Winston Churchill Memorial Trust Fellowship Report

Community Safety and Offender Rights

Travel to Washington State and Minnesota to investigate whether and how to reform New Zealand's law protecting communities from offenders on release from prison

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Wellington 2018

Acknowledgments

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I also wish to thank my employer the Department of Corrections for supporting me to carry out this research.

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Wellington, 2018

[Cover Image: McNeil Island Special Commitment Centre]

Disclaimer

All views expressed in this report are my own and do not represent the views of the Department of Corrections.

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Introduction

This project is about the laws utilised by the state in New Zealand to protect communities by imposing continuing legal restrictions and detention upon people who may still be dangerous on release from prison. It investigates whether they are compliant with the New Zealand Bill of Rights Act 1990. Whether they are compliant or not is not just important for the rights of the people upon whom these restrictions have been imposed. It is important for the rights of everyone in New Zealand. We should be intolerant of laws that are not compliant with the Bill of Rights, because - if it becomes acceptable to have such laws - then this makes it easier for Parliament to pass more such laws in the future.

Every year people who have committed serious offences are released from prison back into New Zealand communities. Many of them will integrate back into the community well, but not all. Some would, if released pose a major threat and put severe stress on their receiving communities.

The Department of Corrections strives to rehabilitate these individuals, but this is a difficult task.

In the meantime, such individuals will continue to be released. We need to protect communities to the best of our ability, while also protecting the rights of individuals who have served their time and need the space to rebuild their lives. The way that communities are protected at the moment is by imposing legal restrictions in the form of court imposed orders known as “extended supervision orders” and “public protection orders”.

This project is also about human rights, and the checks and balances that exist to try and safeguard these rights against undue interference from laws made by Parliament.

The problem with imposing legal restrictions on people after they have served their prison sentence, is that it might infringe against the right not to be punished for the same offence more than once (otherwise known as “double jeopardy”). In order for such restrictions to avoid infringing against double jeopardy, it is important that they are not imposed for the purpose of punishing the offender. The offender has already been punished (they have served their prison sentence) and there can be no further punishment. Prison sentences are imposed for a number of reasons. The primary reason is punishment which – in turn – is supposed to deter crime, and displace the kind of tit-for-tat blood feuds that can arise in the absence of state imposed punishment. The other reason is public safety. By detaining the offender in a secure facility it is hoped that this will prevent them from inflicting further harm on the community, and provide for opportunities to rehabilitate them. The important thing to realise about prison sentences is that there is no requirement for them to serve any public safety function. A person may have committed a serious crime but everyone agrees that it was a one-off and there is no reasonable prospect of it happening again. There is no public safety reason to detain that person, but they are still detained in prison in order to serve as an example and deter others from committing serious crime.

However, if the state is to impose detention or other restrictions on somebody who has already been punished, then it becomes important to be convinced that these restrictions really are necessary for public safety. For example, they need to be more along the lines of quarantine

restrictions are imposed on someone who has a notifiable disease. There is no question that someone who is being quarantined is not being punished. They may feel like they are being punished and they may experience significant distress and inconvenience, but that is merely a side effect and is not the prime objective. It is also important to be convinced that these restrictions are not more restrictive than is necessary to protect public safety. If there was another way to safeguard public safety that was less restrictive than a restriction which has been imposed, then this casts doubt on whether that restriction can be justified in terms of human rights.

This project investigates whether New Zealand has struck the right balance between protecting communities and protecting the rights of former offenders who have completed their sentences.

One of the main reasons that this question arises is that some of these laws (i.e. extended supervision orders) that impose restrictions on former offenders were, at the time they were made, reported by the Attorney-General to Parliament as being inconsistent with the New Zealand Bill of Rights.

If the Attorney-General is right about this, then this makes it more difficult to justify the continued presence of the laws on our statute books in their present form.

This project attempts to decide whether the laws are justified in their present form. If not, is reform necessary? And ,if reform is necessary, what form should it take?

In order to help try and answer this question, I was funded by the Winston Churchill Memorial Trust to travel to Washington State and Minnesota to study their laws and experiences to see what can be learned and how New Zealand compares. These US States have faced and to some extent overcome challenges in drafting and implementing similar “civil commitment” legislation, including having it declared unconstitutional by the Federal Courts. These initial declarations have now been remedied, and the Supreme Court is now satisfied that the laws of these states are constitutional.

How well does New Zealand law compare with the laws of these States? If the comparison is favourable then perhaps concerns about the human rights compliance of our laws is misplaced. If our laws fall short of the standard set by these US states, then this gives is more reason to look at reforming them.

Legislation in New Zealand

In New Zealand, the main legal mechanism for protecting the public has – since 2004 – been extended supervision orders[1]. These orders were supplemented in 2015 by public protection orders[2].

Once a prisoner has reached the end of his or her sentence and must be released, the Department of Corrections may – if there is concern about a continuing threat to the public - apply to the courts for either an extended supervision order[3] or a public protection order[4] to be imposed. Because these people have already been punished for the offences of which they were convicted, some have expressed concern that extended supervision orders may amount to punishing someone twice for the same offence. The same criticism could be made in respect of public protection orders.

