence is in para (15) of 71.09.020 and covers various forms of rape, indecent liberties by forcible compulsion or against a child under fourteen, incest against a child under age fourteen, or child molestation. Also covered are various other offences — murder, assault, kidnapping, burglary or unlawful imprisonment — which are shown either at the time of conviction or subsequently to have been sexually motivated (which must be shown beyond a reasonable doubt). Inchoate offences are also covered.

³² Section 71.09.030, Filing.

³³ Section 71.09.030(5).

³⁴ Section 71.09.020, Definitions — 'Recent overt act' means any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.

³⁵ Section 71.09.040, Sexually violent predator petition — Probable cause hearing — Judicial determination — Transfer for evaluation.

³⁶ Section 71.09.060, Trial — Determination — Commitment procedures.

until such time as: (a) The person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative as set forth in RCW 71.09.092 is in the best interest of the person and conditions can be imposed that would adequately protect the community.³⁷

As has been noted, the legislature has found that there is a need for a special treatment regime for sexually violent predators. Commitment brings with it a right to 'adequate care and individualized treatment'³⁸ and an annual examination and report on the detainee's condition.³⁹ This report may lead to a petition to the court for a declaration that the criteria for detention are no longer met or that conditional release to a less restrictive facility should follow.⁴⁰

This legislation has been followed elsewhere,⁴¹ such as Kansas, where the Sexually Violent Predator Law is part of the Probate Code⁴² and was upheld by the US Supreme Court.⁴³ There are some variations in the legislative model. For example, the Virginia version of the law requires a finding that a person is a sexually violent predator based on 'clear and convincing evidence'⁴⁴ rather than the criminal standard.⁴⁵

Other examples can be found in Australia. Queensland has the Dangerous Prisoners (Sexual Offenders) Act 2003,⁴⁶ which gives as its

37 *Ibid.*

38 Section 71.09.080, Rights of persons committed under this chapter.

39 Section 71.09.070, Annual examinations of persons committed under chapter.

40 Section 71.09.090, Petition for conditional release to less restrictive alternative or unconditional discharge — Procedures.

41 As of 2003, according to John M Fabian, *Kansas v Hendricks, Crane and Beyond* (2003) 29:4 William Mitchell Law Review 1367, 14 states allowed the civil commitment of sex offenders felt too dangerous for release, others required mandatory treatment whilst serving the relevant prison sentence and/or whilst on probation or parole or as a precondition to parole, or ongoing treatment after a parole period.

42 Article 29a of Title 59 of the Kansas Statutes Annotated, available at www.kslegislature.org/legsrv-statutes/index.do (last accessed 19 May 2009).

43 *Kansas v Hendricks* (1997) 521 US 346, *Kansas v Crane* (2002) 534 US 407; the detention was held to be civil in nature and also held to meet the requirements of substantive due process; this is discussed below.

44 Virginia Code §37.2–908 (Title 37.2 — Mental Health, Mental Retardation, and Substance Abuse Services, Chapter 9 — Civil Commitment of Sexually Violent Predators; available at leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC (last accessed 12 December 2010).

45 This is the standard for the civil commitment of a mentally disordered person: *Addington v Texas* (1979) 441 US 418.

46 Statutes are available at www.legislation.qld.gov.au/OQPChome.htm (last accessed 12 December 2010).

objects⁴⁷ the provision of ongoing detention or community supervision ‘to ensure adequate protection of the community’ and continuing control ‘to facilitate their rehabilitation’. This requires an application by the Attorney General in the last six months of a sentence for a ‘serious sexual offence’, defined in the statutory dictionary as a sexual offence involving violence or children. If the court finds that there are reasonable grounds to believe that the prisoner is a serious danger to the community, it may order two psychiatrists to prepare risk assessment reports.⁴⁸ The reports must contain a reasoned conclusion as to ‘the level of risk that the prisoner will commit another serious sexual offence — (i) if released from custody; or (ii) if released from custody without a supervision order being made’.⁴⁹ The final hearing can lead to what is termed a Division 3 order if the prisoner is a serious danger to the community without such an order.⁵⁰

There is no definition of what sort of risk is unacceptable. There is, at least, a standard of proof safeguard in s13,⁵¹ but not one involving the same standard as applicable to criminal proceedings:

(3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied —

(a) by acceptable, cogent evidence; and

(b) to a high degree of probability;

that the evidence is of sufficient weight to justify the decision.⁵²

47 Section 3.

48 Section 8.

49 Section 11(2).

50 Section 13(1).

51 The onus is expressly put on the Attorney General by section 13(7).

52 The statute also sets out the factors to be taken into account in reaching the decision, in section 13(4): ‘(a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists; (b) any other medical, psychiatric, psychological or other assessment relating to the prisoner; (c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future; (d) whether or not there is any pattern of offending behaviour on the part of the prisoner; (e) efforts by the prisoner to address the cause or causes of the prisoner’s offending behaviour, including whether the prisoner participated in rehabilitation programs; (f) whether or not the prisoner’s participation in rehabilitation programs has had a positive effect on the prisoner; (g) the prisoner’s antecedents and criminal history; (h) the risk that the prisoner will commit another serious sexual offence if released into the community; (i) the need to protect members of the community from that risk; (j) any other relevant matter.’

The outcome⁵³ may be an order for detention for an indefinite period, a ‘continuing detention order’, or a ‘supervision order’ with various possible conditions,⁵⁴ and the court must approach this by taking the view that ‘the paramount consideration is to be the need to ensure adequate protection of the community’.⁵⁵ Breaching the conditions of a supervision order is a serious matter. If ‘the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the supervision order’⁵⁶ then a detention order must be made ‘unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can ... be ensured by’ the supervision order, with any suitable amendment. In other words, if the prisoner fails to abide by the set conditions, then the burden falls on the subject to prove why he or she should not be in detention for the protection of the public.

There are similar examples of preventive detention legislation in other Australian jurisdictions. In New South Wales, the relevant legislation is the Crimes (Serious Sex Offenders) Act 2006.⁵⁷

As noted in relation to the Washington statute that started the trend, the detainee has a statutory right to treatment. This can also be found in the Australian statutes. In other words, the corollary of being detained for preventive purposes is a right to receive treatment designed to remove the need for detention for preventive purposes.

As such, the Queensland law provides in section 3 that its objects are: ‘(b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.’

The need for treatment is referred to in various parts of the statute regulating the conditions that might be applied under an order. Similarly, in Western Australia, section 4 gives its objects as including

53 Section 13(5).

54 The possible conditions are mentioned in section 16 and include being supervised, including being visited by or going to visit supervisors, notifying changes of address or work, curfews (which can be monitored by electronic tags), not to commit a further sexual offence, or anything the judge thinks appropriate to protect the community, such as not going within a set distance of a school.

55 Section 13(6).

56 Section 22(1).

57 Available at www.legislation.nsw.gov.au/ (last accessed 12 December 2010). See also the Dangerous Sexual Offenders Act 2006 in Western Australia and the Serious Sex Offenders (Detention and Supervision) Act 2009 in Victoria.

‘control, care or treatment’ of the relevant group; and the Victorian statute notes in section 1 that its purposes include ‘to facilitate the treatment and rehabilitation’ of the offenders covered. The New South Wales statute records that one of its objects is to encourage the undertaking of rehabilitation (section 3). While this is not the same as a right to treatment, it is noted that the grounds for making a detention order (section 17) include the availability of treatment programmes. However, it is clear that this is very much secondary to the aim of protecting the public.

New Zealand

New Zealand’s statutory regime allows ongoing community supervision through Extended Supervision Orders rather than detention. The various Australian statutes noted above also provide for supervision if that will meet the risks posed, with the option for detention if it will not. At first sight, this may seem like a significant difference. In reality, because of the availability of the preventive detention regime in New Zealand, it is not. The difference is that the decision to detain preventively has to be made at the time of sentence, by using preventive detention. It cannot be deferred until the time when the detainee is due to be released from a determinate sentence. In other words, the assessment of risk has to be front-loaded to the time of sentence rather than awaiting the progress (or lack of it) made during the sentence. If the preventively-detained prisoner makes progress during the part of the sentence being served for punitive purposes, namely the minimum term set by the sentencing court, this can be reflected by the Parole Board if the progress is adequate enough to reduce the level of risk so as to allow release.

As has been noted, the acts that create the schemes for post-sentence detention in various parts of the USA and Australia are phrased so that either expressly or by implication the detainee has a right to receive treatment. This is in contrast to the statutory language relating to the preventive detention sentence. However, there is language in various statutes in New Zealand from which, it can be argued, a right to treatment arises. For example, section 28(2) of the Parole Act 2002, which applies to those under preventive detention, provides that the criteria for release are that the Parole Board:

is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence, having regard to —

- (a) the support and supervision available to the offender following release and
- (b) the public interest in the reintegration of the offender into society as a law abiding citizen.