Extended Supervision Orders

The imposition of an extended supervision order subjects the recipient to reporting requirements, and allows probation officers to have control over a number of aspects of their life such as where they can live and work and who they may associate with[5]. It also allows the Parole Board more significant powers, such as the ability to impose 24 hour home detention or 24 hour intensive supervision for up to 12 months.[6]

Extended supervision orders are imposed for a set amount of time up to ten years, but they can be renewed indefinitely if the person is still considered dangerous enough to meet the legal tests.

To impose an extended supervision order the court must be satisfied that there is a high risk that the person will in future commit a sexual offence, or a very high risk that they will commit a violent offence, and there are other matters the court must be satisfied of on top of this.[7] In particular, the court must also be satisfied[8] - after hearing from expert witnesses - that the person displays or possesses a number of characteristics. These differ depending on whether the primary risk is non-sexual violent offending, or sexual offending.

The sexual offending characteristics are:

- the offender displays an intense drive, desire, or urge to commit a relevant sexual offence
- the offender has a predilection or proclivity for serious sexual offending
- The offender has limited self-regulatory capacity
- The offender displays either or both of the following:

[1] Extended supervision orders were brought in by the Parole (Extended Supervision) Amendment Act 2004.
[2] Public Protection Orders were brought in by the Public Safety (Public Protection Orders) Act 2014.
[3] Under section 107F of the Parole Act 2002.
[4] Under section 8 of the Public Safety (Public Protection Orders) Act 2014.
[5] See section 107JA (1) of the Parole Act 2002 for the full list of standard extended supervision conditions
[6] See section 107K of the Parole Act 2002 for a full list of the special conditions that can be imposed by the Parole Board.
[7] See section 107I(2) of the Parole Act 2002.
[8] See section 107IAA of the Parole Act 2002.

(i) a lack of acceptance of responsibility or remorse for past offending:
(ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.

The violent offending characteristics are:

- The offender has a severe disturbance in behavioural functioning established by evidence of: (i) intense drive, desires, or urges to commit acts of violence; (ii) extreme aggressive volatility; and (iii) persistent harbouring of vengeful intentions towards 1 or more other persons
- The offender either (i) displays behavioural evidence of clear and long-term planning of serious violent offences to meet a premeditated goal; or (ii) has limited self-regulatory capacity
- The offender displays an absence of understanding for or concern about the impact of his or her violence on actual or potential victims.

The fact that it is not sufficient under the law for the court to consider that there is a high or very high risk of offending, and that it also must be satisfied that the person has these characteristics, can be confusing at first. What if the court can't be sure that the person displays one of the characteristics (for example, it can't be sure that the person has limited self-regulatory capacity) but it nevertheless thinks that they pose a high risk. Why should that be a reason not to take precautions?

The rationale for this extra step is that it is a recognition that judges are not experts in psychiatry or psychology. A person is unlikely to pose a high risk unless they have these characteristics, and so the court should be satisfied of this before concluding that someone poses a high risk.

Public Protection Orders

The imposition of a public protection order results in the recipient being detained in a purpose built public protection residence. It may be imposed only if the court is satisfied that there is a very high risk of serious sexual or violent reoffending if the person is released into the community or left unsupervised.[9]

As with extended supervision orders, there are other matters about which the court must also be satisfied, including the possession of certain characteristics by the intended recipient.

The court must be satisfied that the person exhibits a severe disturbance in behavioural functioning established by evidence to a high level of each of the following characteristics:

- an intense drive or urge to commit a particular form of offending.

- limited self-regulatory capacity, evidenced by general impulsiveness, high emotional reactivity, and inability to cope with, or manage, stress and difficulties.

[9] See section 13 of the Public Safety (Public Protection Orders) Act 2014.

- absence of understanding or concern for the impact of their offending on actual or potential victims.

- poor interpersonal relationships or social isolation or both.

The rationale for having these additional matters about which the court must be satisfied is the same as with extended supervision orders, it is intended to harness expert opinion in order to increase the chances that decisions to impose public protection orders are only made in situations where the person really does pose a significant risk.

The relevance of the New Zealand Bill of Rights Act 1990

Parliament in New Zealand has supreme power in a way that many overseas legislatures do not. In the United States, for example, laws made by Congress can be struck down by the courts if they are inconsistent with the US constitution. New Zealand has no such constitution that can be used by the courts to strike down laws.

The advantage of the New Zealand system is that it is more democratic. In New Zealand the supreme power rests with a democratically elected body (Parliament), not a Supreme Court like the US Supreme court which is made up of political appointees.

The disadvantage of the New Zealand system is that - in theory - there might be no limit to the kinds of laws that the New Zealand Parliament could pass, and the courts would have no choice but to enforce them[10].

The New Zealand Bill of Rights Act 1990 is an important mechanism which attempts to provide something of a safeguard against Parliament abusing its power. It describes a number of human rights and freedoms such as: the right not to be deprived of life; freedom of expression; liberty of the person and electoral rights and the right not to be punished twice for the same offence. These can be subject to legally prescribed limits, but the Bill of Rights Act states they should only be such reasonable limits as can be demonstrably justified in a free and democratic society. The Bill of Rights Act applies only to the three branches of government (the legislature, executive and judiciary) and any other person or body exercising governmental powers or functions.