The final part of this section, referring to the public interest in reintegration, is one that can only be secured if the offender is given a correlative right to receive the treatment that will result in that reintegration. In terms of seeking to locate this right in domestic law, the language in the Parole Act is supplemented by the language of the Corrections Act 2004. Section 5 of that notes that:

- (1) The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by —
 - (a) ensuring that the community-based sentences, sentences of home detention, and custodial sentences and related orders that are imposed by the courts and the New Zealand Parole Board are administered in a safe, secure, humane, and effective manner; and
 - (b) providing for corrections facilities to be operated in accordance with rules set out in this Act and regulations made under this Act that are based, amongst other matters, on the United Nations Standard Minimum Rules for the Treatment of Prisoners; and
 - (c) assisting in the rehabilitation of offenders and their reintegration into the community, where appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available, through the provision of programmes and other interventions; and
 - (d) providing information to the courts and the New Zealand Parole Board to assist them in decision-making.

The third of these purposes provides what seems to be a qualified right to treatment, subjected as it is to ‘the resources available’. The other limiting language refers, first, to where it is appropriate to rehabilitate and reintegrate an offender. Unless the offence is serious enough that an offender should be detained for the rest of his or her life, it is arguable that the only circumstance in which it is not appropriate to

seek to reintegrate an individual is when the risk posed by the person is such that incapacitation is the only way to keep society safe. But in this situation, a question might arise as to whether the conclusion is possible without adequate attempts to offer treatment. The additional qualification in the statutory language is that programmes will only be offered when it is ‘reasonable and practicable.’ This seems apt to capture issues such as whether there is a course that is validated, whether the offender is willing to participate and so on.

The second purpose referred to in section 5(1) is the aim to meet international minimum standards, namely those set in the UN Standard Minimum Rules. The relevance of these is described below, under the heading relating to international standards.

These purposes of the corrections system are supplemented by the principles set out in section 6 of the 2004 Act:

6. Principles guiding corrections system

(1) The principles that guide the operation of the corrections system are that —

(a) the maintenance of public safety is the paramount consideration in decisions about the management of persons under control or supervision:

(b) victims’ interests must be considered in decisions related to the management of persons under control or supervision:

(c) in order to reduce the risk of reoffending, the cultural background, ethnic identity, and language of offenders must, where appropriate and to the extent practicable within the resources available, be taken into account —

(i) in developing and providing rehabilitative programmes and other interventions intended to effectively assist the rehabilitation and reintegration of offenders into the community; and

(ii) in sentence planning and management of offenders:

(d) offenders must, where appropriate and so far as is reasonable and practicable in the circumstances, be provided with access to any process designed to promote restorative justice between offenders and victims:

(e) an offender's family must, so far as is reasonable and practicable in the circumstances and within the resources available, be recognised and involved in —

(i) decisions related to sentence planning and management, and the rehabilitation and reintegration of the offender into the community; and

(ii) planning for participation by the offender in programmes, services, and activities in the course of his or her sentence:

(f) the corrections system must ensure the fair treatment of persons under control or supervision by —

(i) providing those persons with information about the rules, obligations, and entitlements that affect them; and

(ii) ensuring that decisions about those persons are taken in a fair and reasonable way and that those persons have access to an effective complaints procedure:

(g) sentences and orders must not be administered more restrictively than is reasonably necessary to ensure the maintenance of the law and the safety of the public, corrections staff, and persons under control or supervision:

(h) offenders must, so far as is reasonable and practicable in the circumstances within the resources available, be given access to activities that may contribute to their rehabilitation and reintegration into the community:

(i) contact between prisoners and their families must be encouraged and supported, so far as is reasonable and practicable and within the resources available, and to the extent that this contact is consistent with the maintenance of safety and security requirements.

Parts of this language are clearly of relevance to the current discussion. Most obviously, the principle in paragraph (h) is consistent with the purpose of the corrections system as set out in section 5, and the caveats in the language are similar. However, many of the other principles support the use of appropriate treatment courses. Public safety is assisted if those whose risk can be reduced or managed more effectively as a result of treatment are given that treatment. Indeed, it has to be noted that 'the public' includes prison officers and other prisoners, whose safety may be compromised by a failure to offer treatment courses.

Victims' interests are also assisted by the use of treatment programmes, and a key part of restorative justice may be that the offender undertakes steps to reduce the prospect of victimising anyone else. Further, the idea of adopting the least restrictive approach to a sentence, as seen in paragraph (g), is consistent with the idea that a prisoner should be in reducing and managing the relevant criminogenic (crime-causing) features, with a view to making progress both towards release and down the levels of the prison security system.

In light of these purposes and principles and the obvious value of rehabilitative treatment programmes in securing them, it is worth exploring to what extent the language of the Acts allows the non-provision of programmes on the basis of resource constraints. In other words, to what extent is there a 'right' to treatment that is so limited by the question of resources that it can not properly be described as a 'right' at all. Additionally, to what extent is the Department of Corrections able to decline to give treatment on the basis of financial constraints. To the extent that the Department is required to make provision, there is a corresponding right to receive treatment.

This is where the experience in England and Wales is potentially of value. As has been outlined above, there was an extension of the preventive detention regime in the form of the Criminal Justice Act 2003, which was scaled back significantly just a few years after its introduction. The background to this is case law from the English courts. The number of prisoners subjected to Imprisonment for Public Protection was more than had been expected. The result of that was that many served the minimum term of their sentence set for punishment purposes (which could be a matter of months only) without any access to offending behaviour courses for the simple reason that there were not enough places available. The inevitable effect of this was that when the Parole Board considered the cases of these prisoners, the risk level that had been found sufficient to justify the sentence of preventive detention had not changed, with the result that there was no realistic prospect of release.

Much of the argument in the case related to whether or not detention was lawful in light of human rights standards that prevent arbitrary detention, which is discussed below.⁵⁸ Another question was whether

⁵⁸ In short, given that the prisoners posed a risk to the public, it was not improper to detain them.

it was rational to introduce the system of preventive detention in the absence of adequate treatment programmes. This was not a challenge to the statute, but a challenge to the decision of the Executive to bring the statute into effect without providing adequate resources to deal with the offenders who would be detained under the regime. The English Court of Appeal⁵⁹ determined that this was a failure of a public law duty, not merely a discretionary choice about resources over which the court had no jurisdiction. The reason for the court's decision was that the inevitable consequence of failing to allow the detained prisoners a fair chance of being released at the expiry of their minimum terms, by providing them with treatment programmes in a timely fashion, was that they were being kept longer than was necessary for punishment or the protection of the public. This conclusion followed from the fact that the protection of the public could be secured by providing the appropriate treatment programmes and allowing the Parole Board to assess whether attendance at them had secured sufficient reduction in risk to allow release, which was the premise of the scheme. A public law duty was therefore in play. Such a duty, naturally, gives rise to a correlative right on the part of the prisoners.⁶⁰

Applying this reasoning to the New Zealand statutory provisions, the argument that can be developed is as follows. As has been noted, there are various grounds on which it can be seen that reform and reintegration into the community is an essential part of detention. This in turn means that the language of sections 5 and 6 of the Corrections Act that refer to the provision of treatment interventions as being subject to resources must be given a limited meaning. In particular, any decision not to make provision for treatment programmes must not breach any public law duty to assist the rehabilitation of offenders. In relation to those subject to an indeterminate sentence based on the risk they pose, the failure to give assistance may be preventing their release, so not giving them a fair chance (the corollary of being detained). For those subject to a determinate sentence, the failure to offer treatment may not only reduce the prospect of parole, but may also lead to the release

⁵⁹ See *R (Walker) v Secretary of State for Justice (Parole Board intervening)* [2008] 1 WLR 1977.

⁶⁰ When the matter proceeded to the House of Lords, as *R (James and Others) v Secretary of State for Justice* [2009] UKHL 22, the Secretary of State accepted that there was a public law duty to provide adequate courses, and did not seek to argue that the question of resources was a matter that meant the courts could not adjudicate.

of prisoners at the end of their sentence without making a difference to the risk they pose to the public, which is simply not rational.

Where does that leave the limiting language in sections 5 and 6 of the Corrections Act, namely that treatment programmes and interventions are to be provided ‘where appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available’? It is suggested that this language is appropriate to indicate that the Department of Corrections cannot be expected to provide what does not exist (for example, treatment interventions that have not been validated, or that require trained staff who simply are not available to the Department). Equally, the Department of Corrections cannot be expected to provide something that will not work for the particular prisoner. In conclusion, the language is not meant to suggest that the Department has a free choice about whether or not to offer treatment to someone who could benefit from it.