The courts are required, when interpreting other legislation, to always strive to find a meaning which is not inconsistent with the rights and freedoms in the Bill of Rights Act. This provides something of a check on the powers of Parliament in that, if Parliament really is determined to make a law that the courts may consider to be inconsistent with the Bill of Rights, then it must be very clear about what it is doing. It can't quietly smuggle it in. And if Parliament leaves the courts any wiggle room for a rights-consistent interpretation, the courts will take it (and are in fact obliged to).

However if a law appears to the court to be unavoidably inconsistent with the Bill of Rights Act, and the court can find no way to interpret it in a rights-consistent way, then the courts must nevertheless enforce it.

[10] Although there are potentially some limits to this. As explained by Lord Cooke, the judiciary might decline to enforce extreme laws, such as a law to authorise torture (see Cooke, Robin, "Fundamentals" [1988] NZLJ 158.)

There is another effect of the Bill of Rights Act on Parliament's power to make laws that is much more subtle. Ultimately, the Bill of Rights Act doesn't provide any legal constraint on that power. As explained above, Parliament is supreme and can pass whatever laws it likes. However the Bill of Rights Act does have a mechanism whereby the Attorney-General is required to bring to the attention of Parliament any Bill that appears to be inconsistent with any of the rights and freedoms in the Bill of Rights. The idea is that Parliament will think twice before approving such a Bill. It may make amendments to the Bill to try and make it consistent, or it may refuse to approve it. In practice the main effect of this mechanism is at a lower level. When a Department is working on a new bill, a draft is sent to a human rights team at the Ministry of Justice (or sometimes Crown Law). That draft is examined, and any potential inconsistencies are pointed out. The Department responsible for the Bill then usually finds a way to iron out these inconsistencies and produce a more rights-consistent bill. In this way the Bill of Rights Act has a very positive and largely invisible effect in helping to ensure that new laws do not trample unduly on the rights of citizens.

But sometimes those inconsistencies are not ironed out. For whatever reason, the officials and the Minister responsible for the Bill cannot find a way to achieve their legislative objectives in a way that the officials at the Ministry of Justice consider to be consistent with the Bill of Rights. In such cases the Bill may still be introduced to Parliament, and officials will inform the Attorney-General of their opinion that it is inconsistent. If the Attorney-General agrees, he or she is required to write what is known as a "section 7 report" (named after the section that requires him or her to write the report) to inform Parliament of this apparent inconsistency. If the Attorney-General makes a section 7 report on a Bill then (according to the way that successive AGs have interpreted their role) this doesn't mean merely that he or she thinks that it limits one of the rights or freedoms in the Bill of Rights. It means that he or she thinks that these limits are not reasonable limits as can be demonstrably justified in a free and democratic society.

It is not common for a Bill to get a section 7 report, but there has nevertheless been a steady trickle of Bills receiving them over the years since the Bill of Rights Act was passed. More often than not these Bills pass into law without the offending provisions being addressed. This does not necessarily mean that Parliament or its members do not care about the consistency of laws with the Bill of Rights. If you were to ask an MP why he or she voted for it despite the Attorney-General's concerns they would be unlikely to say that they don't think the Bill of Rights is important. They would probably (if they were knowledgeable about the Bill of Rights Act) be more likely to say that they disagree with the Attorney-General, and that either the proposed law does not limit any rights, or – if it does – that those limits can be demonstrably justified in a free and democratic society.

The fact that there have been a number of Bills that received section 7 reports and which passed anyway could be seen as an indictment of the Bill of Rights Act, and evidence that it is not having a beneficial effect. This would be an unwarranted conclusion because – as mentioned above – much of its value lies in the unseen process whereby draft Bills are amended and revised in an effort to avoid getting a section 7 report.

Nevertheless, it is puzzling and unsettling for the public to realise that New Zealand has laws on its statute books that various Attorney-Generals have reported – at the time of their passage – as being inconsistent with the Bill of Rights in a way that cannot be demonstrably justified in a free and democratic society. We should try to minimise this phenomenon and - if possible - eliminate it

altogether, lest it encourage the belief that it is somehow normal or acceptable to have laws that the Senior Law Officer of the Crown (the Attorney-General) considers to not be demonstrably justifiable in a free and democratic society.

The existence of these potentially inconsistent laws also brings with it the risk that litigants could ask the courts for a declaration of inconsistency with the Bill of Rights Act 1990. Such a declaration has only happened once (in 2015, with respect to a law which disenfranchised prisoners from voting) but this paucity of declarations doesn't mean we can conclude that the courts think that the rest of the laws are consistent. Applications for declarations of inconsistency are rare and this is at least in part due to the fact that: (i) it was not determined that the courts would make such declarations until 2015; and (ii) there is no substantive remedy for an applicant who successfully obtains a declaration (they just get to exert pressure on Parliament to change the law and make it more rights-consistent).

It is possible that we could start to get more declarations of inconsistency[11], and if we see more and more laws that both the courts and an Attorney-General have said are inconsistent with the Bill of Rights, and that nevertheless are allowed by Parliament to remain on the statute book to be reluctantly enforced by the courts, then this risks further normalisation of the idea that such laws are acceptable and nothing to worry about.

We need to look for opportunities to reduce the number of laws that fall into this basket.

This brings us to extended supervision orders. When these orders were first created by the Parole (Extended Supervision) Amendment Act 2004, they were the subject of a section 7 report identifying them as inconsistent with the New Zealand Bill of Rights Act. Since 2004 there have been a number of Bills which expanded the scope of extended supervision orders, and these Bills have also received section 7 reports. The potential also exists that litigants will apply to the courts for a declaration that extended supervision orders are inconsistent with the Bill of Rights Act.