Mental health standards

Another line of reasoning about why those detained on the basis of risk are entitled to be provided with treatment is the parallel that exists with the mental health system. It is worth noting that risk-based incapacitation as a model of criminal justice detention is not a new feature of society. Rather, it is a long-standing basis for detention under the mental health system.

Section 2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 has the following definition of mental disorder:

... an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it —

- (a) Poses a serious danger to the health or safety of that person or of others or
- (b) Seriously diminishes the capacity of that person to take care of himself or herself ...

So there has to be a reduced capacity to look after oneself or dangerousness to self or others. The former may be thought obviously relevant in the criminal justice context, though prisons no doubt also

contain a large number of people whose maladaptive behaviour means that they might meet the diminished capacity test.

This definition, however, is subject to the exclusions in section 4 of the Act, including that the provisions of the 1992 Act cannot be invoked in certain situations, including when the concern arises ‘by reason only of ... (c) That person’s criminal or delinquent behaviour; or (d) Substance abuse; or (e) Intellectual disability’. Note the phrase ‘by reason only’. If there is co-morbidity, then the existence of these features plus a mental disorder does not prevent the 1992 Act being used.

In this context, it should be noted that the various classifications of mental disorder — primarily the World Health Organisation’s International Classification of Diseases (ICD-10),⁶¹ and the American Psychiatric Association’s Diagnostic and Statistical Manual (DSM-IV),⁶² include personality disorders of the sort that might well feature in criminal behaviour. A definition given in ICD-10 is that this category of mental disorder:

covers a variety of conditions and patterns of behaviour that are found to be clinically significant in that they are persistent and represent the lifestyle of the individual and the method of interacting with others; in other words, they are enduring patterns of behaviour. They also require some form of extreme or significant deviation from the norm in society.⁶³

In DSM-IV terms, these are called ‘Axis II’ disorders. To what extent does the exclusion in section 4(c) of the 1992 Act exclude someone who has a personality disorder which causes their criminal behaviour? In other words, it is important to recognise the difference between someone who chooses to engage in antisocial behaviour and someone whose enduring pattern of behaviour is not simply a matter of choice. In the case of *Waitemata Health v Attorney General*,⁶⁴ a five-member Court of Appeal considered the case of a man who probably had a personality disorder. There was a dispute about whether the man also had some form of delusional disorder, namely a mental illness. The

61 Currently in its tenth version and is abbreviated as ICD-10, and available at www.who.int/classifications/icd/en/ (last accessed 15 December 2010).

62 Currently in a revised fourth edition abbreviated as DSM-IV-TR.

63 See ICD-10, chapter 5, F60–69, introductory language.

64 [2001] NZFLR 1122.

court noted that the argument in the underlying proceedings (in the Mental Health Review Tribunal) had been addressed in medical terms, largely on the question of whether a personality disorder was a mental disorder. It expressed the following view — which allowed the ongoing detention of the patient — that is worth setting out in full:

[71] It is unfortunate that some of the expert opinions in the present case continue to refer to a distinction between mental illness and behavioural disorders which may not sufficiently mirror the definition of mental disorder and which perpetuates the former arid debate about the difference between the ‘mad’ and the ‘bad’. The language of the Act attempts to avoid that simplistic division. A recognised and severe personality disorder which has the phenomenological consequences identified in the definition of mental disorder (delusions, disorders of mood, perception or volition or cognition) of the severity indicated in the definition (‘serious danger’, ‘seriously diminish[ed] capacity’) would in normal speech be ‘an abnormal state of mind’. It is disturbing therefore that the clinicians ... seem to decline to apply the definition directly, seeing it as a legal matter which must be determined by the Tribunal, rather than a clinical decision. That view has the capacity to undermine their responsibilities under the Act.