Public Protection Orders were created by the Public Safety (Public Protection Orders) Act 2014. This Bill did not receive a section 7 report, but the possibility of an application for a declaration of inconsistency nevertheless remains.

The objective of this project is to try to remove extended supervision orders and public protection orders from the list of potentially inconsistent laws, and thereby increase the status of the New Zealand Bill of Rights Act and the protection it provides to all of our rights.

There are two ways this could be done.

Firstly, we can examine whether there are opportunities to amend the legislation that creates extended supervision orders and public protection orders, so that their objective (protecting the public) is achieved in a more rights-consistent manner.

[11] This would particularly be the case if Cabinet follows through on its intention, announced in February 2018, to provide a statutory requirement for Parliament to respond to declaration son inconsistency by the courts (see media statement "Government to provide greater protection of rights under the NZ Bill of Rights Act 1990" on 26 Feb 2018. http://www.scoop.co.nz/stories/PA1802/S00257/government-to-provide-greater-protection-of-rights.htm

Secondly and alternatively, we can examine whether the arguments against these laws really stack up. Do these laws really limit rights in a way that cannot be demonstrably justified in a free and democratic society? If it can be shown that they do not, then this strengthens the notion that the Bill of Rights Act is a mechanism that deserves to be respected, and is respected, by Parliament.

To assist in this task I travelled to Washington State and Minnesota to study their laws and processes for protecting the community against dangerous former offenders.

Washington State: Research and findings

Research

I travelled to Seattle in Washington State on 8 November 2016 and departed on 15 November. My primary host was Malcolm Ross (Section Chief, Sexually Violent Predator Unit, Washington State Office of the Attorney General).

I had intended to arrive in Seattle on Monday 7 November and meet with the Washington State Office of the Attorney-General at 9am on Tuesday 8 November. My flight out of Auckland was delayed however, and so I managed to get a message through that I would be late, and I arrived in Seattle in the late morning on 8 November. Staff at the office were nevertheless waiting with coffee and donuts and had prepared a series of talks and discussions to explain the history and current state of legal efforts to protect communities from sex offenders in their State.

Assistant Attorney-General Josh Studor began with a talk outlining the history of the management and commitment of dangerous persons in the United States. He explained how efforts in the early 20th century were more about the enforcement of Victorian sexual norms, and were linked to the temperance movement. Brooklyn had a "known degenerates" list, but it mostly consisted of gay men or prostitutes.

By the thirties a number of states, such as Michigan, had laws dealing with "sexual psychopaths". If a court declared someone to be a sexual psychopath then they could be committed to a hospital indefinitely, and there was no clear legal route to get out. Interestingly, it was not always necessary to have been convicted of any offence in order to be declared a sexual psychopath.

Over the years these laws lost credibility. They were often used to commit people who were "deviant" rather than "dangerous" (for example transgender individuals). They were also used to commit people when there was not enough evidence for a criminal conviction. By the 1990s most of the laws were repealed.

It was a sequence of tragedies in Seattle that sparked the re-emergence of civil commitment laws in Washington State. A young Seattle woman was murdered by a work release inmate with a history of violent sexual offences, and a young Tacoma boy was brutally assaulted and mutilated by a recently released sex offender. Governor Booth Gardner created the Task Force on Community Protection, which held public hearings and heard from experts. It made recommendations for new laws, which resulted in the Community Protection Act of 1990. This Act was unanimously passed in both houses.

Malcolm Ross then gave a presentation giving a general outline of the current law (more on that later).

The following day (Wednesday 9 November) I was given a presentation from Assistant Attorney-General Kristie Barham. This focussed on the management option known in Washington State as the "least restrictive alternative" whereby individuals who had been detained could be released into the community with conditions if it could be shown that this less restrictive alternative was still adequate to protect the community.

I then gave a talk outlining New Zealand's laws and systems, followed by a discussion. Staff from the Attorney-General's office were interested in particular by the fact that New Zealand's laws also applied to purely violent offenders with no sexual offending risk.

We then had a talk from another Assistant Attorney-General, Brooke Burbank, about the constitutionality of the Community Protection Act of 1990, and a history of the legal challenges it has faced.

On Thursday I travelled to Pierce County to sit in on a hearing for a sexually violent predator case. I also had the opportunity to meet with a judge in chambers and discuss the application of their laws, and the differences to New Zealand law.

Friday was a public holiday. After the long weekend, I was taken by Malcolm Ross for a tour of the McNeil Island Special Commitment Centre. McNeil Island lies 70 km to the south of Seattle. The Special Commitment Centre is the only establishment on the island, and accommodates all of the people who are detained as "sexually violent predators" in Washington State. The Centre used to be a prison, and has a long history. Robert Stroud, who later became known as the Birdman of Alcatraz, stabbed and killed a guard there in 1916. Notorious murderer and cult leader Charles Manson was imprisoned there in the 1960s.

The only way on to the island is via a ferry from the nearby town of Steilacoom. The ferry is operated by the Washington State Department of Social and Health Services, and there is a high degree of security just to get on to it.