[72] So too, there is room for concern that the Tribunal, although allowing that a severe personality disorder might amount to an abnormal state of mind for the purposes of the definition, seems to have taken a narrow view of what constitutes disorders of perception or cognition. Section 4 makes it clear that someone is not to be subjected to compulsory assessment or treatment ‘by reason only’ of criminal or delinquent behaviour. But if the behaviour is caused by disordered thinking or perceptions arising out of an abnormal state of mind of such a degree as to pose serious danger, there is no obvious statutory impediment to a finding of mental disorder. The suggestion that the definition cannot have been intended to apply to a ‘view of the world’ arising from such cause and of such severity (see paragraphs [42–44] above) is not immediately attractive. It is difficult to see how H’s personality disorder can be causative of the danger he is recognised to pose (as the Tribunal accepts) except through disordered thinking or perception. A sense of unease is reinforced by the reasoning that H cannot be said to have an intermittent abnormal state of mind because his personality disorder ‘is most accurately described as a predisposing variable’ and is, moreover, not ‘intermittent’ but an ‘abiding feature’ (see paragraph [45] above).

In other words, the Court of Appeal decided to give a wide definition to the question of disorder in relation to a situation in which there was a desire to secure a preventive detention. So, a disorder of volition, which may encompass many personality disorders of the sort that afflict recidivist offenders, is a mental disorder under the 1992 Act. Section 46 of this Act allows prisoners to be transferred to hospital ('whether or not that person is mentally disordered') if the prisoner 'would benefit from psychiatric care and treatment available in a hospital but not available in the institution in which the person is detained'.⁶⁵ Section 66 of the 1992 Act makes it clear that, 'Every patient is entitled to medical treatment and other health care appropriate to his or her condition'.

The consequence of this is to reinforce the point made above about the irrationality of not treating the risk factor that has led to detention. If that risk factor is a behavioural pattern that amounts to a mental disorder, such that an offender could well be classified and detained under the 1992 Act, it is obviously unfair to have access to treatment rest on whether a person is detained in prison or hospital. This is best countered by concluding that the duty to provide treatment exists in both situations. That in turn provides a match between section 46 of the 1992 Act and sections 5 and 6 of the Corrections Act 2004, which suggest that a treatment programme or intervention that requires a hospital setting may entail a transfer under section 46, rather than requiring the Department of Corrections to go beyond its abilities.

International standards

These arguments regarding the duty to provide treatment are reinforced by international standards. Importantly, as noted above, the Corrections Act expressly gives as one of its purposes the importance of securing compliance with the UN Standard Minimum Rules for the Treatment of Prisoners.⁶⁶ The aim of the Rules is described in rule 1 as setting out

65 And there are various circumstances in which offenders can be sent to hospital rather than to prison.

66 These were adopted first by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which was held at Geneva in 1955; subsequently, they were approved by the Economic and Social Council, which is one of the main standing bodies of the UN: see Chapter X of the Charter of the United Nations 1945. The relevant resolutions are 663 C (XXIV) of 31 July 1957 and 2076 (LXI) of 13 May 1977. The full text of the Rules is available at www2.ohchr.org/english/law/treatmentprisoners.htm (last accessed 15 December 2010). The General Assembly of the UN has given its endorsement to the Standard Minimum Rules by passing a resolution setting out the Basic Principles for the

what is generally accepted as amounting to good practice. The language used in the Rules means that it is difficult to argue that they amount to binding international law, as they do not have the element of obligation behind them that is suitable for the title 'law'. Rule 2, however, does describe them as representing 'the minimum conditions which are accepted as suitable by the United Nations'. This could make them suitable for designation as representing the ideal practice of nations, and so arguably part of international law in that way. In any event, the New Zealand legislature has indicated that the domestic system is based, *inter alia*, on the Rules. This gives them the status as a standard against which the operations of the prison system will be judged in domestic law.

Significantly, the Standard Minimum Rules have provisions that emphasise the importance of providing for the reintegration of prisoners. Most obviously, Part IIA of the Rules notes the following:

58. The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.

59. To this end, the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.

These two rules set out the previously discussed, obviously sensible point, that if a prisoner is to be released to the community, it is best that he or she should be returned in a reformed manner.⁶⁷ Rules 60 and 61 give some more guidance on achieving this. Rule 60 mentions the importance of providing a regime in prison that promotes personal

Treatment of Prisoners, designed to assist the full implementation of the Standard Minimum Rules: General Assembly resolution 45/111 of 14 December 1990, available at www2.ohchr.org/english/law/basicprinciples.htm (last accessed 15 December 2010).