There are 260 persons detained as sexually violent predators on the island. All of them are men except for a single woman who is the sole occupant of the woman's wing. She actually mixes with the men during the day in the common areas. I was shown around the whole facility, including accommodation, kitchens, a gym, outdoor exercise yard, assembly hall and library. The detainees were going about their business and often stopped to chat with us in a friendly manner as we moved around. It was a well-equipped facility, and conditions seemed reasonably good.

Findings

The relevant law in Washington State is the Community Protection Act of 1990. This requires that every sex offender must be reviewed by an "End of Sentence Review Committee" prior to being released. They are assessed to determine if they potentially meet the legal definition of a "sexually violent predator".

To meet the test a person must suffer 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. If the committee thinks that a person does potentially meet the test then they are detained pending an investigation by the prosecutor and a "probable cause" hearing before a County Superior Court. If the judge in that hearing considers that there is probable cause to believe that the person is a "sexually violent predator" then the detention of that person will continue pending a civil commitment trial. At the trial the person may opt for a judge or a jury to decide whether they are convinced beyond reasonable doubt that the person meets the legal definition of a "sexually violent

predator". If they do then they are committed for indefinite detention in the Special Commitment Centre on McNeil Island.

Detainees are entitled to annual reviews of their commitment in the Centre. They may be released if a court or jury considers that their condition has changed such that they no longer meet the definition of a sexually violent predator.

They can also be released if it can be shown that they are suitable for what is called a "less restrictive alternative placement". This sees the person placed in the community subject to conditions that are adequate to protect the community, and it is roughly equivalent to an extended supervision order in New Zealand.

Washington State and the Community Protection Act is noteworthy because Washington was the first state to pass this kind of legislation in 1990. It was also the first State to run into legal difficulties. It was challenged in the courts as unconstitutional, and by 1994 a Federal court had declared the legislation was in fact unconstitutional.

There were three main reasons for this.

The first was that the period of time that a person could be detained after initial identification as a potential "sexually violent offender" by the End of Sentence Review Committee, was often longer than 72 hours. This was considered to be too long given that the Committee was not a judicial body.

The second was that the treatment offered to the person while detained under a commitment order was not adequate. A commitment centre should not be treated as a dumping ground for irredeemable souls. Efforts need to be made to rehabilitate residents so that there is some prospect for them to leave the commitment centre and safely re-enter the community.

The third issue was that the main pathway for residents to leave the Commitment Centre via "less restrictive alternative placement" was effectively blocked because there was a lack of housing options for residents to transition into.

The courts didn't stop the programme, but instead issued a "contempt" penalty to Washington State which amounted to $50 per day per resident until the State had addressed these issues. This built up and was held in escrow against the day that the State was successful in its reform. The courts held annual hearings to assess progress. Washington State worked hard to address the criticisms of its legislation, and by 2004 sufficient progress had been made that no more penalties were payable.

By 2007 the landmark case of Kansas v Hendriks[12] saw the US Supreme Court rule that Kansas's sexually violent predator legislation (which was modelled on Washington's Community Protection Act as modified) was constitutional. This was on the basis that it was accurately targeting persons who were genuinely dangerous, and so was genuinely preventative and not punitive. This ruling meant that Washington's Community Protection Act (as modified) was also regarded by the Supreme Court to be constitutional.

In terms of human rights, there are a few ways in which the New Zealand system compares well with Washington State.

[12] (1997) 521 U.S. 346, 351

In Washington State there is – initially – no option to protect the community from a released offender other than though detention in the McNeil Island Special Commitment Centre. The person can apply for a "less restrictive alternative placement" but first they have to serve at least a year in detention in the special commitment centre on McNeil Island. By contrast, in New Zealand the "less restrictive alternatives" are – in the form of extended supervision orders – available as soon as a person is released from prison. Detention in a facility (via public protection orders) are the last resort, not the first resort, and is reserved for the "worst of the worst". So in this way the impact on the rights of offenders in New Zealand is more limited and proportionate to the risk that the offender poses.

Another way in which rights in New Zealand seem better protected is that in New Zealand there are constraints put on the judge's exercise of discretion that are designed to increase the chance that decisions to impose orders are only made when there is a genuine risk. As described above, it is not enough for the court to think that that a person poses a significant risk. It is also necessary for the court to be satisfied that the person displays the types of characteristics that experts consider to be usually displayed in persons that pose that kind of risk. This is an additional protection against unwarranted detention or other restrictions that does not exist in Washington State.

Probably the most significant difference is that in New Zealand the court always retains a discretion as to whether or not to impose an order. Even if the legal tests are met the court does not have to grant the order. The court may grant it. This is a critical advantage for safeguarding rights, because it means that the court is able (and in fact required) to give effect to the Bill of Rights when deciding whether to grant an extended supervision order or a public protection order. If the court considers that – in a particular case - the granting of such an order would be inconsistent with the Bill of Rights in a way that is not demonstrably justifiable in a free and democratic society then it may (and in fact must) exercise its statutory discretion so as to decline to grant the order. And if it grants it then neither the court nor the Parole Board is permitted under the law to impose greater restrictions than are necessary to protect the public. By contrast, in Washington the court (or jury) has no such discretion. If the court determines that the person meets the test and qualifies as a sexually violent predator, then the person "shall" be placed in a secure facility.

But there are other ways in which it could be argued that Washington State is doing a better job of protecting the rights of the people being considered for such legal measures.

Unlike New Zealand, in Washington State the person has the ability to opt for a jury, instead of a judge, to decide whether an order should be imposed on them. In theory this provides protection against the prospect of a corrupt, incompetent or expedient state or judiciary imposing unwarranted orders against people who do not pose significant risk. In practice, people in Washington State almost always opt for a judge anyway, rather than a jury, because their lawyer advises them of the fact that juries are generally much more eager to impose restrictions on former offenders than judges.

The New Zealand laws are broader in scope in that they can also apply to persons for whom the risk of re-offending is restricted to non-sexual violent offending. Washington State's laws only apply in relation to those at risk of sexual re-offending. This means that the potential pool of people who could potentially receive orders is much larger in New Zealand. While this provides more protection

for the public against potential harm from violent former offenders, it also increases the number of people who could potentially become subject to orders.

In Washington State, the legal standard of proof for a determination as to whether someone meets the definition of a "sexually violent predator" is beyond reasonable doubt. This is not the case for New Zealand legislation. For extended supervision orders, the test is merely that the court is satisfied [13] that there is a high risk or (in the case of risk of violence) a very high risk. For public protection orders the court must be satisfied on the balance of probabilities, which is a lower standard than beyond reasonable doubt.

[13] See section 107I of the Parole Act 2002.

Minnesota: Research and Findings

Research

I travelled to Minneapolis-Saint Paul in Minnesota on the 4 April 2017 and spent three days (5, 6, and 7 April) with the Department of Human Services. The Department is responsible for administering the Minnesota Sex Offender Program. My main hosts were Robin C. Benson (Deputy General Counsel) and Nancy Johnston (Executive Director Minnesota Sex Offender Program). I interviewed them on the details of their system, discussed the differences to the New Zealand system, and they provided me with documentation describing how their system works. I also sat in on some hearings. On the morning of the Saturday 8 April, I met with Professor Eric Janus who is President and Dean of William Mitchell College of Law, and the author of a book on America's sexual predator laws.[14]

Findings

The key piece of legislation is the Minnesota Civil Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities, which was passed by the Minnesota Legislature in a special session in 1994. As they reach the end of their sentences, all individuals convicted of sex offences are reviewed to assess their risk of re-offending. If there is concern about re-offending then an application may then be made – by the county in which their offending occurred – for the person to be committed to a secure treatment facility. The legal test is that the court must find by clear and convincing evidence that the person is either a "sexually dangerous person" or a "person with a sexual psychopathic personality". These are terms that are defined in the legislation.

"Sexual psychopathic personality" means the existence in any person of such conditions of emotional instability, or impulsiveness of behaviour, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons.

A "sexually dangerous person" means a person who: (1) has engaged in a course of harmful sexual conduct as defined in subdivision 8; (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct as defined in subdivision 8. For purposes of this provision, it is not necessary to prove that the person has an inability to control the person's sexual impulses.

Once an order has been imposed it cannot be discharged unless a judicial appeal panel is satisfied that the person is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision.

[14] Eric S Janus. Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State. Cornell University Press 2006.

By the early 2000s there were growing numbers of sex offenders being committed under this law, and there was concern that no-one had ever been fully discharged.

In 2015 a Federal court in the case of *Karsjens et al v Minnesota Department of Human Services*[15] declared Minnesota's statutes governing civil commitment and treatment of sex offenders to be unconstitutional, both as written and as applied. One of the key problems as identified by the court was that persons could continue to be detained subject to the order even though they might no longer meet the criteria that got them committed in the first place. The court remarked that "the stark reality is that there is something very wrong with this state's method of dealing with sex offenders in a program that has never fully discharged anyone committed to its detention facilities … since its inception in 1994." The court concluded no-one has any realistic hope of ever getting out of civil detention, and that Minnesota's scheme was "a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system."

Other problems identified by the court included:

- The was no legal requirement for periodic risk assessments to ensure that continuing detention is justified
- The burden of proof for discharge of commitment rests with the individual to prove they are not dangerous, rather than on the state to prove that the person is still dangerous

The *Karsjens* judgment was appealed and a three-judge panel of the United States Court of Appeals for the Eighth Circuit reversed it in January 2017, holding that the statutes were constitutional after all[16]. The appeal court did not seem to think that the problems found by the lower court were serious enough to merit a conclusion of unconstitutionality. It was more concerned with examining whether the laws were rationally connected to the State's legitimate interest of protecting its citizens from sexually dangerous persons or persons who have a sexual psychopathic personality. It concluded that they were. It also considered that the problems and shortcoming identified by the lower court were only problematic if it could be demonstrated that they were "egregious, malicious, or sadistic as is necessary to meet the conscience-shocking standard", and that this could not be demonstrated.

The Eighth Circuit judgment was highly criticised by civil liberty advocates, and the plaintiffs appealed it to the US Supreme Court. But – on 2 October 2017 – the Supreme Court declined to hear the case (without apparently giving reasons).

In terms of human rights, New Zealand's laws compare favourably with those of Minnesota. In particular, New Zealand does have regular reviews of the continuing need for orders, and the state is effectively required to "re-make" its case for the court to allow the order to remain in place.

And in terms of persons who have become subject to extended supervision orders in New Zealand, there is a legal pathway to freedom that has been followed by many. It is too early in the history of New Zealand's public protection orders to know how difficult it might be in practice for people to get

[15] Case No. 11-3659 (DFW/JJK)
[16] Karsjens et al v Piper et al (No. 15-3485)

out of detention in a public protection residence, but the pathway to freedom is set out in the legislation.

Is reform needed in New Zealand?

As discussed above, more than one Attorney-General has reported the empowering legislation for extended supervision orders to Parliament for inconsistency with the New Zealand Bill of Rights Act 1990.

The main issue is consistency with the right in section 26(2) against double jeopardy.

> (2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

The concern is that an extended supervision order amounts to punishment, and it is an additional punishment to the penalty that an offender has already served. In 2007, the Court of Appeal concluded in the case of *Belcher*[17] that extended supervision orders do qualify as punishment and therefore engage section 26. Its reasons for reaching this conclusion included that:

- The triggering effect is a criminal conviction
- The person receiving the order is referred to throughout the legislation as "the offender" and other criminal terminology and institutions are also used
- Victims are notified and may make submissions
- It is an offence to breach an extended supervision order.

However, as the court in *Belcher* noted, a finding that legislation engages a right does not necessarily mean that a law is inconsistent with the Bill of Rights Act. As the court noted at paragraph 49:

"If the imposition of such sanctions is truly in the public interest, then justification under section 5 is available."

Section 5 – as alluded to above – states that rights in the Bill of Rights Act can be subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

However the Attorney-General, in reports to Parliament in 2009 and 2014, considered that extended supervision orders were not justified. The main reason for this was because he considered that it was possible through other laws to address the risk of re-offending in a way that would not infringe section 26. This possibility existed in the form of the sentencing option known as preventive detention. When an offender is being sentenced the court may – if the offender is considered to be particularly dangerous – impose a sentence of preventive detention. This can see the offender detained indefinitely; unless and until the Parole Board is satisfied it is safe to release the offender. Preventive detention is argued to be compatible with the right not to be punished twice for the same offence on the basis that it is imposed as part of the original sentence. It isn't a "second sentence".

[17] See *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA)

Meanwhile, the Attorney-General considered that public protection orders were compliant with the Bill of Rights Act. This might seem surprising given that public protection orders involve detention in a public protection residence, compared to extended supervision orders which might not involve any detention and – if they do – it is only limited duration home detention. The reason for their compliance was that the provisions creating public protection orders were not considered criminal in nature. Indicators of this included that they were created by a stand-alone Act of Parliament that did not employ the language of a criminal statute.

Despite these arguments, I think that there is a strong counter argument that extended supervision orders are – after all – justified under section 5.

Firstly, I don't think it is accurate to say that preventive detention is an acceptable substitute for extended supervision orders. Both extended supervision orders and preventive detention involve the imposition of legal restrictions of potentially unlimited duration. But preventive detention represents a greater imposition on liberty because it involves detention in prison that will continue unless and until the parole board is satisfied that the person no longer imposes undue risk. The burden of having to satisfy the parole board that one doesn't pose undue risk is not insignificant. By contrast, an extended supervision order will lapse after 10 years or less unless the state makes out a case for the imposition of a new order. Another key reason why extended supervision orders are preferable is that they are not imposed until the person is due for release. This provides for the possibility that people can and often do change for the better over the course of their sentence. After all, one of the main reasons for prison is to rehabilitate the offender, and it often works. Preventive detention is, by contrast, imposed years in advance of the person's release. It seems wrong to impose potentially indefinite detention right at the start, before they have had a chance to improve.

Secondly, the particular conditions of an extended supervision order are required by law to be no more restrictive than is consistent with the safety of the community. Even if it is possible to criticise the conditions of particular orders imposed on particular people as being excessively restrictive, this is not relevant to the question of whether the law itself is inconsistent with the Bill of Rights Act. If an excessively restrictive extended supervision order is imposed then that is a misapplication of the law. It is not a problem with the statutory regime; it is a problem with a particular instance of its implementation.

These same arguments apply to the justification of public protection orders. In particular, if a court does not think that a public protection order is justified in a particular case, then it should not impose one.

Still - a critic might argue - even if it is correct that preventive detention is not an acceptable substitute for extended supervision orders, it is perfectly possible to have a civil regime that achieves the same end but with a civil statute. And they can point to public protection orders, which detain persons but using a civil statute that uses civil language and eschews existing criminal bureaucracies, as an example.

This might appear at first to be a spurious argument. If a person is having their liberty constrained, what does it matter to that person whether it is done under a civil statute using civil-type legal

language, rather than a criminal statute using criminal terminology? If the effect on the person is exactly the same, then surely that is all that matters?

But it is not spurious. There is a difference, or at least a potential difference. In particular, even if a restriction is the same in terms of the actual things that the person is prevented from doing, the mere fact of labelling it criminal means it has a greater stigmatising effect on the person. For example, if you are confined to your home because you have tuberculosis (a civil restriction) that has a very different effect on you in terms of how others view you, than if you have been branded as a dangerously violent paedophile, and detained. One will see you accepted back into society the instant you have recovered. The other will hang over you like a dark cloud for the rest of your natural days, and beyond.

So we need to take seriously the additional negative consequences that a criminal measure would have on a person compared to a civil measure.

At the same time, we should also consider the negative consequences of a civil measure. The fact that extended supervision orders use the existing criminal bureaucracy, involving probation officers and the parole board, has significant cost advantages. Yes, it would be possible to build a parallel civil system, but that would be duplicative and wasteful, and more expensive.

We shouldn't shy away from greater expense if this is necessary to protect rights, but I don't think it is reasonable in this instance to incur that expense on behalf of the taxpayer. The additional stigmatising effect of an extended supervision order for a person who has already been convicted of the type of crimes that one needs to have committed to be eligible for an extended supervision order is – if it exists at all – negligible. I don't think this effect would be lessened at all by a civil rebranding exercise.

Summary of Learnings

It is cliché that in order to truly see your home you have to leave it. But it is also true.

The Fellowship has been an incredible opportunity to see New Zealand's laws and processes within a much wider context. When you are living and breathing New Zealand law, you can take certain things for granted. The contrast provided by Washington State and Minnesota has made certain features of our system stand out to me in ways that would not otherwise have been obvious.

My learnings have included the following:

- There is a long history in the United States of the states using laws for the management and commitment of dangerous persons. Early laws lacked credibility and most were repealed by the 1990s. At the same time, there was a resurgence of a new breed of such laws, starting with the Community Protection Act of 1990 in Washington State. These laws spread across the United States, and were usually enacted in response to a local tragedy where a recently released offender committed a serious offence against a member of the public.
- These resurgent laws allowed for the detention of dangerous individuals and were often – at first – declared to be unconstitutional. However in more recent times they have been improved, and found to be constitutional. The main improvements needed included: (i) ensuring that detainees had adequate treatment so that there was a prospect for their rehabilitation and release; and (ii) providing effective legal pathways for their release, and ensuring that practical matters (such as the lack of suitable housing) did not preclude any possibility of release.
- New Zealand's system compares favourably with the two jurisdictions that I studied (Washington State, and Minnesota). In particular: (i) the detention of dangerous offenders is the last resort, not the first resort; (ii) restraints are put on the courts' ability to grant orders, and the court cannot grant orders against an individual unless that individual exhibits certain characteristics that are indicative of high risk; (iii) courts always retain a discretion as to whether to grant orders and what restrictions these orders should contain, and they will comply with the New Zealand Bill of Rights Act 1990 when exercising that discretion; (iv) the officers who use their discretion to implement these orders are also required to do so in a way that is consistent with the New Zealand Bill of Rights Act 1990; (v) New Zealand has regular reviews of the continuing need for orders, and the state is effectively required to "re-make" its case for the court to allow the order to remain in place; and (vi) there is a well-trodden legal pathway to freedom for people who have been made subject to extended supervision orders.
- New Zealand may want to consider looking at some of the additional protections that exist in Washington and Minnesota, such as the ability for the respondent to opt for a jury rather than a judge.

Many of the features that have stood out are positive; in particular, the fact that New Zealand courts retain a discretion as to whether to impose orders and they are required – in exercising this discretion – to comply with the New Zealand Bill of Rights Act 1990. This provides a significant safeguard that is not present in the US jurisdictions that I studied.

These learnings and wider perspective will be invaluable in my day-to-day job. There will be amendments to the relevant legislation in the future and I will be heavily involved in the development of options for these amendments. I can now see the strengths of the New Zealand system, and I can be on guard to ensure that these strengths are maintained. I can now also see the way that our system differs from other systems, such as the absence of juries and differences in the standard of proof. This allows me to look more closely at why these differences exist, and examine whether there are good reasons for them.

I am often asked to speak at conferences and workshops organised by the Law Society and other organisations. I plan to talk about this project, and what I have learned, at a suitable conference or conferences in 2019. I will report back to the Trust on this.

Conclusion

To many non-lawyers (and even some lawyers) it is incomprehensible that there is a debate to be had about whether extended supervision orders and public protection orders are justified. If a court comes to the conclusion that someone poses a high risk of sexually offending against a child why on earth wouldn't we take precautions? People will acknowledge that offenders have rights but what – they ask – about the rights of children not to be raped and murdered? If you are going to restrict someone's rights for anything, surely it would be this? What possible better reason is there for restricting someone's rights?

The point they are missing is that those who are sceptical about the rights-compliance of extended supervision orders and public protection orders are not saying that we shouldn't take precautions. They are not saying that we should never restrict the rights of offenders. They are saying that those restrictions shouldn't be more restrictive than necessary.

But if my study has revealed anything, it has revealed that New Zealand's system does not restrict rights more than is necessary. One of the key ways in which the New Zealand system differs from the US systems that I studied was that the courts retain a discretion as to whether to impose an order, even after the legal tests have been satisfied. And the parole board and probation officers also retain a discretion as to how to exercise their powers. These actors are not legally permitted to exercise that discretion so as to impose greater restrictions than are necessary. If they do then that is not a problem with the law being inconsistent with the Bill of Rights, it is a problem with its implementation.

Even if it is conceded that extended supervision orders are akin to criminal sanctions and thus engage the right in section 26 not to be punished twice for the same offence, it does not automatically follow that they do not comply with the overall Bill of Rights Act. They could still be a justified limitation in accordance with section 5 of the Act. While it would be possible to drape extended supervision orders in expensive clothes of civil appearance, the benefits of doing so to the recipient of the orders (or anyone else) are virtually non-existent, and so the continuation of extended supervision orders (and public protection orders) in their current form appears to be eminently justifiable.