67 There are several other relevant rules: r64 requires 'efficient after-care directed towards the lessening of prejudice against him and towards his social rehabilitation'; r70 suggests that there should be privilege systems 'in order to encourage good conduct, develop a sense of responsibility and secure the interest and co-operation of the prisoners in their treatment'; and r79 and following relate to the maintenance of social relationships that might assist the social rehabilitation of the prisoner.

responsibility, and of providing a gradual return to society through pre-release programmes or parole. Furthermore, Rule 61 notes the importance of emphasising that prisoners remain part of the community, which in turn requires social rehabilitation.⁶⁸

When the prospect of return to the community may turn on whether the risk posed by the prisoner is reduced, the most obviously relevant provisions are rules 65 and 66, which, under the heading of 'Treatment', provide as follows:

65. The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.

66. (1) To these ends, all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release.

(2) For every prisoner with a sentence of suitable length, the director shall receive, as soon as possible after his admission, full reports on all the matters referred to in the foregoing paragraph. Such reports shall always include a report by a medical officer, wherever possible qualified in psychiatry, on the physical and mental condition of the prisoner.

(3) The reports and other relevant documents shall be placed in an individual file. This file shall be kept up to date and classified in such a way that it can be consulted by the responsible personnel whenever the need arises.

The purpose of these provisions is undoubtedly to ensure that an appropriate individualised plan is put in place, which picks up the requirements of rule 59, already noted above. See also rule 63, which refers to the principles set out and notes that their fulfilment 'requires

68 Various parts of the rules give further content to this: for example, rule 71 notes the need for work in prison which should be of a sort that might assist a prisoner to earn an honest living once released; and rule 77 emphasises the importance of education.

individualization of treatment and for this purpose a flexible system of classifying prisoners in groups' and supports the use of separate facilities that are suitable for the treatment of the different groups according to their needs.⁶⁹ Rule 69 makes this plain:

69. As soon as possible after admission and after a study of the personality of each prisoner with a sentence of suitable length, a programme of treatment shall be prepared for him in the light of the knowledge obtained about his individual needs, his capacities and dispositions.

This is supplemented by various other parts of the Standard Minimum Rules. So, rule 22 requires the provision of a medical officer at a prison and a psychiatric service for the diagnosis and treatment of 'mental abnormality'.⁷⁰ Further, rule 49 (which is part of the rules that deal with the other personnel that a prison should have) refers to the need to have, so far as possible, 'a sufficient number of specialists such as psychiatrists, psychologists, social workers, teachers and trade instructors'. Finally, there is rule 62, which provides that:

62. The medical services of the institution shall seek to detect and shall treat any physical or mental illnesses or defects which may hamper a prisoner's rehabilitation. All necessary medical, surgical and psychiatric services shall be provided to that end.⁷¹

These provisions indicate that there is a duty to treat mental disorder, of which an example is likely to be the sort of persistent criminality that leads to recidivism, unless there is an explanation for the conduct that does not represent a clinically significant maladaptive pattern of behaviour.

Also worth noting in this context is the major human rights treaty to which New Zealand is a party, the International Covenant on Civil and Political Rights 1966.⁷² In particular, Article 10 provides that:

69 Rule 63(3) notes that 'It is desirable that the number of prisoners in closed institutions should not be so large that the individualization of treatment is hindered'. See also rule 67, which notes that prisoners should be divided into classes 'in order to facilitate their treatment with a view to their social rehabilitation'.

70 In this context, see the discussion of mental disorder above.

71 See also rules 82 and 83, which requires the treatment of 'insane' prisoners in appropriate institutions (not prisons), and the proper management of those who suffer from 'other mental diseases or abnormalities'.

72 GA Res 21/2200A, UN GAOR Supp (No. 16), 21st sess, 1496th plen mtg, at 52, A/6316 (1966); available at www2.ohchr.org/english/law/ccpr.htm (last accessed 15 December 2010). New Zealand became a party to this Covenant by ratifying it on 28 December 1978.

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

...

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

The importance of this is that New Zealand has undertaken as a matter of its international law obligations that it will seek to secure reformation and social rehabilitation of prisoners, and any failure to do so might lead to a claim before the Human Rights Committee of the UN.⁷³ It is also relevant to note that the courts in New Zealand, when they are interpreting domestic statutes, will seek to give effect to international obligations as far as is possible.⁷⁴ This reinforces the suggestion made above that the limiting language of sections 5 and 6 of the Corrections Act 2004 will be given a narrow interpretation, so as to provide a wider substance to the right to be treated.

73 Under the First Optional Protocol to the ICCPR, also of 1966, to which New Zealand became a party on 26 May 1989.

74 See *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) and *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA).