



A Tale of Two Risks: risk assessments and treatment of two dangerous long-term New Zealand detainees

Anthony Ellis

Research Working Paper Series

June 2020

HRP 20-004

The views expressed in the HRP Research Working Paper Series are those of the author(s) and do not necessarily reflect those of the Harvard Law School or of Harvard University. Research Working Papers have not undergone formal review and approval. Such papers are included in this series to elicit feedback and to encourage debate on important public policy challenges. Copyright belongs to the author(s). Papers may be downloaded for personal use only.

www.hrp.law.harvard.edu

Table of Contents

Abstract.....	3
“J” and Richard Genge	5
What is Intellectual Disability?.....	6
Overlap of Intellectual Disability and Autism.....	7
What is an indeterminate sentence?	8
Concerns over current modern-day risk assessment	10
RELEVANCE OF HUMAN RIGHTS LAW	11
General Comments.....	11
Meaning of Arbitrary Detention	14
J (BY WELFARE GUARDIAN T) V ATTORNEY-GENERAL	15
Comment on human rights compliance	18
Powers of the Family Court in IDCCRA cases.....	18
My involvement with the case	20
Is J intellectually Disabled?.....	21
Savant Syndrome and Abilities	21
J’s IQ scoring.....	24
Challenging behaviour.....	24
Pharmacological treatment of the Intellectually Disabled/Autistic Persons	25
DETENTION FOR REASONS OF INTELLECTUAL DISABILITY AS DISCRIMINATION	28
Committee on the Rights of Persons with Disabilities and the Convention on the Rights of Persons with Disabilities.....	28
Noble v Australia	33
CRITICISM OF DETENTION ON GROUNDS OF ASSESSED DANGEROUSNESS	34
Commentary on such detentions: New Zealand.....	37
WHAT REALISTICALLY COULD BE DONE FOR J AND OTHERS WITH SIMILAR PROBLEMS? 38	
RICHARD GENGE	40
Issues affecting both J and Mr Genge: arbitrary detention/lack of rehabilitation	41
Miller and Carroll v New Zealand.....	41
State Party’s response to Miller and Carroll.....	42
More detailed aspects of risk assessment.....	44
Different Scientific and Legal Thinking.....	46
For risk assessment purposes is Mr Genge a sex offender or murderer or both?	46
Do murderers repeat offend? —Rarely.....	48
Mr Genge’s actual risk of reoffending.	55
Human Rights Committee Jurisprudence.....	56
European Jurisprudence	59
Irish Jurisprudence.....	60
Sentence or detention of “No Hope”.....	61
The High Court Judgment of Justice Clark.....	66
Group Therapy is not the only route forward.....	68
Dangers of Group Therapy	69
Timing of Therapy	73
Cultural Issues	75

<i>Importance of Ethnicity of Therapy Providers</i>	80
<i>Cultural Competence—Access to Justice</i>	80
CONCLUSIONS	83

A Tale of Two Risks: risk assessments and treatment of two dangerous long-term New Zealand detainees

Dr Tony Ellis¹

Abstract

This paper compares two cases of long-term detention on the basis of claimed risks to public safety in New Zealand, a common law jurisdiction. The first is that of an intellectually disabled autistic offender, who remains in detention after 14 years after breaking three windows. The second is that of a murderer/rapist, sentenced to life imprisonment with the possibility of parole, but who remains in detention after 26 years. The paper considers whether either of them or both are reliably or adequately shown to be dangerous, given difficulties in risk prediction; whether detention for such lengthy terms can be classified as detentions of no hope, leading to a human rights breach such as disproportionately severe treatment and/or lack of dignity; and the applicability of these analyses as they apply to the wider population of the indeterminately detained. The co-morbidity of the autistic man as intellectually disabled is also considered and challenged from a human rights perspective, including the compulsory administration of psychotropic drugs when the literature suggests that there is no evidence for such prescription: and instead such medication appears to be widely used as a form of chemical restraint.

Two of my clients, “J” and Richard Genge, could not in most respects be more different: Mr Genge is serving a life sentence, with at least theoretical eligibility for parole, for a murder committed on 17 September 1994, whilst J is detained under a regime for intellectually disabled persons accused of criminal offences after he broke three windows on 8 June 2004. The common thread is that both have now been detained for long periods on the basis of perceived risk to public safety, and any prospect of future release depends upon the possibility of a more favourable assessment of what is termed their “dangerousness”. J and Mr Genge therefore raise difficult questions of the permissible length of detention, and the underlying assessment, management and/or treatment of perceived “dangerousness”.

¹ The author was a Harvard Law School, Human Rights Program Visiting Fellow in 2019, and is a human rights barrister in private practice in Wellington, New Zealand. He acknowledges Professor Gerald Neuman, Joint Director of the Human Rights Program for the encouragement to write this working paper, and for his suggestions for improvements, Ben Keith, Barrister of Wellington, and Dr Brigit Mirfin-Veitch, Director of the Donald Beasley Institute for their comments on the draft paper, and inspiration provided by Professor Dirk Van Zyl Smit, of Nottingham University.

In respect of J, the author acknowledges the assistance of the New Zealand Law Foundation in making a grant of NZ\$10,000 to assist funding the Fellowship. The writer has no known conflicts of interest.

J's current detention order expires on 31 July 2020, a two day hearing is scheduled for 21/22 July 2020, and a two-year extension to a total of 16 years is being sought, somewhat extraordinary for breaking three windows, more so as that offence was his first in adult court. Mr Genge received life imprisonment for murder, and 12 years for rape, 26 years ago. He is still detained. His next parole hearing is on 4 September 2020.

Given the wide scope of the issues, the analysis is incomplete, and further research is required, both by researchers, and myself. But a number of important human rights arise. The first question that needs to be asked is whether either is truly dangerous at all, and secondly whether their incarceration should continue, and thirdly how should those decisions be made. It has been suggested, including by a very senior New Zealand judge, that predictive tests have, surely, continued to improve over time, and such tests are relied upon, routinely, including in Mr Genge's own case. But that

² At the time of writing a two day fixture if possible is to be allocated prior to 31 July 2020, but the Covid 19 pandemic has put timetables, and receipt of documentation into disarray.

³ Tonry, 'Sentencing and Prediction: Old Wine in Old Bottles', in J. de Keijser, J. Roberts and J. Ryberg (eds), *Predictive Sentencing Normative and Empirical Perspectives* (2019) 269, at 273, says:

A. Accuracy

Violence is rare, even among known offenders. Predicting rare events accurately is inherently difficult. As a result, the technology of violence prediction is not very good. The predictions are more often inaccurate than accurate. I was astonished to learn, when reviewing the contemporary literature as background for writing this chapter, that accuracy is little better now than it was four decades ago. Norval Morris (1974), in an influential early synthesis, concluded that predictions of future violence were wrong two-thirds of the time. The most exhaustive contemporaneous analysis by psychologist John Monahan (1981) reached the same conclusion. Predictions that people will not be violent were overwhelmingly correct, but that is trivial: if only 10 per cent are violent, a prediction that no one will commit a violent crime will be correct 90 per cent of the time. Morris argued that the then current knowledge did not justify imposing longer prison terms on people predicted to be violent: "Dangerousness" must be rejected for this purpose, since it presupposes a capacity to predict future criminal behavior quite beyond our present technical ability'. Locking up three people predicted to be violent when only one will be is, he said, is deeply unjust. Two would be wrongfully deprived of extended periods of freedom.

Cf Justice Susan Glazebrook in her thoughtful (in 2010 a New Zealand Court of Appeal Judge, now a Supreme Court Judge) article: Glazebrook, 'Risky Business: Predicting Recidivism', 17 *Psychiatry, Psychology and Law* (2010) 110, concludes:

Risk prediction is still in its developmental stage and, as risk assessment tools become more refined through further study, it is likely that predictability will be improved. Given that an individual's liberty and community protection is at stake risk assessment should be based upon the best available methodology. What is needed is a holistic individualised assessment of risk insofar as that is possible.

Her Honour is at odds with Tonry, above—that accuracy is little better now than it was four decades ago.

See Glazebrook, 'Risky Business: Predicting Recidivism', 17 *Psychiatry, Psychology and Law* (2010) 110, (at the time a Judge of the New Zealand Court of Appeal and now of the New Zealand Supreme Court) writing extrajudicially:

optimistic view is not shared by, for example, the leading criminologist Professor Michael Tonry, writing in 2019, says:⁵

“[T]he technology of violence prediction is not very good. The predictions are more often inaccurate than accurate. I was astonished to learn, when reviewing the contemporary literature as background for writing this chapter, that accuracy is little better now than it was four decades ago.”

As Tonry observed, citing Norval Morris from forty-five years earlier, the result is that of each three people detained as “dangerous”, at least two likely are not, and so – contrary to normal understandings of grounds for detention – the result is systemically unjust. The conditions of detention, including the appropriateness of high security facilities, and the use of psychotropic medication to “manage” detainees – compounds the problem.

“J” and Richard Genge

J is detained under a civil detention regime created by The Intellectual Disability (Compulsory Care and Rehabilitation) Act (“**IDCCRA**”) 2003 (NZ). That Act has a precursor in that it authorizes a civil detention, triggered by a criminal charge. A further request to extend J’s detention for another 2 years, to a total of 16 years so far, was made in February 2020. His current detention order expires in July 2020, and a hearing to consider the two year requested extension, is scheduled for 20/21 July 2020.

Mr Genge’s imprisonment, is under a criminal statute, a sentence of life imprisonment for murder, and 12 years for a simultaneous rape, but with the possibility of release by decision of the New Zealand Parole Board after fifteen years’ imprisonment onward.

Both are, within their respective statutory regimes, people found “dangerous” and have become victims of detention regimes of arguably no hope. Given the comments

Risk prediction is still in its developmental stage and, as risk assessment tools become more refined through further study, it is likely that predictability will be improved. Given that an individual’s liberty and community protection is at stake risk assessment should be based upon the best available methodology. What is needed is a holistic individualised assessment of risk insofar as that is possible.

⁵ See *Tonry*, supra note 3. Tonry continues:

“A. Accuracy

Violence is rare, even among known offenders. Predicting rare events accurately is inherently difficult. Norval Morris (1974), in an influential early synthesis, concluded that predictions of future violence were wrong two-thirds of the time. The most exhaustive contemporaneous analysis by psychologist John Monahan (1981) reached the same conclusion. Predictions that people will not be violent were overwhelmingly correct, but that is trivial: if only 10 per cent are violent, a prediction that no one will commit a violent crime will be correct 90 per cent of the time. Morris argued that the then current knowledge did not justify imposing longer prison terms on people predicted to be violent: “Dangerousness” must be rejected for this purpose, since it presupposes a capacity to predict future criminal behavior quite beyond our present technical ability’. Locking up three people predicted to be violent when only one will be is, he said, is deeply unjust. Two would be wrongfully deprived of extended periods of freedom.”

of Tonry, and Morris, already cited, Charles Dickens was surely prophetic when he referred to an “*epoch of incredulity*”.⁶

This paper contrasts the detention and treatment of these two different individuals: Mr Genge, who is not intellectually disabled, and J, who is, and in common with many with intellectual disability, he is also autistic. The paper gives an outline of intellectual disability and Autistic Spectrum Disorder; a basic understanding of risk assessment; the rejection in human rights law of sentences of “no hope” – that is, the prospect of lifetime imprisonment without steps towards or realistic chance of release; and psychotropic medication use on the intellectually disabled. It then applies that analysis to an abbreviated factual matrix of the two cases, followed by legal analysis and conclusions.

What is Autism or Autism Spectrum Disorder?

Following years of debate, the way autism has been conceptualised and classified met with significant changes in 2013, when the American Psychiatric Association rewrote the Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-5),⁷ and defined Autism Spectrum Disorder (ASD) as a life-long neurodevelopmental disorder that affects the way that an individual communicates with and relates to other people. More specifically, ASD is defined by the presence of impairments in communication, social interaction and imagination, alongside repetitive and restricted patterns of thought and behaviour.⁸ Ms Robertson further refers to the DSM-5 (2013), and abbreviates its lengthy definition to observable impairments in socio-communicative and behavioural domains.

What is Intellectual Disability?

The American Association on Intellectual and Developmental Disabilities has the most developed literature on the topic. They define ID as:

Intellectual disability is a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18.

⁶ C. Dickens, *A Tale of Two Cities* (1859), 1, at opening paragraph: It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of light, it was the season of darkness, it was the spring of hope, it was the winter of despair.

⁷ For the fuller definition see American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders 5th Edition (DSM-5)* (2013), at Diagnostic Criteria 299.00 (F84.0). Curiously the earlier editions all used roman numbering—DSM I, DSM II, DSM III, and DSM IV.

⁸ Robertson, Caitlin Eve, *Autism Spectrum Disorder: Forensic Aspects and Sentencing Considerations* (PhD Thesis, Deakin University, 2017), 19.

For current purposes, that is the same as s 7 of **IDCCRA**. An IQ of 70 or less is required to a 95% confidence level, lack of adaptive functioning skills, and both deficits occurring before 18 years old.

Overlap of Intellectual Disability and Autism

Mr Genge the convicted murderer/rapist has no such disability.⁹ J has a diagnosis of ID and ASD. There is a wide field of literature on co-morbidity. Estimates for co-morbidity range from as high as 70%,¹⁰ and as low as 4%. Matson and Matson¹¹ referring to a previous article by one of themselves¹² cite 4 to 40%, but warn of inconsistency of research, and differing definitions.¹³ Laura O Saad and Eloisa H R V Celeri¹⁴ in their two-page 2019 update, say whilst there is still a lot to understand regarding autism and intelligence, a growing trend points to a different direction than previously considered. Prevalence of the rates of autism co-morbid with intellectual disability have tended to decrease not only because of new definition parameters. They say that Crespi, has recently, hypothesized that autism might be a disorder of high intelligence, but with imbalanced components.¹⁵ This theory is not yet confirmed. It does however emphasize a shift in thinking in this area over the last few years, and as will be seen fits the hypothesis this writer has been following, that J is not intellectually disabled, merely mislabelled. In an study by Burgha for the English National Health Service, the prevalence of autism in adults with ID living in communal care establishments was 31%, and in private households was 35.4%.¹⁶

A special edition of the Journal of Intellectual Disability Research was issued in May 2016.¹⁷ The editorial, *The intersection of autism spectrum disorder and intellectual disability* begins:

⁹ A 2020 psychiatric report does note he has Post-Traumatic Stress Disorder caused by sexual and severe physical abuse, and an antisocial personality disorder.

¹⁰ Saad and Celeri, 'A Brief Update on Intelligence in Autism Spectrum Disorder', 4 *Global Journal of Intellectual & Developmental Disabilities* (2018) at abstract.

¹¹ H. Adams and J Matson, 'Scope and Prevalence of the Problem', in J. Matson and M. Matson (eds), *Comorbid Conditions in Individuals with Intellectual Disabilities* (2015) 3, at 9-10.

¹² Matson and Shoemaker, 'Intellectual Disability and its Relationship to Autism Spectrum Disorders', 30 *Research in Developmental Disabilities* (2009) 1107-1114.

¹³ *Ibid.*, they refer to LaMalfa, Lassi, Bertelli, Salvini and Placidi, 'Autism and Intellectual Disability: A Study of Prevalence on a Sample of the Italian Population', 48 *Journal of Intellectual Disability Research* (2004) 262-267: concluding that 40% of persons with ID have an ASD, while 70% of persons with ASD have ID.

¹⁴ See *Saad and Celeri*, supra note 10.

¹⁵ Crespi, 'Autism as a Disorder of High Intelligence', 10 *Frontiers of Neuroscience*, (2016) 300.

¹⁶ United Kingdom National Health Service, *Extending the 2007 Adult Psychiatric Morbidity Survey* (2012).

¹⁷ Blacher and Kasari, 'The Intersection of Autism Spectrum Disorder and Intellectual Disability', 60 *Journal of Intellectual Disability Research* (2016) 399-400.

Such is the gist of this Special Issue of JIDR on autism spectrum disorder (ASD), the first ever for the journal. In seeking papers that addressed the intersection of both ASD and intellectual disability (ID), we were struck by the importance of drawing together the best of both fields. We found that autism-specific instruments and traditional thinking were not always the most accurate for researching populations with ID. Similarly, traditional thinking about developmental constructs in ID, such as in the area of language, could not adequately describe the unique and often uneven profiles in autism. It is interesting that ID is a very common co-morbid disorder with ASD, yet the field over the last decade or two has paid little attention to this fact (Lecavalier, Snow & Norris, 2011), although the definition of ASD in DSM 5 (APA, 2013) may catalyse research in this area.

Whatever the true number of individuals with both conditions, it is not insignificant, and seemingly as yet poorly understood, or researched.

It is not without irony that the NZ Government's 2018 mental health inquiry in its conclusions said¹⁸

There are few suitable services for, and poor responses to, people with complex or multiple needs (for example, people with an intellectual disability and/or autism as well as a mental health need). Age and life stage transitions are not well supported. The lack of integration between and within the health and social sectors and for high-need population groups is a barrier to improving people's experience and outcomes. Current laws and practice result in unacceptable levels of compulsion and restrictive practices. Too often, lacking a full range of connected services that wrap around and care for people earlier (such as talk therapies and group support), we fall back on the use of compulsion and restriction.

But this sentiment is not yet reflected in practice.

What is an indeterminate sentence?

Both J and Mr Genge, though detained under distinctly different statutory schemes, one civil, one criminal, but both are serving what are in effect indeterminate sentences.

For present purposes New Zealand has two indeterminate criminal sentences¹⁹ received by those sentenced to preventive detention, customarily for serious sexual offences, and those for Homicide, (Murder or Manslaughter).²⁰ Both are given a minimum non-parole period of at least ten years, (the tariff period). Despite a life sentence, they are not in practice to date any sentences of life without parole.²¹

¹⁸ New Zealand Government, *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* (2018),

¹⁹ Ignoring treason which no one has been convicted of, and Class A drug offences, e.g. Heroin.

²⁰ 139 countries have life imprisonment for murder (more if you include the death penalty), and 49 for manslaughter. See D. Van Zyl Smit and C. Appleton, *Life Imprisonment: A Global Human Rights Analysis* (2019), 127.

²¹ Third Strike sentences with no parole, have not yet been imposed for homicide. The 2019 Christchurch murderer of 51 people may well be the first, he has pleaded guilty to 51 counts of murder, 40 of attempted murder and one charge under the Terrorism Prevention Act. He awaits sentence. See Radio New Zealand, 'Christchurch Mosque Attacks: Gunman Pleads Guilty to all Charges', 28 March 2019, retrieved from: <https://www.rnz.co.nz/news/national/412640/christchurch-mosque-attacks-gunman-pleads-guilty-to-all-charges> 26 March 2020.

Release is possible if the Parole Board grants parole, which it can do after the minimum non-parole period of 10 or more years, as set by the sentencing judge.

In Mr Genge's case he received a 15 years minimum non-parole period.²² Under parole legislation, release is primarily dependent on the offender being found no longer to be a risk to the community : the paramount consideration for the Parole Board is the safety of the Community.²³

J's detention is also indeterminate: but it seems worse and the circumstances of his potential release, if ever, are somewhat amorphous.

If a accused charged with a criminal offence is thought to be insane, or otherwise mentally impaired such as having an intellectual disability there is a separate stream of the criminal justice system that operates under the Criminal Procedure (Mentally Impaired Persons) Act 2003. ("**CP(MIP)A**"). The relevant New Zealand statutory scheme provides for hybrid civil and criminal committal in such cases. For committal to occur, a District Court Judge must determine on the balance of probabilities that the person concerned committed the *actus reus* of the offence, leaving aside *mens rea* on the basis that an impaired person is not capable of forming requisite intent.²⁴

Arguably, this is discriminatory, and in *Noble v Australia* such a scheme was found by the UN Committee on the Rights of Persons with Disabilities to be a breach of a fair trial, an arbitrary detention, and discriminatory. That case is discussed further below.²⁵

During the 20 month process of finding of unfitness, J was first detained in community care, then secondly detained in secure specialist ID care by the District Court in its criminal jurisdiction, for a further 22 months being the "disposition" of the case, the substantive equivalent of sentencing: not having been found guilty he could not be *sentenced*.²⁶ Then thirdly, following 9 renewals of civil orders he has been detained for a cumulative term of 14 years, with a tenth application pending for a possible further 2 years. There is no maximum period of detention; the criterion for release from civil detention is based on specialist assessors, health assessors, a psychiatrist, or psychologist, or sometime one of each. Their clinical assessments under s 77 IDCCRA

Professor Newbold, a criminologist was reported to say "the courts have had 10 opportunities under "three strikes" to deliver a sentence of life without parole, but never have. In each case they've found it would be "manifestly unjust". See Newsroom, 'The Ins and Outs of Life Without Parole', 28 March 2019, retrieved from: www.newsroom.co.nz/2019/03/28/510682/the-ins-and-outs-of-life-without-parole.

²² The minimum non-parole period of 10 years for murder was increased from 7 years in 1987. A 17-year minimum is now the starting point for a brutal or callous murder.

²³ Section 7, Parole Act 2002.

²⁴ Section 9, Intellectual Disability (Compulsory Care and Rehabilitation) Act, 2003 at the time J was charged. Since 2019, s 9A requires the accused be found mentally impaired prior to determining his *actus reus*.

²⁵ CRPD, *Noble v Australia*, Views of 2 Sep. 2016, UN Doc. CRPD/C/16/D/7/2012.

²⁶ Sections 24 and 25, Criminal Procedure (Mentally Impaired Persons) Act, 2003.

occur at 6 monthly intervals (apart from the initial assessment). A Family Court Judge may under s 76 make recommendations to the Director-General of Health.

The starting point for detention under a life sentence for murder is either 10 years, or 17 years for a particularly brutal and callous murder.²⁷ Aggravating and mitigating features are then assessed to arrive at the actual sentence. A murder sentence is not imposed on a drip-fed basis.

After an inmate reaches his parole eligibility date, The Parole Board must consider Parole at least at two yearly intervals, unless a postponement order has been issued by the Board delaying a hearing up to 5 years. The Boards are chaired by either the Chairperson, Deputy Chairperson, (A High Court or District Court Judge), or a Convenor who are mostly sitting or retired judges, but some are lawyers appointed after obtaining 7 years legal experience, they sit with at least two others usually lay persons. An extended Board of five persons would customarily deal with indeterminate sentences, and include a psychiatrist in its quorum. The statutory criteria for release is satisfying the Board that the inmate is no longer an undue risk to the community.²⁸

A psychiatrist one of the two specialist advisers recommending J's tenth extension of detention for a further two years from July 2020, suggests he is not recommending less, as J gets upset when not released, and a longer period of detention will diminish the opportunity to get upset. The Judge will of course be invited to dismiss that proposition as unsound. J will no doubt get upset being detained for a further 2 months, let alone 2 years. That additional two years will result in a cumulative term of 16 years detention, with yet more possible, comparable with that of the starting point of a sentence for a brutal and callous murderer of 17 years.

Concerns over current modern-day risk assessment

Risk is by definition uncertain. Harm may or may not materialize from someone classified as dangerous. Post 1970's risk has generally been understood to refer to the risk of violent or sexual offending. Any assessment usually carried out by a health assessor, who is a psychiatrist, or psychologist, or both, is replete with possible false negatives (a prediction of no re-offending when this will occur), or false positives, (a prediction of re-offending when this would not have occurred) findings. The meaning of dangerousness may vary across jurisdictions, and is fluid over time, depending partly on public and political concerns about crime at any given time.²⁹ It is also important to understand that someone who falls into a 'high-risk' category does not

²⁷ Section 104, Sentencing Act, 2002.

²⁸ Section 7, Parole Act, 2002.

²⁹ Pratt, 'Dangerousness, Risk and Technology', 28 *Australian & New Zealand Journal of Criminology* (1995) 3.

necessarily pose a great risk of serious offending (or causing serious harm); in other words, risk does not

Neal, and Slobogin et al,³¹ opine after a systematic review of the 364 psychological assessment tools used in legal cases report that the results of a two-part investigation of psychological assessments by psychologists in legal cases, that nearly all of the assessment tools used by psychologists and offered as expert evidence in legal settings have been subjected to empirical testing (90%). However, they were able to clearly identify only about 67% as generally accepted in the field, and only about 40% have generally favorable reviews of their psychometric and technical properties in authorities such as the Mental Measurements Yearbook. Analyzing legal challenges to the admission of this evidence they conclude that legal challenges to the assessment evidence for any reason occurred in only 5.1% of cases in the sample (a little more than half of these involved challenges to validity), and only about a third won. They say challenges to the most scientifically suspect tools are almost nonexistent. Attorneys in their view rarely challenge psychological expert assessment evidence, and when they do, judges often fail to exercise the scrutiny required by law.

Relevance of Human Rights Law

General Comments

One of the three sources of jurisprudence from UN treaty bodies such as the UN Human Rights Committee (“HRC”) are its General Comments.³² General Comment 35³³ on Article 9 of the International Covenant on Civil and Political Rights (“ICCPR”), Liberty and security of the person, was shepherded through the HRC by Professor Neuman.

GC35/21 sets the scene for human rights standards applicable:

³⁰ Van Ginneken, ‘The Use of Risk Assessment in Sentencing’, in J. de Keijser, J. Roberts and J. Ryberg (eds), *Predictive Sentencing Normative and Empirical Perspectives* (2019) 9, at 16.

³¹ Slobogin, Saks, Faigman and Geisinger, ‘Psychological Assessments in Legal Contexts: Are Courts Keeping “Junk Science” Out of the Courtroom?’, 20 *Psychological Science in the Public Interest* (2019) 134-163.

³² For those unfamiliar with the Committee’s General Comments, see Neuman, ‘Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members’, *Harvard Human Rights Program Research Working Paper Series* (2006). General Comments address recurring legal issues of substance or procedure under the ICCPR, without being focused on any particular state, and over the years the HRC has increased the transparency of its process for generating General Comments. It now receives several rounds of public input, and deliberates on the text in open session... General Comments usually provide a synthesis or progressive codification of the HRC’s interpretation of a particular substantive article of the ICCPR, based primarily on its past experience in communications and concluding observations, the other two sources of jurisprudence. Some General Comments address cross-cutting issues, and others have addressed HRC procedures.

³³ HRC, General Comment No. 35 – Article 9: Liberty and Security of Person, UN Doc. CCPR/C/GC/35 (2014).

When a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals,³⁴ then once the punitive term of imprisonment has been served, to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified.³⁵ State parties must exercise caution and provide appropriate guarantees in evaluating future dangers.³⁶ The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society.³⁷ If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention.³⁸

Challenges to the New Zealand system of preventive detention an indeterminate sentence began with the 2002 decision of *Rameka Harris and Tarawa v New Zealand* footnoted in GC32/21 above. Here Mr Rameka was detained on preventive detention after being found to have a 20% risk of reoffending. This was followed by an Australian decision in *Fardon*, and then ultimately by *Miller & Carroll v New Zealand* in 2018 postdating the General Comment.

In *Fardon v Australia* the HRC considering a system of post criminal sentencing, and a fresh civil detention arising after release from the criminal sentence noted by a majority of 11-2 that psychiatric prediction is not a precise science. Likewise, neither is psychology. Health professional's predictions of dangerousness make it difficult for judges to find as a fact someone is dangerous.³⁹

³⁴ In different legal systems, such detention may be known as "rétention de sûreté", "Sicherungsverwahrung" or, in English, "preventive detention"; see HRC, *Rameka et al v New Zealand*, Views of 6 Nov. 2003, UN Doc. CCPR/C/79/D/1090/2002.

³⁵ *Ibid.*, para. 7.3.

³⁶ See concluding observations by Germany: HRC, Concluding Observations on the Sixth Periodic Report of Germany, Adopted by the Committee at its 106th Session (15 October – 2 November), UN Doc. CCPR/C/DEU/CO/6 (2012), para. 14.

³⁷ HRC, *Dean v New Zealand*, Views of 17 March 2009, UN Doc. CCPR/C/95/D/1512/2006, para. 7.5.

³⁸ HRC, *Fardon v Australia*, Views of 18 March 2010, UN Doc. CPR/C/98/D/1629/2007, para. 7.4.

³⁹ *Ibid.*, para. 7.4.4: The "detention" of the author as a "prisoner" under the DPSOA was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation. **The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science.** The DPSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.

[**Bold** and emphasis added]

The HRC subsequently found arbitrary detention in *Miller and Carroll v New Zealand*, which concerned two repeat rapists who had been detained for more than twice the minimum non parole periods of ten years.⁴⁰ The decision was the first, and so far only, HRC case to date in which an oral hearing was held.⁴¹ The writer was counsel for both Mr Rameka, Mr Miller and Mr Carroll. The HRC's finding of arbitrary detention considered that the key to release is the Parole Board needing to consider whether the two rapist authors⁴² were an *undue risk to the community*.⁴³ The ascertainment of risk, let alone undue risk, is fraught with uncertainty.

The NZ Government's considering its response to the HRC⁴⁴ said it would review the system of preventive detention together with other aspects of the criminal justice system. Two years later nothing has been further advised to the Committee. I will

⁴⁰ HRC, *Miller & Carroll v New Zealand*, Views of 7 Nov. 2017, UN Doc. CCPR/C/121/D/2502/2014.

⁴¹ *Ibid.*, para. 6.1: Following an invitation by the Committee, pursuant to Guidelines on making oral comments concerning communications, adopted in the Committee's 120th Session, legal representatives of both parties appeared before the Committee on 31 Oct. 2017 (the State party's representatives through a video-conference), answered questions from Committee members on their submission and provided further clarifications. The author also submitted some additional information in writing, including the Parole Board's most recent decisions denying parole of Mr. Carroll in 2016 and to Mr. Miller in 2017.

⁴² The term used to describe the person bringing the case.

⁴³ "The Committee further notes the State party's explanation that decisions of the Parole Board on whether or not to order release of prisoners incarcerated in preventive detention are based on the assessment, pursuant to section 7 of the Parole Act 2002, of whether or not they represent an "undue risk" to the safety of the community, and that detention must not be longer than absolutely necessary for the safety of the community. The Committee notes, in this regard, the authors' uncontested assertion that the Parole Board is not authorized to consider the overall proportionality of the period of detention in light of the crime for which the reviewed prisoners were convicted and that it is instructed, pursuant to section 7 of the Parole Act to afford "paramount consideration" to the safety of the community."

⁴⁴ New Zealand Government, *Response of the NZ Government to the decision of the Human Rights Committee under articles 9(1), 9(4), and 10(3) of the International Covenant on Civil and Political Rights Communication No 2502/2014-Miller* (undated, but received 19 Jan. 2019).
Steps taken in relation to the future to prevent violations

30 The New Zealand Government has asked the Department of Corrections to provide advice on how the operation and design of New Zealand's prisons could be reformed over the longer term. This advice, which is currently under development, will cover issues of direct relevance to preventive detainees as it will focus on opportunities to maximise rehabilitative and re-integrative opportunities for all prisoners.

Considerations for legislative reform

31 The legislative settings for preventive detention and release on parole will also need to be carefully reviewed in light of the Committee's Views.

33 The Safe and Effective Justice Programme is a phased plan of work running until June 2020. It responds to concerns that the criminal justice system is not adequately meeting the needs of the public, victims, communities, or people who offend. The work will include an examination of the current sentencing and parole settings, and will include the existing arrangements for offenders who pose a serious and continuing risk to public safety. Although there is no specific focus on the sentence of preventive detention, the programme is likely to involve consideration of the appropriateness and effectiveness of this sentence and orders such as the extended supervision order and public protection order.

challenge on their behalf domestically their cases following the non-binding decision of the HRC, which nevertheless informs decision making on the New Zealand Bill of Rights Act 1990.⁴⁵

Meaning of Arbitrary Detention

There is no domestic dispute that the meaning of arbitrary detention is as the UN Human Rights Committee in its General Comment No 35/12⁴⁶ says:

An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law,⁴⁷ as well as elements of reasonableness, necessity and proportionality. For example, remand in custody on criminal charges must be reasonable.

As already seen General Comment 35/21 of the UN Human Rights Committee provides:⁴⁸

If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention.

This is relevant as the extension of J's detention as will be seen shortly, as it was from an initial criminal detention, becoming a current civil detention. With those introductory comments, I can now turn to aspects of the first case.

⁴⁵ The Long Title reading:

An Act--

(a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and

(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

⁴⁶ For those unfamiliar with the Committee's General Comments, see *Neuman*, supra note 32. General Comments address recurring legal issues of substance or procedure under the ICCPR, without being focused on any particular state, and over the years the HRC has increased the transparency of its process for generating General Comments. It now receives several rounds of public input, and deliberates on the text in open session... General Comments usually provide a synthesis or progressive codification of the HRC's interpretation of a particular substantive article of the ICCPR, based primarily on its past experience in communications and concluding observations. Some General Comments address cross-cutting issues, and others have addressed HRC procedures.

⁴⁷ HRC, *Gorji-Dinka v. Cameroon*, Views of 17 March 2005, UN Doc. CCPR/C/83/D/1134/2002, para. 5.1; HRC, *Van Alphen v Netherlands*, Views of 23 July 1990, UN Doc. CCPR/C/39/D/305/1988, para. 5.8.

⁴⁸ *HRC*, supra note 33.

J (by welfare guardian T) v Attorney-General

J (by welfare guardian T) v Attorney-General,⁴⁹ is a long (191 page) judgment, issued ten months after the High Court heard the case. The case awaits an appeal hearing in the NZ Court of Appeal. Given the length of the judgment it is not possible to provide a detailed analysis. An overview, and a few selected points are considered.

J is a 35 year old Tongan/Australian man with severe autism, and intellectual disability. I have, and continue, to query whether he is correctly diagnosed as having an ID.⁵⁰ At 16, he originally got into trouble with an altercation with a 17 year old girl at school, when he cut the back of her throat, (he regularly playacts, or genuinely believes he is James Bond). According to the then Specialist Assessor, a neuropsychologist, he tied the girl down on a bed and slit her throat, she was in hospital for two weeks, and needed plastic surgery. This was substantially untrue. When challenged, she amended the facts, but not the conclusions of her report as to his dangerousness. The true version was, a few stitches were required to the back of her neck, and she was released from hospital that afternoon. The Youth Court (a division of the District Court)⁵¹ apparently gave him a conviction and discharge,⁵² albeit he was plainly unfit to plead, and a conviction was legally impossible. Nevertheless, his demonization as a dangerous person had begun. He had also been accused of being, a paedophile as he likes female feet. However such an allegation or anything similar is misguided as he has no apparent awareness of sexuality. He has no history of sexual offending. He is otherwise viewed as dangerous, and too much of a risk to be released from compulsory care. At the time of writing he is detained at the secure Mason Clinic, the largest psychiatric hospital in New Zealand located on the North Island,⁵³ which also has a ward for the intellectually disabled needing secure care.

Four years after the assault on his schoolgirl classmate when he was 20, he responded to a loud noise, a well-known trigger for challenging behaviour⁵⁴ for autistic persons. He went next door with an axe, and attacked his neighbour's van. He

⁴⁹ New Zealand High Court, *J (by welfare guardian T) v Attorney-General*, CIV-2017-485-000025, Judgment of 25 May 2018. The Intellectual Disability Compulsory Care And Rehabilitation Act (IDCCRA) requires suppression of the name and identifying details of the disabled person.

⁵⁰ Important as if not intellectually disabled, he cannot be detained under the IDCCRA.

⁵¹ Where the bulk of NZ's criminal cases are decided, with the exception all category 4 offences, including murder, manslaughter and treason, as well as any other offence where the accused is likely to be sentenced to life imprisonment. or preventive detention, these are tried in the High Court.

⁵² The files are usually sealed, and cannot be referred to by adult courts.

⁵³ According to Stats NZ, the population of New Zealand in 2018 was 4.88 million, 77% living on the North Island. See Stats NZ, 'Three in Four New Zealanders Live in the North Island', 26 Oct. 2017, retrieved from: http://archive.stats.govt.nz/browse_for_stats/population/estimates_and_projections/SubnationalPopulationEstimates_AtJun17_MR3.aspx#gsc.tab=0

⁵⁴ Chester, 'People With Intellectual and Developmental Disorders in the United Kingdom Criminal Justice System', 28 *East Asian Archives of Psychiatry* (2018) 150-158.

smashed three windows valued at \$800. After his mother disarmed him, the police, and an ambulance were called. He had been hurt by the flying glass.

For those of us fit to plead without a criminal record, we would likely to have received a diversion (or a caution). The maximum sentence for someone facing the summary charges he faced (misdemeanours) is three months imprisonment, (unlawfully in a yard, and criminal damage). However, after much discussion, and delay, after 20 months whilst he was detained in intellectually disabled care, he was found unfit to plead. On the basis of his Intellectual Disability and Autism.⁵⁵ He was then detained in ID care by the District Court in its criminal jurisdiction for a further 22 months being the “disposition” of the case, the equivalent of sentencing. Not having been found guilty he could not be sentenced.⁵⁶ Following that incarceration, he was transferred to the Family Court’s civil jurisdiction, and his detention has now been extended 9 times to 14 years, with a tenth application pending.

Too many Judges have had responsibility for the file, and have had involvement in extensions, one different judge for almost every year between February 2006, and February 2020:

Date	Period	Expiry	Type	Judge
8-Feb-06	2 years	7-Feb-07	Judgment	Kerr
27-Nov-06	1 year 1 day	8-Feb-08	Minute	Clarkson
4-Feb-08	Deferred		Minute	Adams
24-Apr-08		Existing order continues	Minute	Adams
30-Apr-08	6 months	29-Oct-08	Minute	Adams
29-Oct-08	Expiry Deferred	Until further order of Court	Minute	Malosi
5-Dec-08	None specified		Minute	Adams
28-Jan-09	6 months	27-Jul-09	Judgment	Rogers
29-Jun-09			Judgment	Adams
27-Jun-09	12 months	26-Jul-10	Judgment	Hikaka
19-Jul-10	3 months	18-Oct-10	Minute	Eivers
23-Sep-10	Hearing scheduled 6-Oct-10		Minute	Rogers
6-Oct-10	2 years	5-Oct-12	Judgment	Hikara
20-Jul-11	Reappoint lawyer		Minute	Neal

⁵⁵ Sections 9 and 14, as they then were of the Criminal Procedure (Mentally Impaired Persons) Act, 2003.

⁵⁶ Sections 24 and 25, Criminal Procedure (Mentally Impaired Persons) Act 2003.

12-Oct-11	Review		Minute	Hikara
5-Dec-11	Change to Supervised Care		Minute	Rogers
3-Oct-12	Expiry Deferred	3-Dec-12	Minute	Southwick
4-Oct-12	Reappoint lawyer		Minute	Southwick
27-Nov-12	Deferred further	17-Dec-12	Minute	Whithead
17-Dec-12	2 years	16-Dec-14	Judgment	Skellern
18-Jun-13	Reappoint lawyer			Eivers
19-Sep-13	Review		Directions	Southwick
16-Dec-14	Reappoint lawyer		Minute	Southwick
17-Dec-14	4 months	16-Apr-15 or until earlier order	Minute	Southwick
24-Feb-15	Allocate 1.5 hours hearing before 17-Mar-15	17-Mar-15	Minute	Neal
3-Mar-15	Two weeks adjournment (of what?)	31-Mar-15??	Minute	Skellern
13-Apr-15	Extended to 18 months under wrong section 82 not 85	12-Oct-16	Judgment	Skellern Deputy Registrar
17-Apr-15	Correction to s 85			Deputy Registrar
22-Dec-15	Timetabling & refusal to allocate a hearing given impact on John		Minute	Skellern
13-Apr-16	JAG subs		Minute	Rogers
3-Oct-16	Expiry Deferred	13-Dec-16	Minute	Skellern
15-Nov-16	Timetabling		Minute	Malosi
25-Nov-16	Expiry Deferred	28-Feb-17	Order	Twaddle
27-Feb-17	Extended 18 months	28-Aug-18	Judgment	Goodwin
23-Aug-18	Extended for 20 months	13-Apr-20	Judgment	Goodwin
18-Feb-20	Application to extend for 2 years pending			Goodwin
24-Mar-20	Extended to 14 May 2020		Order	Goodwin
13-May-20	Extended to 31 July 20 pending 2 day hearing 21/22 July 2020 to determine		Order	Goodwin

	2 year extension sought			
--	-------------------------	--	--	--

J's risk of actual dangerous behavior or just fantasy?

One of the two latest 2020 special assessors reports says;

This has been a recurrent theme, with other Specialist Assessors such as Dr Mhairi Duff commenting in 2014 that "It should be noted that J means no harm to others as he fails to have a core understanding of the permanency of harm believing rather, for example, that his victims will get up and go home after he has cut off their feet" and in my view remains true.

So he has fantasies of causing harm. But to what extent would he ever carry these fantasies out? His worst offending resulted in a few stitches on his classmate, and then he was stopped before committing more serious damage. This was followed three years later by breaking three windows. Since being detained his behavior has deteriorated according to numerous "incident" reports all written by his detainers without input from him. In simple terms his behaviour was better when he lived in the community.

Comment on human rights compliance

If a person who was not mentally impaired caused a few stitches after an assault they would not be locked up for years on the chance that they might do it again, as the jurisdiction to have such detention only arises if you are mentally impaired. In terms of risk of reoffending, there might have been a probation officer's assessment, but little or no forensic examination. There would certainly not have been more than 14 years of secure confinement conditioned, in effect, on significant reliance on forensic risk assessment, which pays scant attention to J's prior clean slate in adult court. As only the mentally impaired can be detained for such possible future behaviour (together with the modern trend for particularly dangerous sex offenders).⁵⁷ Put simply, J's treatment is discriminatory and disproportionate.

Powers of the Family Court in IDCCRA cases

The Family Court has power under the IDCCRA to order roll over civil detentions for up to three years at a time, with no maximum amount.⁵⁸ This arises from a particular statutory interpretation based on a Court of Appeal decision. It is the crucial legal justification for J's detention.

Sections 46 and 85 IDCCRA

⁵⁷ See *Fardon v Australia*, supra note 38.

⁵⁸ The Family Court is a division of the District Court, and Judges are warranted to sit in various divisions, e.g. Criminal with or without a jury warrant, Family Court, Youth Court, Civil jurisdiction etc.

Is the total possible detention under section 46, including extensions 3 years in total? or is it without limit? Section 46 provides:

46 Term of compulsory care order

- (1) Every compulsory care order lasts for the term specified in the order.
- (2) The term specified under subsection (1) may not be longer than 3 years.
- (3) The term specified in the order may be extended under section 85.

Section 85(1) provides:

85 Extension of compulsory care order

- (1) The Family Court may, on the application of the co-ordinator, extend the term of a care recipient's compulsory care order.
- (2) If the court extends a compulsory care order for a care recipient no longer subject to the criminal justice system, the court must consider and determine whether the care recipient must receive supervised care or secure care.

In *RIDCA v VM*⁵⁹ the NZ Court of Appeal were considering whether an intellectually disabled person could be further detained under that legislation, albeit the Court was faced with just over three years detention, not 14 or 16 years. They said:

[91] In short, we agree with the High Court Judge that the longer a care recipient has been subject to a compulsory care order, extension decisions will require ongoing and sometimes increasing justification, because the community protection interest will need to be greater to outweigh the increased weight given to the liberty interest of the care recipient.

The interpretation of that decision is challenged as wrong in the forthcoming appeal of J.

I view this type of detention as a form of preventive detention absent of the necessary checks and balanced prescribed for traditional preventive detention only imposable by higher courts for very serious offending. This form of detention is akin to the recently introduced Public Protections Orders, under the Public Safety (Public Protections Orders) Act 2014, intended for the country's "worse" criminals who having served their sentences but being an imminent, very high risk of serious sexual offending can be subjected to a civil detention scheme, on release from their criminal sentence. That Act necessarily required the proceedings to be conducted in the High Court. That a first instance Family Court, can impose such detention, and/or extent the detention is more than disturbing, it is possibly unique in common law jurisdictions.

⁵⁹ New Zealand Court of Appeal, *RIDCA v VM*, CA491/2010, Judgment of 19 Dec. 2011. Given the importance of the case five rather than the normal three Judges of the Court of Appeal sat.

My involvement with the case

I obtained pro bono instructions from the Justice Action Group,⁶⁰ and challenged on behalf of J (acting for his Welfare Guardian, J's mother), the then 10 year detention, being sought to be extended to 12 years. J lost the Family Court two day hearing.⁶¹ An appeal from the Family Court to the High Court followed, as did an application for Habeas Corpus,⁶² and an urgent judicial review,⁶³ which were also both dismissed. The High Court then over 7 days considered four applications heard together, a belated appeal from the criminal sentencing (as manifestly excessive), an appeal from the Family Court Order extending the detention to 12 years, the substantive judicial review, and the first ever challenge since the IDCCR Act was enacted in 2003, under s 104, an inquiry of the lawfulness of the detention by a High Court Judge. All applications were heard together and failed.⁶⁴ Given the amount of time given to render judgment the Family Court had temporarily extended the Compulsory Care Order, and a hearing on that also took two days in August 2018, and was again lost. That decision is under appeal, as are the various other decisions of the High Court, except the decision to detain him under the original criminal charges, which has exhausted its domestic appeal rights. The last detention order is the vital order, in a case alleging arbitrary detention, as it is the current order authorising detention. Some 40 pages of detailed reasoning as to why the High Court were wrong have been filed, and the parties are awaiting the Court of Appeal fixture to be allocated.

Besides the issues of arbitrary detention, discrimination and fair trial, addressed in *Noble v Australia* below⁶⁵ other issues arise. In particular the question of J's dangerous and risk to be released. The Supreme Court of Canada, in June 2018, issued judgment in *Ewert v Canada*⁶⁶ as to the (un)reliability of actuarial risk assessments. *Ewert* found actuarial instruments not validated on indigenous populations.

As J is Tongan/Australian any validity of actuarial testing on such an unusual genetic mix is highly unlikely, as there will not be a class of similar individuals to validate such testing on. As it is impossible to ascertain "individual" future risks, the choice of instrument to assist is vitally important. Family Court Judge Goodwin found in his latest extension to 14 years detention that:

⁶⁰ An advocacy group, for ID persons. Now wound up following the demise of its founder, and principal advocate.

⁶¹ New Zealand Family Court, *Paul Harvey v J*, FAM-2006-092-001669, Judgment of 27 Feb. 2017. Such decisions of the Family Court are usually suppressed this was not an application for media presence and reporting having been granted.

⁶² New Zealand High Court, *J v Care Manager*, CIV-2017-485-004, Judgment of 18 Jan. 2017.

⁶³ *J (by welfare guardian T) v Attorney-General*, supra note 49.

⁶⁴ *Ibid.*

⁶⁵ *Noble v Australia*, supra note 25.

⁶⁶ Supreme Court of Canada, *Ewert v Canada*, No. 37233, Judgment of 13 June 2018.

[43(e)] However, as the instrument does not consider risk factors such as specific characteristics (autism spectrum disorder, a fixation on violence, sensory sensitivity, impulsivity, threats of killing people, attempts to abscond, accessing weapons, lack of insight into the impacts of actions on victims and not having access to victims due to current violent constraints) a clinical over-ride is used, which increases his risk category to the high to very high range.

Given his minor “criminal” history of an assault at 16 years old in the Youth Court which cannot be relied upon in adult court, a window breaking at 20 years old, this new litany of problems over another decade plus appears to be an environmental result at J’s frustration of having being in secure care, and not being cared for in a stimulating manner, rather than any inherent criminality, and only results from psychologist’s and psychiatrist’s professional judgments far from a factual certainty, discussed further below. A clinical override, or structured clinical judgment, as the results of actuarial testing to not co-incide with health assessors views of J’s risk takes us back to first generation risk assessments, rather than the fourth generation currently in use, primarily based on actuarial assessment.

Professor Keyser’s text opines on the issue of risk:⁶⁷

While this is a *volte-face* from the position that they have previously adopted, this acknowledgment does not go far enough. Using only ones’ professional judgment with which to assign individuals to a sample group without empirically-based justification, amounts to the *ipse dixit* of the expert.⁶⁸...

Is J intellectually Disabled?

I find this issue intriguing, and have not been able to get to the bottom of how persons with severe autism can have their IQ assessed accurately, as their main problem is with communication, and communicating with the health assessor is more than problematic. An additional factor are J’s savant abilities. His savant abilities, viewed as a positive aspect of his makeup, are generally ignored. As the literature observes the savant syndrome is not widely understood.

Savant Syndrome and Abilities

Historically, the term Savant has been around for over a hundred years. The first use of term is described by Al-Onizat.⁶⁹ "Idiots savants" was used by Down (1887) to describe individuals with developmental disability, or individuals with an IQ below (25) but who still seemed knowledgeable, with specific skills such as visual arts, drawing,

⁶⁷ Coyle and Halon, 'Humpty Dumpty and Risk Assessment: A Reply to Slobogin', in P. Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (2013) 193.

⁶⁸ *Ibid.*, 209-210.

⁶⁹ Al-Onizat, 'Measurement of Multiple Intelligences Among Sample of Students With Autism, and Intellectual Disability Using Teacher Estimation and Its Relationship With the Variables: The Type and Severity of Disability, Gender, Age, Type of Center', 8 *International Journal of Education* (2016) 107.

musical performance and particular arithmetic skills, such as calendar calculating, or prime number derivation.

The term "Idiot Savant" meant: Idiot: low intelligence, which in the days of using mental retardation rather than intellectually disability was then acceptable.⁷⁰ It derives from the French, *Savoir* mean knowing or "a learned person". The term savant syndrome has replaced this term, or so it is said, albeit it does not appear to be in exclusive use. One definition of savant abilities is:

Savants are people with severe social and cognitive deficits but with corresponding high ability in a narrow domain.⁷¹

There is no dispute that despite J's co-morbid diagnosis of ID with ASD, viewed as disabilities, that on the plus side he has savant abilities (which are barely encouraged). His particular abilities include calculating the day on which your next birthday will fall, within a second of two from being given your date of birth. He is also a talented drawer or artist, and appears quite musical.

Chieko Kanai et al⁷² say the estimated prevalence of savant abilities in autism is 10%, whereas the prevalence in the non-autistic population is less than 1%. ASD is also said to occur in about 1% of the population.

Al-Onizat quoting Treffert ⁷³ says it is a rare, but extraordinary, condition in which individuals with serious mental disabilities, including autistic disorder, have some 'islands of genius' that stands in marked incongruous contrast to the overall handicap. The author categorises the condition into three:⁷⁴

1) Splinter skills: These skills are most common. Autistic savants with splinter skills display obsessive preoccupations with and memorization of trivia and obscure information such as license plate numbers of vehicles and sports statistics,

(2) Talented skills: Autistic savants with talented skills have a more highly developed and specialized skill. For instance, they can be very artistic and paint beautiful sceneries, or for some, have a fantastic memory that allows them to work out difficult mathematical calculations mentally.

⁷⁰ Only comparatively recently has mental retardation been replaced by intellectual disability especially in the US. See The Wall Street Journal, 'Erasing a Hurtful Label From the Books', 27 June 2015, retrieved from: <https://www.wsj.com/articles/SB10001424052748704865104575588273153838564>. Decades-long quest by disabilities advocates finally persuades state, federal governments to end official use of 'retarded'. It is even used in Éva Gyarmathy's 2016 article discussed below, supra note 79.

⁷¹ Sternberg, 'Multiple Intelligences in the New Age of Thinking', in S. Goldstein, D. Princiotta and J. Naglieri (eds), *Handbook of Intelligence* (2015) 229, at 230.

⁷² Kanai, Toth, Itahashi, Hashimoto and Kato, 'Intelligence', in J. Matson (ed), *Handbook of Assessment and Diagnosis of Autism Spectrum Disorder* (2016) 379, at 379.

⁷³ D. Treffert, *Extraordinary People: Understanding Savant Syndrome* (2006), 15.

⁷⁴ K. Exkorn, *The Autism Sourcebook: Everything You Need to Know About Diagnosis, Treatment, Coping, and Healing* (2015).

(3) Prodigious skills: These skills are the rarest. Prodigious savants have spectacular skills that would be remarkable even if they were to occur in non-handicapped individuals. There are only about 25 autistic savants in the world who display prodigious skills, which could include for instance, the capability to play an entire concerto on the piano after listening to it only once.

J would fit category 2.

Scheuffgen et al⁷⁵ rightly observe, autism with savant skills also challenges notions of general intelligence by the frequent presentation of savant skills: areas of surprising talent in individuals who are otherwise assessed as being low-functioning. Nader et al⁷⁶ comment, the DSM-5 requires an autism spectrum diagnosis to specify whether it is accompanied by intellectual disability, yet the text refers to autistics' "(often uneven) intellectual profile" which confirms Scheuffgen's view of challenges to general intelligence, as the authors assert that assessing autistic intelligence is not necessarily straightforward. Indeed, findings that the measured intelligence of autistic individuals varies—sometimes dramatically—according to which test instrument is used are among the most durable in the history of autism research, but also among the most overlooked as to their full implications.

J's results on two IQ test instruments were 84 on the Raven Progressive Matrix ("RPM"), and 60 on the Gold Standard test for non-disabled persons the WAIS-IV.⁷⁷ (The definition of ID needs an IQ of 70 or less to a 95% confidence level). Nader et al⁷⁸ confirms that higher results, sometimes dramatically higher result from using the RPM. They further say, because the RPM is a complex test of general and fluid intelligence that they challenge the recurring view that autism is incompatible with the development of genuine human intelligence. Their present and previous findings also challenge the still-common view that autistic strengths are limited to rote memory, isolated "islets" of ability or other simple low-level skills. Instead, complex reasoning, and novel problem-solving abilities may be important in autism.

Éva Gyarmathy, adds to the debate⁷⁹ by suggesting that the savant phenomenon cannot be linked solely to a mental deficit, as its previous label (savant idiots) suggested, and is not necessarily accompanied by autism. Its essence is that a special ability shows up in a certain area. Consequently, it is a big challenge to the theories of

⁷⁵ Scheuffgen, Happé, Anderson and Frith, 'High "Intelligence," low "IQ"? Speed of Processing and Measured IQ in Children with Autism', 12 *Development and Psychopathology* (2000) 83-90.

⁷⁶ Nader, Courchesne, Dawson and Soulières, 'Does WISC-IV Underestimate the Intelligence of Autistic Children?', 46 *Journal of Autism and Developmental Disorders* (2016) 1583.

⁷⁷ David Weschler, *Adult Intelligence Scale Fourth Edition (WAIS-IV)* (2008).

⁷⁸ Nader et al, supra note 76—Thus, autistics' RPM performance presents interesting challenges to commonly invoked theories of autistic limitations (e.g., "disordered complex information processing;" Au-Yeung et al. 2013, p. 84), and to the recurring premise that autism per se causes low intelligence (e.g., Vivanti et al. 2013).

⁷⁹ Gyarmathy, 'The Savant Syndrome and Its Connection to Talent Development', 5 *Open Science Journal of Psychology* (2018) 9-16.

intelligence. Whilst she comments on Crespi's theory⁸⁰ that autism involves high intelligence, but it is unbalanced, she makes the point that IQ tests are unable to identify the true mental potential of these individuals. She postulates that gifted individuals can easily be assigned the label of mentally disabled, as the testing also measures the desire to meet expectations, but the label "not motivated" can be confused with the lack of abilities. A desire to meet expectations is not a priority motive of autistic persons. Whilst this diagnosis might mean little to the individual, the diagnosis can seriously affect their lives. She rightly asserts that intelligence and knowledge are not the same, and the savant syndrome needs to be differentiated from "mental retardation" autism and talent.

She concludes Medical Science does not, as yet, regard the savant syndrome as an existing phenomenon. Its incidence, and its identification, is both sparsely documented, but an increasing number of research studies aim to uncover the special cognitive development inherent in the savant syndrome. Hopefully this research will assist J.

J's IQ scoring

During the High Court hearing, I called Professor Barrett an expert psychometrician. His view was that alleged finding of IQ to a 95% confidence level (+/- 5%) was wrong on the Wechsler Adult Intelligence Test WAIS-IV (WAIS),⁸¹ the lower the test scores the more unreliable they were, and he concluded that the true margin of error was +/- 12.5, not +/- 5. I am still exploring this issue, which now finds added impetus with the 2019 Crespi view⁸² that autistic persons may have high intelligence. As his detention is under the IDCCR Act, if he is not intellectually disabled, then the particular detention must be misplaced, unlawful and arbitrary.⁸³

J is detained essentially as dangerous on the recommendation of health assessors, just as murderers and rapists are. Health Assessors are both the key to locking and unlocking a detainee in secure care or prison and are substantially deferred to by Judges. A report is required from a health assessor before a secure or community order is made, and as previously discussed specialist assessors review their clinical opinion under the IDCCRA every six months.

Challenging behaviour

Various *incident reports* are made on his behaviour by his detainers to justify continued detention, an "incident" equates with criminality, albeit a mere unchallenged allegation, and the accuser is not before the Court. I have viewed this as arbitrary detention on

⁸⁰ See *Saad and Celeri*, supra note 10.

⁸¹ The standard IQ test used normally used.

⁸² *Saad and Celeri*, supra note 10.

⁸³ See discussion on *Noble v Australia*, supra note 25, para. 120, and definition of Arbitrary Detention at page 46 below.

the basis of allegations or gossip, with no opportunity to refute (breach of natural justice). Also it appears to breach the presumption of innocence. A recent English article has been eye opening, Chester⁸⁴ says:

The term 'offending behaviour' is problematic when used in relation to people with IDD. The dividing line between 'challenging behaviour' and 'offending behaviour' is often blurred. Challenging behaviour is defined as behaviour 'of such an intensity, frequency or duration as to threaten the quality of life and/or the physical safety of the individual or others and is likely to lead to responses that are restrictive, aversive or result in exclusion'.

J's continuing detention relies on his challenging behaviour, as he is dangerous. Legally he cannot commit offending behaviour for which he can be prosecuted on normal criminal law principles, being unfit to plead.

Pharmacological treatment of the Intellectually Disabled/Autistic Persons

The approach to challenging behaviour is important given the consequences, one widely used "treatment" is pharmacological using psychotropic medication, which is being used on J.⁸⁵ This can be also be described as "chemical restraint".⁸⁶ Claire Spivakovsky observes⁸⁷ that some promising work has emerged in "mad studies", she says Ben-Mosche et al's (edited collection),⁸⁸ in particular, offers accounts of both the interlocking legacies that connect sites like the school to the prison through the confinement and control of disabled bodies⁸⁹, as well as the ways by which 'mad' bodies become subject to new, targeted forms of imprisonment, such as 'chemical

⁸⁴ Chester, supra note 54.

⁸⁵ New Zealand Family Court, Paul Harvey v J, FAM-2006-092-001669, Judgment of 23 Aug. 2018, para. 26. In his evidence Dr Seth says that medication for J and proposed changes to medication were discussed and were agreed with Ms T. Her view and recollection of those discussions is different and she questions the extent of the discussion and her understanding of medication given. **Ms T as an older Tongan lady, is, in my view, a person unlikely or unwilling to openly challenge professional opinion or advice.** Her inclusion in decisions about John's medication (and consent generally) should be more carefully considered. It may be appropriate for a more clearly defined written record to be kept of discussions with regards to her consent on such issues.

[**Bold** added and names anonymised].

⁸⁶ That is, the use of chemical substances such as tranquilisers or other psychotropic pharmaceuticals, which are used for the purposes of subduing a person or controlling unwanted behaviour.

⁸⁷ Spivakovsky, 'Governing Freedom Through Risk: Locating the Group Home in the Archipelago of Confinement and Control', 19 *Punishment & Society* (2017) 366-383.

⁸⁸ L. Ben-Mosche, C. Chapman and A. Carey, *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (2013).

⁸⁹ N. Erevelles, Crippin' Jim Crow: Disability, Dis-Location, and the School-to-Prison Pipeline (2013), 81-99.

incarceration’.⁹⁰ Which has led Steele⁹¹ to conclude that ‘disability itself is cerebral such that the designation of disability to an individual provides the heightened, indeed hyper, possibility for confinement, intervention, and regulation of that disabled body wherever that individual might be’. Clare Spivakovsky, further observes that:⁹²

96% of people with disability who are subjected to restrictive interventions in Victoria have been subjected to some form of chemical restraint (Webber et al., 2011), and that for the majority of these individuals, this has involved the routine administration of these drugs for years at a time (McGillivray and McCabe, 2006).

In short disabled persons can be controlled and detained not just physically, but mentally also, and once the mind is altered the ability to complain become further diminished.

That is seriously alarming, as other research shows 50% usage of such medications in residential setting, without any evidence of the efficacy of the medications.⁹³ A further article concludes that because autism is only the starting point for a highly individualised treatment plan it requires a fundamental change to the psychiatric mind set to tackle the treatment of those with autism (let alone a co-morbid diagnosis).⁹⁴ This is reminiscent of the ECHR in *Oliveria and Portugal*⁹⁵ discussed shortly. The Firth Prescribing Guidelines for People with Intellectual Disability was brought to my attention by J’s prescribing psychiatrist (who had not read them) during cross examination in the Family Court which provide for a limited role for medication for ASD

⁹⁰ Fabris and Aubrecht, ‘Chemical Constraint: Experiences of Psychiatric Coercion, Restraint, and Detention as Carceratory Techniques’, in L. Ben-Mosche, C. Chapman and A. Carey (eds) *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (2013) 185, at 185-199.

⁹¹ Steele, ‘Disabling Forensic Mental Health Detention: The Carcerality of the Disabled Body’, 19 *Punishment and Society* (2016) 327-347.

⁹² Spivakovsky, *supra* note 87 at 374.

⁹³ Horovitz, ‘Challenging Behaviors’, in J. Matson and M. Matson (eds), *Comorbid Conditions in Individuals with Intellectual Disability* (2015) 27, at 47. The author concluded that there is a staggering lack of evidence for the efficacy of psychotropic medication use when compared to behavioural techniques, especially when considering the high proportion of individuals who are prescribed psychotropic medications.

⁹⁴ Crespi, ‘Comparative Psychopharmacology of Autism and Psychotic-Affective Disorders Suggests New Target for Treatment’, 1 *Evol Med Public Health* (2019) 160-161.

⁹⁵ ECHR, *Fernandes de Oliveira v Portugal*, Appl. No. 78103/14, Judgment of 31 Jan. 2019, para 96. The Convention is challenging traditional practices of psychiatry, both at the scientific and clinical-practice levels. In that regard, there is a serious need to discuss issues related to human rights in psychiatry and to develop mechanisms for the effective protection of the rights of persons with mental disabilities.

which is incurable.⁹⁶ Horovitz⁹⁷ considers the use of psychotropic medications of widespread use in practice, and it has been highly controversial in the literature. (Matson and Neal 2009, Matson et al. 2012).

He further says that there is a staggering lack of evidence for the efficacy of psychotropic medication use when compared to behavioural techniques, especially when considering the high proportion of individuals who are prescribed psychotropic medications. Horovitz also considers over prescription is common practice.

Matthews in his 2016 thesis confirms this.⁹⁸ He says that over 50% of those he studied were prescribed one or more psychotropic medications, and despite this high rate participants had high rates of co-morbid psychiatric conditions, indicating current approaches to treatment were not optimal.⁹⁹ He suggests:

That a radical rethink is required about prescribing practices for this population and that clinical guidelines such as the New Zealand ASD Guideline should take a stronger position in outlining the evidence base and limitations of psychotropic medications¹⁰⁰

Matthews, M., Bell, E. and Mirfin-Veitch, B.¹⁰¹ also confirm that people with ASD are at increased risk of comorbid psychiatric disorders, particularly anxiety, depression and ADHD.

The Firth Guidelines provides a moderating view:¹⁰²

Even with the use of optimum resources and good professional input, some behaviour problems remain unchanged, causing serious risk to the person and others. In some cases, the use of psychotropic medications brings welcome relief to all concerned; for example, using low-dose risperidone in those with an autism spectrum disorder may reduce stereotypies and disturbed behaviour. In some, medications can work to reduce elevated arousal levels, allowing the person to engage in other therapeutic approaches. Nevertheless, clinicians who use psychotropic medications outside their licensed indications feel vulnerable and open to criticism for 'unethical practice', and strong views

⁹⁶ S. Bhaumik, S. Kumar Gangadharan, D. Branford, M. Barrett, *The Frith Prescribing Guidelines for People with Intellectual Disability* (2015), 136. Aggression and self-injurious behaviour (SIB) may also warrant a trial of medication treatment in their own right, as a last resort. Medication should only be considered as part of an overall treatment strategy based on functional analysis, with contingency management as the primary objective of the intervention. Risk assessment will be a key part of any consideration to prescribe, and medication should be regularly reviewed, with the aim of limiting both use and duration of treatment to a minimum.

⁹⁷ *Horovitz*, supra note 93 at 27.

⁹⁸ Matthews, Martyn, *Autism and Comorbid Psychiatric Disorders: Assessment, Treatment, Services and Supports* (PhD Thesis, University of Otago, 2016).

⁹⁹ *Ibid.*, at 124. Forty-five percent of those surveyed were found to be taking at least one psychotropic medication, with over half of these taking more than one.

¹⁰⁰ *Ibid.*, at 243.

¹⁰¹ Matthews, Bell and Mirfin-Veitch, 'Comparing Psychopathology Rates Across Autism Spectrum Disorders and Intellectual Disabilities', 12 *Advances in Mental Health* (2018) 163-172.

¹⁰² S. Bhaumik, S. Kumar Gangadharan, D. Branford, M. Barrett, supra note 96 at 17.

exist about 'chemical straitjacketing' for behaviour disorders in the absence of adequate resources.

The potential for severe side effects need consideration, and given communication difficulty, and other comorbid diagnoses, and other medical prescriptions make that difficult.

This is area of practice that seems long overdue for a human rights lens to be cast over it, and needs further research and challenge. The possibilities for a human rights challenge on the basis of affecting freedom of expression, and freedom of thought have barely been considered in human rights jurisprudence. The issue of over prescription is ripe for a broad human rights challenge encompassing those challenges, either alone, or with a challenge on the basis of a breach of the ICCPR, Article 7 the prohibition of torture and ill-treatment including medical or scientific experimentation, also reflected in similar terms in s 9 NZBORA. A challenge on the question of compulsory psychiatric treatment which is a hot international human rights topic, whilst also a possibility is perhaps a little premature whilst the jurisprudence is still developing before the Committee on the Rights of Persons with Disabilities.

Detention for reasons of intellectual disability as discrimination

Committee on the Rights of Persons with Disabilities and the Convention on the Rights of Persons with Disabilities

The UN Committee on the Rights of Persons with Disability, ("CRPD").) Guidelines, state:¹⁰³

10...The Committee has repeatedly stated that States parties should repeal provisions which allow for involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairments...

13...The involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty.

14...Persons with disabilities are frequently denied equal protection under these laws by being diverted to a separate track of law, including through mental health laws. These laws and procedures commonly have a lower standard when it comes to human rights protection, particularly the right to due process and fair trial, and are incompatible with article 13 in conjunction with article 14 of the Convention.

[Bold added]

In respect of New Zealand, the CRPD said:¹⁰⁴

¹⁰³ CRPD, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities – The Right to Liberty and Security of Persons with Disabilities* (2015).

¹⁰⁴ CRPD, Concluding observations on the initial report of New Zealand, UN Doc. CRPD/C/NZL/CO/1 (2014), at III.

Equal recognition before the law (art. 12)

21. The Committee notes the recent work on examining supported decision-making regimes in New Zealand.

22. The Committee recommends that the State party take immediate steps to revise the relevant laws and replace substituted decision-making with supported decision-making. This should provide a wide range of measures that respect the person's autonomy, will and preferences, and is in full conformity with article 12 of the Convention, including with respect to the individual's right, in his or her own capacity, to give and withdraw informed consent, in particular for medical treatment, to access justice, to marry, and to work, among other things, consistent with the Committee's general comment No. 1 (2014) on equal recognition before the law.

[**Bold** in original]

The New Zealand Government's response as of July 2019, says:¹⁰⁵

104. There are no measures currently underway or planned to revise laws to recognise supported decision-making consistent with the CRPD

133. In 2019, the Government initiated a review and revision of the guidelines implementing the [Mental Health] Act to align the application of the current legislation as closely as possible with the CRPD. This will include a review of processes for consent and second opinions under the Act.

The UN Committee Against Torture in a 2020 NZ case¹⁰⁶ noted:

6.4 In November 2018, an independent inquiry into the New Zealand mental health system recommended that the Mental Health (Compulsory Assessment and Treatment) Act 1992 be repealed. The Government is currently considering that recommendation and work is already under way to revise the guidelines under that Act. The revisions seek to align the application of the current legislation as closely as possible with the State party's obligations under the Convention on the Rights of Persons with Disabilities.

In simple terms, despite chairing the Working Group that led to the Convention, New Zealand has been slow, and remiss, in considering its international obligations, it ratified the Convention early in its life, but took another eight years to allow individual communications.¹⁰⁷ The practical outcome of the review of the Mental Health legislation is awaited with interest.¹⁰⁸

¹⁰⁵ New Zealand Office for Disability Issues, *The New Zealand Government's Response to 'The List of Issues Prior to Submission of the Combined Second and Third Periodic Review of New Zealand'* (2019).

¹⁰⁶ CAT, *Zentveld v New Zealand*, Decision adopted 4 Dec. 2019, UN Doc. CAT/C/68/D/852/2017.

¹⁰⁷ Convention on the Rights of Persons with Disabilities, 2008, 2518 UNTS 283. Optional Protocol ratified 2016.

¹⁰⁸ *New Zealand Government*, supra note 18, para. 11.2: "...As an initial step towards legislative reform, we recommend the immediate repeal and replacement of the Mental Health Act. Any new Act needs to reflect a human rights-based approach, align with the recovery and social wellbeing model of mental health, and support the role of families and whānau and significant others, while retaining and building on the strengths of existing legislation."

The CRPD have called for a paradigm (revolutionary) shift of attitudes¹⁰⁹ from at least 55 countries in their approach to mental health and psychosocial laws, in their concluding observations from country reports. Progress has been slow in countries reforming their legislative provisions, putting it mildly. Antonio Martinez-Pujalte,¹¹⁰ comparative review noted last year, considering Argentina, Ireland, and Peru, where he commends Peru for being the first substantially Convention complaint country.

This approach of paradigm shift is reflected in a 2019 judgment of the Grand Chamber (17 Judges) of the ECHR, in *Oliveria v Portugal*¹¹¹ observed:

74. The United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health issued a report concerning the right to health for all people with disabilities on 2 April 2015. In respect of the CRPD he found as follows...

96. The Convention is challenging traditional practices of psychiatry, both at the scientific and clinical-practice levels. In that regard, there is a serious need to discuss issues related to human rights in psychiatry and to develop mechanisms for the effective protection of the rights of persons with mental disabilities.

97. The history of psychiatry demonstrates that the good intentions of service providers can turn into violations of the human rights of service users. The traditional arguments that restrict the human rights of persons diagnosed with psychosocial and intellectual disabilities, which are based on the medical necessity to provide those persons with necessary treatment and/or to protect his/her or public safety, are now seriously being questioned as they are not in conformity with the Convention...

99. A large number of persons with psychosocial disabilities are deprived of their liberty in closed institutions and are deprived of legal capacity on the grounds of their medical diagnosis. This is an illustration of the misuse of the science and practice of medicine, and it highlights the need to re-evaluate the role of the current biomedical model as dominating the mental-health scene. Alternative models, with a strong focus on human rights, experiences and relationships and which take social contexts into account, should be considered to advance current research and practice ...”

112. At the same time, the Court reiterates that the very essence of the Convention is respect for human dignity and human freedom. In this regard, the authorities must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned and in such a way as to diminish the

The Government accepted recommendation 34 repeal of that legislation. See Ministry of Health, ‘Government Inquiry into Mental Health and Addiction’, 6 June 2019, retrieved from: <http://www.health.govt.nz/our-work/mental-health-and-addictions/government-inquiry-mental-health-and-addiction>. Hopefully similar comments will apply to Intellectually Disability legislation.

¹⁰⁹ Martinez-Pujalte, ‘Legal Capacity and Supported Decision-Making: Lessons from some Recent Legal Reforms’, 8 *Laws* (2019) 2: says, can be described without exaggeration as revolutionary.

¹¹⁰ *Ibid.*

¹¹¹ *Fernandes de Oliveira v Portugal*, supra note 95.

opportunities for self-harm, without infringing personal autonomy (see, *mutatis mutandis*, *Mitić v. Serbia*, no. 31963/08, § 47, 22 January 2013) ...

[**Bold** added]

Judge Pinto de Albuquerque, whose dissents are always worthy of reading in his partial dissent says:

40. **The legal international scenario is confusing, to say the least, signaling tough ongoing discussions on the matter.**¹¹² The Human Rights Committee does not share the views of the CRPD Committee, since it acknowledges that involuntary hospitalisation may be justified¹¹³. Similarly, the [UN] Subcommittee on the Prevention of Torture¹¹⁴ expressed the opinion that deprivation of liberty can be justified on grounds of risk of self-harm or harm to others.

[**Bold** and emphasis added].

Martinez-Pulalte says,¹¹⁵ the Convention approach can be described without exaggeration as “revolutionary”. He also notes the recent modification of the Peruvian

¹¹² On the UN Disabilities Convention and its interpretation by the CRPD Committee, see Loza and Omar, ‘The Rights of Persons with Mental Disabilities: is the UN Convention the Answer? An Arab Perspective’, 14 *The British Journal of Psychiatry International* (2017) 53-55.:

“The General comment on Article 12 interprets important human rights provisions from a narrow perspective, distances medical knowledge and alienates families in many cultures”; Freeman et al, “Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities” 2015 *Lancet Psychiatry*, 844-50: “In the event that a life could be saved from suicide, we submit that the Committee’s assertion that involuntary treatment should never be allowed is wrong. ... When there is a conflict between different rights, the right to life should trump other rights.” “What if the person is hearing voices that tell him or her to hurt themselves or another person? ... we cannot accept that doing away completely with involuntary admission and treatment will promote the rights of persons with mental illness”; : “very few would support the idea that the state never, even as a last resort, has a duty to protect those who are clearly unable to make crucial treatment decisions for themselves”; Bartlett, “The United Nations on the Rights of Persons with Disabilities and Mental Health law” (2012) 75 (5) *The Modern Law Review* 752-78; Fennell and Khaliq, “Conflicting or Complementary Obligations? The UN Disability Rights Convention and the European Convention on Human Rights and English law” (2011) *European Human Rights Law Review* 662-74; Weller, “The Convention on the Rights of Persons with Disabilities and the Social Model of Health: New Perspectives” (2011) *Journal of Mental Health Law* 74-83; Lush, “Article 12 of the United Nations Convention on the Rights of Persons with Disability” (2011) *Elder Law Journal* 61–68 (and many more).”

¹¹³ *HRC*, supra note 33.

¹¹⁴ CAT, Approach Regarding the Rights of Persons Institutionalized and Treated Medically Without Informed Consent, UN Doc. CAT/OP/27/2 (2016).

¹¹⁵ *Martinez-Pujalte*, supra note 109. Article 12 of the International Convention on the Rights of Persons with Disabilities contains one of the most significant legal innovations of recent decades, which is called upon to exert a potentially high impact on national legal systems and requires a thorough revision of traditional legal institutions that have lasted for centuries...The General Comment of the Committee on the Rights of Persons with Disabilities on Article 12 shows that we are facing a change of paradigm **that can be described without exaggeration as revolutionary, making a thorough revision of national laws necessary**. In fact, since the Convention came into force, several countries have undertaken deep legislative changes in order to adapt their legal systems to Article 123. In this paper, three of the most recent and innovative legal reforms— those of Argentina (2014), Ireland (2015) and Peru (2018)—have

Civil Code, and Civil Procedure Code deserves a highly positive evaluation as the first regulation of legal capacity and supported decision-making substantially compliant with the Convention.

If viewed in a comparative way, with sexist and racist it can be seen a “sanist” approach is applied, not adopting the required paradigm shift. Professor Perlin says:¹¹⁶

There is a robust clinical literature on how issues of race, class, gender, and sexual orientation may influence all aspects of the clinical setting: on the relationship between student and client, between students, between student and clinical supervisor; the attitude of the fact-finder toward the clinical client and student lawyer. But there has been virtually no attention paid to the role of sanism in the clinical setting. “Sanism” is an irrational prejudice of the same quality and character as other irrational prejudices that cause and are reflected in prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry. It permeates all aspects of mental disability law and affects all participants in the mental disability law system: litigants, fact finders, counsel, expert and lay witnesses. Its corrosive effects have warped mental disability law jurisprudence in involuntary civil commitment law, institutional law, tort law, and all aspects of the criminal process (pretrial, trial and sentencing). It reflects what civil rights lawyer Florence Kennedy has characterized the “pathology of oppression.”

The CRPD’s General Comment No 6 records:¹¹⁷

30. ... In particular, States parties shall modify or abolish existing laws, regulations, customs and practices that constitute such discrimination. **The Committee has often given examples in that regard including: guardianship laws and other rules infringing upon the right to legal mental health laws that legitimize forced institutionalization and forced treatment**, which are discriminatory and must be abolished;

[**Bold** added]

The United Kingdom Parliament’s Joint Committee on Human Rights, discussing the Convention say:¹¹⁸

22. Article 14 of the Convention stipulates that the “**existence of a disability shall in no case justify a deprivation of liberty**”. Article 12(2) of the Convention says that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” In General Comment No. 1 on Article 12, the UN Committee on the Rights of Persons with Disabilities emphasised the crucial importance of ensuring that steps are taken to support individuals to exercise their legal capacity, including by means of supported decision-making, i.e. a process of decision-making which requires support to be given to a person to make their own decisions, and where such is not possible, for any decision to be taken on the basis of the best interpretation of an individual’s known wishes and preferences in respect of that decision.

been selected to be analyzed in the light of the Convention, finding out to what extent they can be a model for legislative changes to be exerted in the remaining States.

¹¹⁶ Perlin, ‘You Have Discussed Lepers and Crooks: Sanism in Clinical Teaching’, 9 *Clinical Law Review* (2003) 683.

¹¹⁷ CRPD, General Comment No. 6 (2018) on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6 (2018), para. 30.

¹¹⁸ UK Joint Committee on Human Rights, *The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards* (2018).

23. **The General Comment on Article 12 is critical of approaches, which say that people should only have legal capacity if they have mental capacity.** The CRPD Committee says that “perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.

24. **The CRPD Committee has recently assessed the UK’s compliance with the UNCRPD and has recommended that the UK “abolish all forms of substituted decision-making** concerning all spheres and areas of life by reviewing and adopting new legislation in accordance with the Convention to initiate new policies in both mental capacity and mental health laws,” and “repeal legislation and practices that authorise non-consensual involuntary, compulsory treatment and detention of persons with disabilities on the basis of actual or perceived impairment.”

25. **However, the CRPD Committee’s interpretation of the Convention is contested and stands at odds with the approach of the European Court and the UN Human Rights Committee, ...**

[**Bold** added]

In their findings, the UK parliamentarians say:

Overview of findings

32. **There is consensus that the current system is broken and hundreds of thousands of people are being unlawfully detained.** According to those who gave evidence to the Committee, there is broad support for the Law Commission’s proposals.

[**Bold** added]

Given there are hundreds of thousands British detainees being unlawfully detained, the issues are obviously not easy. In April 2019, the Chairperson of the Joint Human Rights Committee, said in respect of the definition:¹¹⁹

The Government is attempting to introduce a definition of deprivation of liberty into the Bill, as the Committee recommended...

The Bill is currently in Ping Pong.

Following disagreement between the Commons and the Lords as to the drafting of the definition, the Government has now proposed to remove the definition from the Bill and to say that “guidance about what kinds of arrangements for enabling the care or treatment of a person fall within paragraph 2(1)(b) of schedule AA1” must be included in Codes of Practice under the Mental Capacity Act.

Noble v Australia

The views of the CRPD who in *Noble v Australia*¹²⁰ found Mr Noble’s an intellectually disabled person’s detention was discriminatory, an unfair trial, and an arbitrary

¹¹⁹ United Kingdom Government, *The Government’s Response to The Joint Committee on Human Rights 7th and 12th Reports* (2019).

¹²⁰ *Noble v Australia*, supra note 25. The Committee found at:[Criminal Law (Mentally Impaired Defendants) Act 1996 (WA) (the MID Act)];

8.3. ...As a result of the application of the MID Act, **the author’s rights to a fair trial were instead fully suspended, depriving him of the protection and equal benefit of the law.**

detention, are inspiring, and important in this field, their jurisprudence is embryonic with less than thirty cases decided since 2006, seven from Australia, and none from NZ who only permitted individual communications eight years after ratification of the treaty by ratifying the optional protocol. An Australian Senate inquiry followed on the long term detention of the mentally impaired.¹²¹ Mr Noble was released.

Criticism of detention on grounds of assessed dangerousness

Terry Carney et al¹²² raised a number of serious issues of relevance. That Judicial determinations of civil commitments based solely on medical assessment of a person's need for treatment were a breach of the constitutionally protected right to freedom from arbitrary detention, led to the inclusion of an objective test for compulsory treatment criteria in mental health legislation in United States jurisdictions, and Canadian provinces. For example in *Thwaites v Health Sciences Centre Psychiatric Facility*,¹²³ the Manitoba Court of Appeal in Canada, which found that the province's civil commitment standard breached section 9 (freedom from arbitrary

The Committee therefore considers that the MID Act resulted into a discriminatory treatment of the author's case, in violation of article 5(1) and (2) of the Convention.

8.6. ...The Committee considers that while States parties have a certain margin of appreciation to determine the procedural arrangements to enable persons with disabilities to exercise their legal capacity,¹²⁰ the relevant rights of the person concerned must be complied with. This did not happen in the author's case, as **he had no possibility and was not provided with adequate support or accommodation to exercise his rights to access to justice and fair trial**. In view thereof, the Committee considers that situation under review amounts to a violation of the author's rights under articles 12(2)-(3) and 13(1) of the Convention.

8.7 ...**The author's detention was therefore decided on the basis of the assessment by State party's authorities of potential consequences of his intellectual disability, in the absence of any criminal conviction, thereby converting his disability into the core cause of his detention. The Committee therefore considers that the author's detention amounted to a violation of article 14 (1) (b) of the Convention according to which "the existence of a disability shall in no case justify a deprivation of liberty"**.

8.9 ...Additionally, the Committee notes that the author was detained during more than 10 years, without having any indication as to the duration of his detention. His detention was deemed indefinite in so far as, in compliance with section 10 of the MID Act, "an accused found under this part to be not mentally fit to stand trial is presumed to remain not mentally fit until the contrary is found [...]". Taking into account the irreparable psychological effects that indefinite detention may have on the detained person, the Committee considers that the indefinite detention he was subjected to amounted to inhuman and degrading treatment.¹²⁰ The Committee therefore considers that the indefinite character of the author's detention and the repeated acts of violence he was subjected to during his detention amount to a violation of article 15 of the Convention by the State party.

[**Bold** added]

¹²¹ Australian Senate, Community Affairs References Committee, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016).

¹²² Carney, Tait and Beupert, 'Pushing the Boundaries: Realising Rights Through Mental Health Tribunal Processes?', 30 *Sydney Law Review* (2008) 329.

¹²³ Manitoba Court of Appeal, *Thwaites v Health Sciences Centre Psychiatric Facility*, No. 20/87, Judgment of 29 Feb. 1988.

detention) of the Canadian Charter of Rights and Freedoms, commented that in the absence of objective standards, the possibility of compulsory examination and detention hangs over the heads of all persons suffering from a mental disorder, regardless of the nature of the disorder, and the availability and suitability of alternative and less restrictive forms of treatment.

The Manitoba legislature, and eventually all provincial legislatures, amended their mental health statutes to conform to these Charter requirements, inserting an objective test in place of the former clinical judgment test.

In the influential case *Lessard v Schmidt*, a United States Federal District Court held that:¹²⁴ (1) civil commitment could only be based on a finding of ‘dangerousness’, which required evidence of a recent overt act, and a likelihood of immediate harm without intervention; and (2) due process rights must be applied as stringently in the civil commitment context as in criminal proceedings because the same liberty interests are a stake in both cases. This meant that processes of entry into compulsory treatment should include procedural protections such as notice of the reasons for detention, a right to legal representation, and consideration of less restrictive alternatives.

The UN Special Rapporteur on Health, has also said:¹²⁵

21. The promotion and protection of human rights in mental health is reliant upon a redistribution of power in the clinical, research and public policy settings. Decision-making power in mental health is concentrated in the hands of biomedical gatekeepers, in particular biological psychiatry backed by the pharmaceutical industry. That undermines modern principles of holistic care, governance for mental health, innovative and independent interdisciplinary research and the formulation of rights-based priorities in mental health policy...

47. Discrimination, de jure and de facto, continues to influence mental health services, depriving users of a variety of rights, including the rights to refuse treatment, to legal capacity and to privacy, and other civil and political rights. The role of psychiatry and other mental health professions is particularly important and measures are needed to ensure that their professional practices do not perpetuate stigma and discrimination...

64. Justification for using coercion is generally based on “medical necessity” and “dangerousness”. These subjective principles are not supported by research and their application is open to broad interpretation, raising questions of arbitrariness that has come under increasing legal scrutiny. “Dangerousness” is often based on inappropriate prejudice, rather than evidence. There also exist compelling arguments that forced treatment, including with psychotropic medications, is not effective, despite its widespread use. See Steve R. Kisely and Leslie A. Campbell, “Compulsory community and involuntary outpatient treatment for people with severe mental disorders”, Cochrane database system (December 2014); and Hans Joachim Salize and Harald Dressing,

¹²⁴ United States District Court for the Eastern District of Wisconsin, *Lessard v. Schmidt*, No. 71-C-602, Judgment of 18 Oct. 1972.

¹²⁵ HRC, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, UN Doc. A/HRC/35/21 (2017).

“Coercion, involuntary treatment and quality of mental healthcare: is there any link?”
Current Opinion in Psychiatry, vol. 18, No.5 (October 2005).

[**Bold** and emphasis added]

As an earlier incumbent of that Special Rapporteur on Health, Professor Paul Hunt has been appointed the NZ Chief Human Rights Commissioner, perhaps the Human Rights Commission may now take an interest in these issues?

In *Ewert v Canada*¹²⁶ the Supreme Court of Canada noted that there is reason to be very careful before accepting evidence based on assessment tools, not properly validated, which is was not on indigenous Canadian populations. In New Zealand, a small country of around 5 million, much smaller than Canada, requires evidence that particular assessment tools have been properly validated for New Zealand, and for a particular group, (or both) such as Māori or Tongan and then properly applied in actuarial assessments.

Given the stakes involved, the validity of such tests always being carefully examined ought to be standard. This does not always happen major investigations have revealed that courts routinely admit evidence with poor or unknown scientific foundations.¹²⁷ Validation is an ongoing effort consisting of collecting, analyzing, and synthesizing various sources of evidence about how a particular tool performs in different sets of circumstances.

Wagner J, for the majority in *Ewert*, noted:

... the Crown took the position that actuarial tests are an important tool because the information derived from them is objective and thus mitigates against bias in subjective clinical assessments. In other words, the impugned tools are considered useful *because* the information derived from them can be scientifically validated. In my view, this is all the more reason to conclude that s. 24(1) imposes an obligation on the CSC to take reasonable steps to ensure that the information is accurate.

Contextually, it is worth repeating Family Court Judge Goodwin stating:¹²⁸

[43(e)] However, as the instrument does not consider risk factors such as specific characteristics (autism spectrum disorder, a fixation on violence, sensory sensitivity, impulsivity, threats of killing people, attempts to abscond, accessing weapons, lack of insight into the impacts of actions on victims and not having access to victims due to

¹²⁶ *Ewert v Canada*, supra note 66. Per McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ: in continuing to rely on the impugned tools without ensuring that they are valid when applied to Indigenous offenders, the CSC breached its obligation under s. 24(1) of the *CCRA* to take all reasonable steps to ensure that any information about an offender that it uses is as accurate as possible. However, the CSC's reliance on the results generated by the impugned tools does not constitute an infringement of E's rights under s. 7 or s. 15 of the *Charter*.

¹²⁷ United States of America Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009).

¹²⁸ *Ibid.*, 20-21.

current violent constraints) a clinical over-ride is used, which increases his risk category to the high to very high range.

The actuarial methodology requires accurate information and validation for NZ persons with ID and ASD, of which there is none. The expert opinions applied to J have little value given the instruments used are neither validated for NZ, nor for the intellectually disabled,¹²⁹ and J's risk is realistically even more unknown than the usual comparative approach of assessing persons of like characteristics, and identifying what proportion will likely re-offend as finding a group with similar characteristics is not possible, and assessment becomes a clinical judgment criticised by Keyser as the *ipse dixit* of the expert.¹³⁰

Commentary on such detentions: New Zealand

The NZ Law Commission's observation,¹³¹ regarding *Winterwerp v the Netherlands* (1979)¹³² are equally applicable here to the dangerousness of someone with mental impairments arising from Autism and Intellectual Disability. In *Winterwerp*, three pre-requisites were identified for compliance with the European Convention on Human Rights:

- there must be correspondence between expert medical opinion and the definition of the mental state required to satisfy the defence;
- the court's determination of mental impairment must be based on objective medical expertise; and
- the court must have discretion to determine whether or not the mental state is "of a kind or degree warranting compulsory confinement".

Professor Brookbanks has commented¹³³ that the adequacy of the law in describing and defining the conditions under which a compulsory care ordered may be indefinitely continued, in a manner that does not breach the subject person's fundamental rights as a disabled person are important. Relying on English authority he says "[t]he requirement that the procedures be enshrined in the law are a practical safeguard against arbitrary conduct by any arm of the state."¹³⁴ He says, this clearly represents a challenge for New Zealand lawmakers, since the provisions for extension of a

¹²⁹ Keyser, supra note 66; saying—Using only ones' professional judgment with which to assign individuals to a sample group without empirically-based justification, amounts to the *ipse dixit* of the expert.

¹³⁰ Keyser, supra note 66.

¹³¹ NZ Law Commission, *Mental Impairment Decision-Making and the Insanity Defence* (2010).

¹³² ECHR, *Winterwerp v The Netherlands*, No. 6301/73, Judgment of 27 Nov. 1981.

¹³³ Brookbanks, 'Managing the Challenges and Protecting the Rights of Intellectually Disabled Offenders', in B. McSherry and I. Freckleton (eds), *Coercive Care—Rights, Law and Policy* (2013) 218.

¹³⁴ United Kingdom Court of Appeal, *Secretary for Justice v RB*, Civ No. 1608, Judgment of 20 Dec. 2011.

compulsory care order are currently unattended by any criteria indicating the circumstances in which such an extension may be justifiable, or the factors to be taken into account in making such an order. Such legislative ambiguity may understandably lead to feelings of resentment, and disempowerment, by those being considered for an extension, or further extension of a compulsory care order, for whom compulsory care may come to be viewed as an unnecessary restriction upon their liberty, without a clear cause. He also says that the legislative's passing of a highly complex and prescriptive statute affecting a highly vulnerable group was bound to lead to legal challenges. He concludes that¹³⁵

While the expressed aim of the IDCCRA was to limit detention orders to a maximum period of three years, in reality the failure of the legislature to define criteria limiting **the courts' ability to repeatedly extend such orders resulted in a de facto default position whereby compulsory care risked becoming indefinite preventive detention.**

Despite the learned Professor's very helpful views, I disagree on one point. The detainee's view are not the end of that lacunae in the law, the absence of understanding what is "prescribed by law"¹³⁶ also means the detention may well be arbitrary, and it submitted that it is.

Plainly, we have not heard the last on the unlawful detention of those with ID/ASD. Further research is necessary in order to explore these issues more fully.

What realistically could be done for J and others with similar problems?

In an English case of 2015, Justice Mostyn in *Bournemouth Borough Council v PS and DS*¹³⁷ before the English Court of Protection¹³⁸ considered the circumstances of Ben who moved in to his current accommodation in 2011 see paras 10 and 13:

10. Ben was born on 12 February 1987 and is now aged 28. He is diagnosed as suffering from autistic spectrum disorder and mild learning disability.[English terminology for intellectual disability] The first statement from the social worker, Mr Morrison records how he needs continuous care, in the following terms:

¹³⁵ *Brookbanks*, supra note 133.

¹³⁶ *HRC*, supra note 33; General Comment 35/14—The grounds and procedures **prescribed by law** must not be destructive of the right to liberty of person; GC35/22— Any substantive grounds for arrest or detention must be **prescribed by law** and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application; GC35/23—Article 9 requires that procedures for carrying out legally authorized deprivation of liberty should also be **established by law and States parties should ensure compliance with their legally prescribed procedures.**

[**Bold added**]

¹³⁷ United Kingdom Court of Protection, *Bournemouth Borough Council v PS & DS*, EWCOP 39, Judgment of 11 June 2015.

¹³⁸ The Court of Protection in English law is a superior court of record created under the Mental Capacity Act 2005. It has jurisdiction over the property, financial affairs and personal welfare of people who lack mental capacity to make decisions for themselves.

‘Ben has a diagnosis of autism with associated severely challenging and dangerous behaviour including damage to property, physical injury to others, self harm and inappropriate sexualised behaviour. He also has significant impairments of social interaction and communication with others. He is at risk self neglect because he lacks insight into his care needs and the need to maintain his medication. Ben would not be able to care for his physical and mental health needs without support as staff need to prompt him to undertake all personal care, to get out of bed at an appropriate time in the morning, wash his hair and help in maintaining his personal and dental hygiene...

13. “This is a 2-bedroom bungalow with a garden. He lives there on his own and has staff with him in his home for 365 days a year with 24 hour waking night staff attendance provided by Dorset Healthcare University NHS Foundation Trust Domiciliary Care Agency. Ben is subject to constant observation and monitoring and is provided with minimal personal care when he is in his home.

He is encouraged to engage with a timetable devised by staff to ensure all daily tasks are completed within the appropriate times of the day. Ben has difficulties in engaging with the agreed tasks as he invariably declines, and reverts to wanting to go back to the arrangements of previous institutional settings where everything was done for him.

With support, he uses local transport and is involved in doing his own shopping for food and other consumables. Ben needs staff support to encourage him to get out of bed in the morning as he is likely to stay in bed till 12 noon if left. This is managed on a one to one step by step basis. Ben also needs encouragement from the staff to complete his personal care tasks. He has difficulties effectively cleaning himself when in the bath and includes washing his hair. He also needs hands or support to clean his teeth. Without this personal support Ben would neglect his personal care needs putting his health at significant risk of harm.

Ben does not have access to the kitchen when cooking is being undertaken by the staff as there have been some incidents of him putting himself and others at risk...

Ben’s medication is managed and administered by support staff which he accepts and is compliant with the arrangements. The medication is in a locked cupboard managed by staff as Ben has no understanding of the need for his medication and why he is required to take it to maintain good health.”¹³⁹

Clearly it is possible for someone with—autism and associated severely challenging and dangerous behaviour including damage to property, physical injury to others, self-harm and inappropriate sexualised behaviour to be housed in the community. J whilst not as difficult as Ben also has significant impairments of social interaction, and communication with others, and challenging behaviours. Nevertheless Ben was able to live in the community in England, so why cannot J live in the community in NZ? Better still he could live with his mother, which he did until the breaking windows incident.

Such an minimal impairment of human rights alternative needs to be considered before secure care is ever imposed.

¹³⁹ *Bournemouth Borough Council v PS & DS*, supra note 137, para. 13.

Richard Genge

Some background on Mr Genge is now set out, followed by discussion on a number of issues which jointly affect Mr Genge, and J, before dealing more fully with Mr Genge's issues.

At 19 years old, Mr Genge was convicted of murder and rape. On 25 October 1995, he received a life sentence for murder, a type of indefinite sentence. He received a minimum non-parole period of 15 years for the murder, and a finite period of 12 years imprisonment for sexual violation by rape.

Primarily without counsel, he has been a prodigious litigant before the New Zealand Courts, having taken 22 higher court cases, including 6 habeas corpus applications and appeals, 12 judicial reviews, and 3 related appeals, and one statutory appeal¹⁴⁰ from matters arising from his imprisonment. This working paper cannot canvas the vast wealth of Mr Genge's legal issues, and will focus on risk factors, sentences of no hope, cultural, and related matters.

The judicial review judgment of Justice Clark in the Wellington High Court of 15 June 2018,¹⁴¹ covers in detail his lengthy and prolific concerns about rehabilitation, which is linked with his risk profile. At para 39 Her Honour says: "*I have set out in an addendum to this judgment a detailed chronology of key dates, decisions and events bearing on the issue of Mr Genge's access to rehabilitative programmes.*"

In brief, there is a standoff between the individual treatment he seeks, and what the Department of Corrections is willing to give—group treatment. He challenges that the effectiveness of group therapy is any better than individual therapy. Justice Clark apparently assuming it was without discussion. For a person in his circumstances, individual therapy would be better, as it is unlikely to cause him psychological distress, and neither will it cause psychological damage to others in the same group therapy sessions. He needs ethnically appropriate individual therapy. He is Māori, NZ's indigenous population which number only 16.5%¹⁴² of the population has over 50% of the prison population. Only 21% of prison staff, and 7.3% of the Department of Corrections psychologists (the effective keeper of the keys to his release) are Māori, that, and other systemic factors militate against release. He was doing well on individual therapy provided by a bi-cultural therapist.¹⁴³ It could well be the real resource issue (if any) is the absence of qualified Māori psychologists. This is discussed below.

¹⁴⁰ Relating to security for costs refused to be waived by the Registrar of the Court of Appeal, and also declined by a single Court of Appeal Judge on review.

¹⁴¹ New Zealand High Court, *Genge v Chief Executive, Department of Corrections*, CIV-2016-409-397, Judgment of 15 June 2018.

¹⁴² Stats NZ, *2018 Census* (2018).

¹⁴³ Stated in a report to the Parole Board by Dr Porter.

Mr Genge denies he committed the crimes, he was effectively sentenced without a recollection of the crimes, accepting from others that he was Guilty having no personal recollection of these crimes. A co-accused (3 were charged and convicted) is currently seeking an appeal, which if granted. will assist Mr Genge's attempts to have a belated appeal from his conviction.

Issues affecting both J and Mr Genge: arbitrary detention/lack of rehabilitation

Miller and Carroll v New Zealand

The views of the HRC included:

8.6 ...Under these circumstances, the Committee considers that the length of the authors' preventive detention, together with the State party's failure to appropriately alter the punitive nature of the detention conditions after the expiration of their period of non-eligibility for parole, constitutes a violation of articles 9(1) and 10(3) of the Covenant.

8.15 ...[In relation to the Parole Board] Accordingly, the Committee considers that the State party failed to show that judicial review over the lawfulness of detention was available to the authors in order to challenge their continued detention pursuant to article 9 (4) of the Covenant.

9. The Human Rights Committee, acting under article 5(4), of the Optional Protocol to the Covenant, is of the view that the information before it discloses violations by the State party of article 9 (1) and (4) and article 10(3) of the Covenant with respect to each author.

The same logic should equally apply to a person sentenced to an indeterminate sentence for murder, as well those sentenced to preventive detention for sexual or violent offences, both being indeterminate sentences.¹⁴⁴ No change is made to any conditions of either group when completing the non-minimum parole period. Accordingly, he is currently being arbitrarily detained, and not treated with dignity and respect.

In one sense, internationally it does not strictly matter as the HRC have determined that the Parole Board, and subsequent judicial review, are insufficient for a proper article 9 process, and the non-independent Parole Board here is considering his risk assessment, however we are yet to see the Government's final response to this finding in *Miller and Carroll*. In the domestic courts it does matter, and will be advanced on appeal.

¹⁴⁴ Section 4 (interpretation section), Sentencing Act, 2002: indeterminate sentence of imprisonment means a sentence of imprisonment for life or a sentence of preventive detention. Section 23: no sentence of any kind may be imposed cumulatively on an indeterminate sentence of imprisonment.

State Party's response to Miller and Carroll

The State party in its response to *Miller and Carroll* on 27 November 2018, to the HRC said—*there is no lesser form of restriction that can be placed upon either of the authors*¹⁴⁵ i.e. No covenant remedy is available.

Having also set out the Committee's views on the lawfulness of review before the Parole Board, and the Courts, the State party basically confines this to the 'too hard basket', and otherwise ignores it. It sets out the Committee's view as to article 9(4) at 5:

5. The Committee considered the Parole Board did not, for the purpose of enabling the authors' rights to challenge the lawfulness of their detention, constitute a "court" within the meaning of article 9(4). It observed that, given the indefinite length of preventive detention, the Parole Board (and not the courts) in effect determines the ultimate length of the sentence of a prisoner serving preventive detention. The Committee further considered that the authors' rights to appeal the Parole Board's decision to the ordinary courts did not meet the standard required by article 9(4). It held the courts do not engage in a full review of the facts but "only monitor, from a predominantly procedural point of view, factual decisions previously reached by the Parole Board in relation to the risk posed by prisoners".

Then it spends some time on saying what happened to the two authors at the Parole Board:

27 As will appear from the foregoing summary the position remains that in the assessment of the Parole Board it is not possible at this time to release either author from preventive detention. On each occasion, the Parole Board concluded that the statutory threshold for release had not been met and the panel was not satisfied that the authors would not pose an undue risk to the safety of the community, if released.

In essence the State party fail to understand that a domestically lawful detention can still be, as the Committee in *Miller and Carroll* decided—arbitrary in international human rights law.

This is also consistent with ECHR jurisprudence in *James, Wells and Lee v UK*:¹⁴⁶

195...However, as noted above, it has indicated that in circumstances **where a decision not to release or to re-detain a prisoner was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court, or on an assessment that was unreasonable in terms of those objectives, a detention that was lawful at the outset could be transformed into a deprivation of liberty that was arbitrary** (see *Grosskopf*, cited above, §§ 44 and 48; *Weeks*, cited above, § 49; and *M. v. Germany*, cited above, § 88).

[**Bold** added]

The State party continues:

¹⁴⁵ *Miller & Carroll v New Zealand*, supra note 40, para. 29.

¹⁴⁶ ECHR, *James, Wells and Lee v The United Kingdom*, Appl. Nos. 25119/09, 57715/09 and 57877/09, Judgment of 18 Sep. 2012.

28 That said, each author's detention is reviewed periodically by the Parole Board and the full range of rehabilitative and re-integrative programmes is available to them, subject to eligibility criteria. Between appearances, prison staff continues to work with people on preventive detention to identify their needs and risk, so that they can access the rehabilitative and reintegrative programmes that they require.

29 Given the respective determinations of the Parole Board after consideration of the facts of each author's case, **there is no lesser form of restriction that can be placed upon either of the authors.**

[**Bold** added]

The State party's response to future violations is meaningless in terms of actual immediate remedy for either Alan Miller, Michael Carroll, or Richard Genge, given the HRC's request for a remedy within 180 days, i.e. by October 2018.¹⁴⁷ In the longer term it appears to have potential, but may fall by the wayside. The State party said:

Steps taken in relation to the future to prevent violations

30 The New Zealand Government has asked the Department of Corrections to provide advice on how the operation and design of New Zealand's prisons could be reformed over the longer term. This advice, which is currently under development, will cover issues of direct relevance to preventive detainees as it will focus on opportunities to maximise rehabilitative and re-integrative opportunities for all prisoners.

Considerations for legislative reform

31 The legislative settings for preventive detention and release on parole will also need to be carefully reviewed in light of the Committee's Views.

32 An opportunity for that review is an initiative the New Zealand Government launched in July 2018 – the Safe and Effective Justice Programme (Hāpaitia te Oranga Tangata). This review seeks to transform the criminal justice system so that it better focuses on uplifting the wellbeing of all people affected by crime. The Minister of Justice, Hon Andrew Little, is leading the programme to ensure the criminal justice system...

33 The Safe and Effective Justice Programme is a phased plan of work running until June 2020. It responds to concerns that the criminal justice system is not adequately meeting the needs of the public, victims, communities, or people who offend. The work will include an examination of the current sentencing and parole settings, and will include the existing arrangements for offenders who pose a serious and continuing risk to public safety. Although there is no specific focus on the sentence of preventive detention, the programme is likely to involve consideration of the appropriateness and effectiveness of this sentence and orders such as the extended supervision order and public protection order.

Even in terms of a proposal, nothing is likely prior to June 2020, legislation would likely take a further year, or so. The Government's term of office (3 years) will expire in November 2020, and an election is currently scheduled for September 2020. As the opposition have totally different policy on penal reform, any remedy (if one is recommended) will ultimately decide on the fate of the Government elected in the

¹⁴⁷ The Committee's views were determined on 27 November 2017, but neither the State party on the authors received a copy until April 2018, the author's received their copy on 10 April 2018, and 180 days are counted from that date.

ballot box, and the legislative timetable, and will be far removed from the Committee's request for a remedy in 180 days, meanwhile Messrs Miller, Carroll and Genge will continue to be held in arbitrary detention. Unless a domestic court releases them.

The State party's response would not be out of place on letterhead from Australia, or other countries habitually ignoring the HRC's views.

If Mr Genge is not dangerous, then his position is equally as bad as either Alan Miller's, or Michael Carroll's.

More detailed aspects of risk assessment

In practical terms the personality and individuality of Mr Genge some 25 years ago when committing his crimes at 19 years of age, and the man he is today are different.¹⁴⁸ He has spent his entire adult life in prison, and any further prison may become so detrimental as to amount at some stage to be inhumane. A good reason to follow the ECHR approach to sentences of no hope, and reassess sentencing by the trial court.

For example, the difference in behaviour of young versus mature persons was an issue in *Grant v The Queen*¹⁴⁹ where the NZ Court of Appeal noted Professor Ogloff's point at 31:

[31] Along with reviewing Mr Grant's background and assessing his risk of future offending, Professor Ogloff described how the development of the pre-frontal cortex in particular plays a significant role in maturation. The brain develops in a back-to-front pattern and the pre-frontal cortex is the last portion of the brain to fully develop. As a consequence, adolescents and young people do not develop the complex decision-making and planning skills of adults until later in their development. With respect to offending patterns by age, a so-called age-crime curve exists...offending peaks in the adolescent and youth years, and rapidly declines thereafter.

83 As the age-crime curve shows, young people will typically be identified as being higher risk than older people. As such, it is of critical importance to consider age, development, and context when considering the level of risk that an individual pose for reoffending.

(Footnotes omitted.)

This has not been considered when estimating his risk, some 25 years later.

It is vitally important to understand it is not possible to scientifically ascertain any individuals risk of re-offending. The score resulting from a risk assessment is not a prediction of that offender's likelihood of reoffending, rather it is an estimate of the rate

¹⁴⁸ Also see the Grand Chamber case; *James, Wells and Lee v The United Kingdom*, supra note 146—The Court reiterates that where reasons of dangerousness are relied upon by the sentencing courts for ordering an indeterminate period of deprivation of liberty, these reasons are by their very nature susceptible of change with the passage of time (see *Weeks*, cited above, § 46).

¹⁴⁹ New Zealand Court of Appeal, *Grant v R*, CA628/2015, Judgment of 19 Dec. 2017.

of reoffending that can be expected of a group of offenders with matching covariates to that individual.¹⁵⁰

However, trying to find Māori Sexual Homicide Offenders of similar age is if not an impossible task, likely to result in a very small number, making comparisons virtually impossible. The Department do not specify who the "group" Mr Genge is in, consists of. Using actuarial risk assessments is generally considered more reliable than relying on clinical opinion, but you need a group of like offenders to compare the individual with.¹⁵¹

The Māori review, discussed below¹⁵² suggested, what was needed was:

- "Ensure that Māori participate fully in delivery and governance.
- "Provide opportunities for Māori to develop their own priorities and kaupapa as part of mainstream organisations.
- "Ensure that the tools of measurement and evaluation are reliable and valid for specific use with Māori -particularly when they are utilised to assess perceptual, attitudinal and cognitive behaviours.

None of which occurred. Risk assessments rely on inferential reasoning:—This man resembles offenders who were likely to recidivate, therefore he is likely to recidivate.

¹⁵⁰ Copas and Marshall, 'The Offender Group Reconviction Scale: A Prospective Comparative Study', 47 *Applied Statistics* (1998) 159-171.

¹⁵¹ Gredecki and Hocken, 'Thinking Outside of The Box, The Assessment of Sexual Offending Recidivism and Specialist Populations', in J. Ireland, C. Ireland and P. Birch (eds) *Violent and Sexual Offenders: Assessment, Treatment and Management* (2019) 16, at 25: According to Heilbrun, Yasu Hara, and Shah (2008) one of the important considerations involves the population to which the individual being assessed actually belongs. There are important differences in base rates of violence, risk factors and protective factors, and risk-relevant interventions for differing populations. As such, a key challenge for practitioners is conducting risk assessments with specialist populations. By such population we mean clients who have characteristics (some protected) that set them apart from the general population in some way. This may include disability, ethnic background ...

These characteristics represent a challenge because there is much less established research knowledge about the factors that are relevant to understanding their offending. Furthermore, standardised risk assessments are not likely to have been validated on these client groups. As a result, this means uncertainty about the reliability and validity of standardised assessments for specialist populations, leading to practical and ethical questions about how best to assess risk of further offending or further offending.

Also see Professor Keyser above at 67 saying— Using only ones' professional judgment with which to assign individuals to a sample group without empirically-based justification, amounts to the *ipse dixit* of the expert

... As such, specialist forensic populations are likely to be at a disadvantage because of the lack of appropriate risk assessment tools for them."

¹⁵² New Zealand Department of Corrections, *What Works for Māori Synthesis of Selected Literature* (2012).

Different Scientific and Legal Thinking

Faigman et al,¹⁵³ identify a basic cultural and language gap between the scientific and legal world, the former focused on the phenomenon of groups, the latter focused on the individual, such that reasoning from group data to individual decisions can be highly problematic. An understanding of this dynamic is important in parole decision-making where actuarial risk assessments are being applied to individual cases to assist parole decision-makers with little training on risk assessment. There is potential for members, as untrained decision-makers, to draw inferences from the data in an individual case at hand that may not be appropriate or accurate. (Likewise this applies to J). Cucolo and Perlin say:¹⁵⁴

For a judge to make a ruling on the potential future risk of an individual, his or her ultimate decision is inevitably purely based on the subjective opinion of an expert witness, devoid of concrete answers and verifiable scientific conclusions.

For risk assessment purposes is Mr Genge a sex offender or murderer or both?

Psychologists are unable to agree on whether to categorise a sexual homicide offender, such as Mr Genge, as a murderer, or a sex offender, which would logically have different risk parameters, and different risk profiles.

For example, Sara Skott, Eric Beauregard, and Rajan Darjee say:¹⁵⁵

We conclude that sexual homicide offenders might be considered a distinct group of homicide offenders, more similar to sexual offenders than to other homicide offenders.

Whereas one of the very same authors Eric Beauregard, (and Matt DeLisi, and Ashley Hewitt) in the same year 2018 say:¹⁵⁶

Therefore, we suggest that based on their criminal career, SHOs [Sexual Homicide Offenders] should be considered more as murderers than sex offenders. However, to fully answer this question, future studies should include a group of non-sexual homicide offenders.

¹⁵³ D. Faigman, D. Kaye, M. Saks and E. Cheng, *Modern Scientific Evidence: The Law and Science of Expert Testimony* (2012); D. Griffin, *Killing Time: Life Imprisonment and Parole in Ireland* (2012), 103-146.

¹⁵⁴ Cucolo and Perlin, 'The Strings in the Books Ain't Pulled and Persuaded': How the Use of Improper Statistics and Unverified Data Corrupts the Judicial Process in Sex Offender Cases', No. 3223877 *NYLS Legal Studies Research Paper* (2018).

¹⁵⁵ Skott, Beauregard and Darjee, 'Sexual and Nonsexual Homicide in Scotland: Is There a Difference?', *Journal of Interpersonal Violence* (2018).

¹⁵⁶ Beauregard, DeLisi and Hewitt, 'Sexual Murderers: Sex Offender, Murderer, or Both?' 30 *Sexual Abuse* (2018) 932-950.

A 2019 article¹⁵⁷ indicated sex offending is a complicated, multi-determined behaviour, and treatment models have involved to respond to research over the past 40 years in an effort to effectively address it. Despite numerous reviews and meta-analyses, the effectiveness of sex offender treatment in reducing recidivism remains unclear. A 2015 meta-analysis comparing 4,939 treated with untreated sex offenders concluded that the evidence basis for sex offender treatment remains unsatisfactory (Schmucker and Losel, 2015). Treatment studies of sexual offender subgroups have also had discouraging results, and has prompted more research on newer treatment models, such as the good lives and circles of support and accountability models, as well as on long-term, individual treatment programmes. The Grønnerød, Grønnerød, and Grøndahl article¹⁵⁸ says the debate on the effectiveness of sexual offender treatment has been running for about four decades without any clear conclusion. Despite numerous reviews and meta-analyses, the question as to whether sexual offender treatment reduces recidivism in general still lacks a clear and definite answer.¹⁵⁹ In another recent text the introduction¹⁶⁰ says:

Psychological and criminological theories of sexual murder

There are only a few psychological and criminological theories of sexual homicide, all of them with a limited empirical basis. In fact, these theories are typically based on small study groups comprising only one type of sexual murderer, for example, serial sexual murderers or sadistic sexual murderers, both of which represent only a small percentage of incarcerated sexual murderers (Fox & Levin, 1999; Proulx, Cusson, & Beauregard, 2007). In addition, these theories encompass only a limited number of factors.

So, the accuracy of risk assessment for a group of like offenders (which have yet to be identified) must be highly suspect, as seemingly over 80% of sexual crimes are unreported. Yet how accurate that survey is itself, must be questionable. For example, in *Director of Public Prosecutions for Western Australia v Mangolamara*¹⁶¹ Hasluck J held:

In the end, bearing in mind that the rules of evidence reflect a form of wisdom based on logic and experience, I am of the view, for the reasons I have referred to, that little weight should be given to those parts of the reports concerning the assessment tools. In my view, the evidence in question does not conform to long-established rules concerning expert evidence. The research data and methods underlying the assessment tools are assumed to be correct but this has not been established by the evidence. It has not been made clear

¹⁵⁷ Ricci and Clayton, 'Using Offence Drivers to Guide Conceptualisation and treatment of Trauma in Male Sex Offenders', in J. Ireland, C. Ireland and P. Birch (eds), *Violent and Sexual Offenders: Assessment, Treatment and Management* (2019) 282, at 287.

¹⁵⁸ Grønnerød, Grønnerød and Grøndahl, 'Psychological Treatment of Sexual Offenders Against Children: A Meta-Analytic Review of Treatment Outcome Studies', 16 *Trauma Violence Abuse* (2015) 280-290.

¹⁵⁹ *Ibid.*, at 284.

¹⁶⁰ J. Proulx, E. Beauregard, A. Carter, A. Mokros, R. Darjee and J. James, *Routledge International Handbook of Sexual Homicide Studies* (2018), xxi.

¹⁶¹ Supreme Court of Western Australia, *Director of Public Prosecutions (WA) v Manglomara*, MCR 25 of 2006, Judgment of 27 March 2007, paras. 165-166.

to me whether the context for which the categories of assessment reflected in the relevant texts or manuals were devised is that of treatment and intervention or that of sentencing. Dr Pascu acknowledged under cross-examination that the assessment tools are directed not to the commission of serious sexual offences but to sexual re-offending of any kind (t/s 60). She acknowledged also that the database used for the mathematical model upon which Static-99 was based related to untreated English and Canadian sex offenders released back into the community on an unsupervised basis).

Moreover, having regard to the admissions made under cross-examination that the tools were not devised for and do not necessarily take account of the social circumstances of indigenous Australians in remote communities, I harbour grave reservations as to whether a person of the respondent's background can be easily fitted within the categories of appraisal presently allowed for by the assessment tools.

Whereas, in *Director of Public Prosecutions (WA) v GTR*¹⁶² McKechnie J expressed a similar view as Hasluck J. His Honour held:

The qualifications and limitations on the use of predictive models in the evidence speak for themselves. These limitations are supported by the published literature to which I have referred. For reasons similar to those expressed in *Mangolamara*, I cannot attribute significant weight to the expert psychiatric opinions as to risk. I accept that the use of one or more predictive models, with or without a clinical interview and appraisal, may be helpful in determining a counselling regime or a management strategy for an offender. In such cases there has already been a determination of guilt and a sentence has been imposed. Little prediction is required by the sentencing judge. Within that context there is usefulness in the models to aid the offender's rehabilitation, to customise a course of treatment or therapy, and to plan for the offender's release to the community.

However, an application under the DSO Act requires more intense scrutiny. The respondent's liberty may be removed or curtailed because of a prediction which a judge is required to make as to future offending. For that reason, the DSO Act requires acceptable and cogent evidence to a high degree of probability. While opinions based on the present predictive models may be suitable for management purposes, they lack cogency for the purposes of the DSO Act that little weight can be attributed to the results of assessments that rely on them. Accepting the view expressed that clinical interview alone is a poor predictor; it remains the case in Western Australia that as yet the tools that are being developed to increase the accuracy of predictive outcome of dangerous sexual offenders have not developed to such a stage that the evidence can be described as 'acceptable and cogent'.

When read with the Canadian Supreme Court approach in *Ewert v Canada*¹⁶³ and the paucity of reliable statistics, the validity of risk prediction must be seriously suspect.

Do murderers repeat offend? —Rarely

The risk of murderers reoffending is low even rare. Dirk Van Zyl Smit¹⁶⁴ ("Smit") from which a significant portion of this section is sourced from suggests that lengthy, intrusive and protective conditions of release are often based on the assumption that released life-sentenced prisoners will continue to be a danger to the public, and

¹⁶² Supreme Court of Western Australia, *Director of Public Prosecutions (WA) v GTR*, MCS 17 of 2007, Judgment of 20 Dec. 2007, paras. 111-112.

¹⁶³ *Ewert v Canada*, supra note 66.

¹⁶⁴ *D. Van Zyl Smit and C. Appleton*, supra note 20 at 282.

commit further offenses in the community. However, a small and growing body of evidence from multi jurisdictions suggests that recidivism among paroled life-sentenced prisoners is rare. Logically, if so, life-sentenced prisoners pose a lesser threat to the community than many other prisoners.¹⁶⁵

John Anderson¹⁶⁶ also relying heavily on Smit has some interesting commentary. He asks are there justifiable absolute forms of retribution and extreme incapacitation because of the unique moral obloquy involved and/or are the convicted murderers forever dangerous to society, resulting in an enduring need for community protection?¹⁶⁷ He then partially answers this from an analysis of the available data—there may be a small number of convicted murderers who are forever dangerous to the community, the risk of violent and homicidal recidivism is minimal for the overwhelming majority (see, for example, Broadhurst et al., 2017¹⁶⁸; Liem, 2013¹⁶⁹; Van Zyl Smit & Appleton, 2019, ch.10).¹⁷⁰ His concluding words are poignant:

There is clearly a need for caution and the application of procedural safeguards in considering the release of convicted murderers to parole, but the fact that those released from life imprisonment across the world have significantly lower rates of recidivism than other released prisoners and very rarely commit another murder is a solid plank in the argument of the disutility of natural life sentences

Scandinavia

In a massive Swedish study all individuals born in 1958-1980 (2,393,765 individuals) were included. Persistent violent offenders (those with a lifetime history of three or more violent crime convictions) were compared with individuals having one or two such convictions, and to matched non-offenders. The results showed that a total of 93,642 individuals (3.9 %) had at least one violent conviction. The distribution of convictions was such that 24,342 persistent violent offenders (1.0 % of the total population) accounted for 63.2 % of all convictions.

Smit says in Scandinavia, researchers have found low rates of serious violent offending among released homicide offenders. In Sweden, in 2014, for example, Sturup and Lindqvist¹⁷¹ followed up 153 homicide offenders more than 30 years after

¹⁶⁵ Liem, Zahn and Tichavsky, 'Criminal Recidivism Among Homicide Offenders', 29 *Journal of Interpersonal Violence* (2014) 2630-2651.

¹⁶⁶ Anderson, 'Recidivism of Paroled Murderers as a Factor in the Utility of Life Imprisonment', 31 *Current Issues in Criminal Justice* (2019) 255-268.

¹⁶⁷ *Ibid.*, at 256.

¹⁶⁸ Broadhurst, Maller, Maller and Bouhours, 'The Recidivism of Homicide Offenders in Western Australia', 51 *Australian & New Zealand Journal of Criminology* (2017) 1-17.

¹⁶⁹ Liem, 'Homicide Offender Recidivism: A Review of the Literature', 18 *Aggression and Violent Behaviour* (2013) 19-25.

¹⁷⁰ D. Van Zyl Smit and C. Appleton, *supra* note 20.

¹⁷¹ Sturup and Lindqvist, 'Homicide Offenders 32 Years Later—A Swedish Population-Based Study on Recidivism', 24 *Criminal Behaviour and Mental Health* (2014) 5-17. See also Eronen,

release and found that 10 percent of the cohort had been reconvicted, five of whom (3 percent) had committed a further homicide, two being reconvicted of murder.

UK

A British 012 study¹⁷² showed about a 3% re-offending between 2000/1 and 2010/11. Smit observes In England and Wales, recent research shows that “only 2.2% of those sentenced to a mandatory life sentence and 4.8% of those serving other life sentences reoffended, compared to 46.9% of the overall prison population.”¹⁷³ In their assessment of dangerousness and the risk posed to the public by persons convicted of murder in England and Wales, Mitchell and Roberts¹⁷⁴ highlight that “during the period 2000-01 and 2010-11, there were 6,053 convictions for murder or manslaughter, and only 30 cases less than ½% of persons who had previously been convicted of such an offense. That British study¹⁷⁵ reported by the BBC showed about a 3% re-offending rate between 2000/1 and 2010/11.

Holland

A 2011 Dutch study by Snodgrass et al found that, on average, “offenders serving longer sentences are reconvicted at a lower rate and have a lower probability of ever being reconvicted” compared to short-term prisoners.¹⁷⁶

USA

Smit reports that a 2004 report by the Sentencing Project revealed that, in Michigan, 175 individuals who had been convicted of murder were paroled between 1937 and 1961; none committed a further homicide, and only four were returned to prison for other offenses.¹⁷⁷ A 2013 California-based study found that “the reconviction rate of lifers was approximately one-tenth the rate of those who served determinate sentences.”¹⁷⁸ Only four prisoners were reconvicted within three years of release, of eighty-three life-sentenced prisoners released in California during 2006-2007.

Hakola and Tiihonen, ‘Factors Associated with Homicide Recidivism in a 13-Year Sample of Homicide Offenders in Finland’, 47 *Psychiatric Services* (1996) 403-406.

¹⁷² BBC, ‘Killers Who Go on to Kill Again Under Spotlight’, 19 Jan. 2012, retrieved from: <https://www.bbc.com/news/uk-16638227>.

¹⁷³ HMI Probation and HMI Prisons, *A Joint Inspection of Life Sentence Prisoners* (2013), 6.

¹⁷⁴ B. Mitchell and J. Roberts, *Exploring the Mandatory Life Sentence for Murder* (2012), 60-61.

¹⁷⁵ BBC, *supra* note 172.

¹⁷⁶ Snodgrass, Blokland, Haviland, Nieuwbeerta and Nagin, ‘Does the Time Cause the Crime? An Examination of the Relationship Between Time Served and Reoffending in the Netherlands’, 49 *Criminology* (2011) 1149-1194, 1167.

¹⁷⁷ Mauer, King and Young, *The Meaning of “Life: Long Sentences in Context* (2004), 23.

¹⁷⁸ California Department of Corrections and Rehabilitation, *Lifer Parolee Recidivism Report* (2013), 5.

Similarly, in 2011, Weisberg et al found the recidivism rate of convicted murderers released since 1995 in California to be “miniscule.” The researchers stated that¹⁷⁹

Among the 860 murderers released by the Board since 1995, only five individuals have returned to jail or returned to the California Department of Corrections and Rehabilitation for new felonies since being released, and none of them recidivated for life-term crimes. This figure represents a lower than one percent recidivism rate, as compared to the state’s overall inmate population recommitment rate to state prison for new crimes of 48.7 percent.

Keyser, using New York State release data between 1985 and 2011, and using a three-year follow-up period, reported in 2013 that, offenders released after serving time for murder and manslaughter returned at the lowest rates.”¹⁸⁰ Moreover, most murders reoffending were technical parole violations. Liem et al, using Pennsylvania Department of Corrections data in 2014, found that of the ninety-two homicide offenders who were paroled between 1977 and 1983, “very few homicide offenders”. Likewise, Bjorkly and Waage¹⁸¹ concluded in a study on recidivistic single-victim homicide in 2005, that “killing again” was very rare among released life-sentenced prisoners, ranging from 1 to 3.5 % of all homicides, conceding that more research is needed.

Broader measures of recidivism, such as re-arrest rates, reveal that life sentenced prisoners also constitute a category that would be least likely to be rearrested. In 2004, Mauer et al found that individuals released from life sentences in the United States were less than one-third as likely to be rearrested within three years compared to all released persons, and were more likely to be charged with a property than violent offense.¹⁸² A large-scale US Bureau of Justice Statistics study, carried out by Durose et al in 2014, based on over 400,000 released US prisoners, found that prisoners who had committed homicide had the lowest five-year re-arrest rates compared to all other groups of released prisoners.¹⁸³

Many US based commentators have noted the difficulties in predicting future dangerousness on the basis of a past offense.¹⁸⁴ For example, in their follow-up study of 239 released life prisoners who had their death sentences commuted to life

¹⁷⁹ Weisberg, Mukamal and Segall, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California* (2011), 17.

¹⁸⁰ Keyser, *2011 Inmate Releases: Three-Year Post Release Follow Up* (2012), 9.

¹⁸¹ Bjorkly and Wagge, ‘Killing Again: A Review of Research on Recidivistic Single-Victim Homicide’, 4 *International Journal of Forensic Mental Health* (2005) 99-106.

¹⁸² *Mauer, King and Young*, supra note 177 at 24.

¹⁸³ US Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (2014).

¹⁸⁴ Cunningham and Reidy, ‘Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing’, 16 *Behavioural Sciences and the Law* (1998) 71-95; Marquart and Sorenson, ‘A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders’, in H. Bedau (ed), *The Death Penalty in America: Current Controversies* (1997) 162.

imprisonment after the Furman decision in 1997, Marquart and Sorensen reported that “these prisoners did not represent a significant threat to society” and found that they could not “conclude from these data that their execution would have protected or merited society.”¹⁸⁵ The data showed that, overall, nearly 80 percent of this group did not commit additional crimes, having spent an average of five years in the community, and that a small percentage (less than 1 percent) if released murderers were returned to prison for committing a subsequent homicide.

Canada

In Canada, only 1 of 199 individuals sentenced to death whose sentences were commuted to Life and eventually released on parole, between 1920 and 1967 were reconvicted of homicide. Of an additional thirty-two persons released between 1959 and 1967, only one had been convicted of a new offence, which was not a murder.¹⁸⁶

Dirk Van Zyl Smit¹⁸⁷ continues reporting that in 2002, the National Parole Board of Canada reported that 11,783 prisoners, convicted of murder (4,131) or manslaughter (7,752), were released between 1975 and 1999. Of these, 37 (0.3 percent) were subsequently convicted for further homicide offenses.¹⁸⁸ In 2015, the Board stated that over the last twenty one years, individuals serving indeterminate sentences on full parole were 1.8 times more likely to have died than to have had their supervision periods revoked for having committed a new offense; and they were 4.7 times more likely to have died than to have had their supervision periods revoked because of a violent offense. The ratio almost doubled for those offender who were on full parole for over five years.¹⁸⁹ The report stated:

Marquart and Sorensen, ‘A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders’, 23 *Loyola of Los Angeles Law Review* (1989) 5-28, opening paragraph: On June 29, 1972, a sharply splintered United States Supreme Court, in *Furman v. Georgia*, ‘struck down the capital sentencing statutes of Georgia and Texas. Justices Brennan and Marshall found that the death penalty was per se unconstitutional. Justices Stewart, Douglas, and White found that capital punishment, as then administered under the statutory schemes of many states, constituted cruel and unusual punishment in violation of the eighth amendment.’ Justice Stewart concluded that “the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed.” Justice Douglas echoed this sentiment and stated “[u]nder these laws no standards govern the selection of the penalty.

¹⁸⁶ Mauer, King and Young, *supra* note 177 at 23.

¹⁸⁷ D. Van Zyl Smit and C. Appleton, *supra* note 20 at 283.

¹⁸⁸ Parole Board of Canada, *Offenders Serving a Life Sentence for Murder: A Statistical Overview* (2002), 12. See also Correctional Service Canada, *Recidivism among Homicide Offenders*, 5 March 2015, retrieved from: <https://www.csc-scc.gc.ca/research/forum/e042/e042c-eng.shtml>. Cale, Plecas, Cohen and Fortier, ‘An Exploratory Analysis of Factors Associated with Repeat Homicide in Canada’, 14 *Homicide Studies* (2010) 159-180.

¹⁸⁹ Parole Board of Canada, *Performance Monitoring Report 2014-2015* (2015), 51.

Between 1994/95 and 2014/15, 2,598 offenders serving indeterminate sentences had completed 3,024 federal full parole supervision periods. As of April 19, 2015, 54% of the supervision periods were still active (supervised), 20% had ended because the offender had died while on parole, 15% were revoked for a breach of condition, 7% were revoked as the result of a nonviolent offence, and 4% were revoked as the result of a violent offence.

Australia

A Western Australian incomplete study¹⁹⁰ showed of 894 Australian males arrested for homicide during the period 1984-2005, and subsequently released from prison, that 13 (7.3%) were in fact re-arrested for another homicide offence. How many were convicted is unknown. Whatever the numbers, murdering again compared to other repetitive violent crime is low risk.

Similarly, in Australia, studies have consistently found that have considerably lower recidivism rates than average.”¹⁹¹ In Western Australia a 2017 study by Broadhurst et al¹⁹² found that with a twenty-two-year follow-up period (from 1984 to 2005), only 3 of 1088 released homicide offenders were charged with a further homicide. They reported 40.2% had been re-arrested for any offence, and 18.6% for a serious offence.”

New Zealand

John Anderson¹⁹³ comments that a 2000 study by Spier¹⁹⁴ reported that prisoners released between 1995 and 1998 showed that 73% of inmates were re-convicted of some offence within two years of their release, none of those who had been serving life imprisonment were re-imprisoned, and only 4.7% of convicted murderers were re-convicted of a violent offence¹⁹⁵ Interestingly, he says it was specifically noted that ‘violent offenders released from a prison sentence for homicide or sex offences had lower violent offence reconviction rates than inmates released from prison for all other violent offences’ (pp. 11–12). That is particularly useful for Mr Genge a Murder/rapist.

The data gathered in that study, found that ‘only a very small proportion of all released inmates are re-convicted for very serious offences, and the type and seriousness of

¹⁹⁰ University of South Wales, ‘Counting the Risk of Murderers Re-Offending’, accessed 14 May 2019, retrieved from: <https://criminology.research.southwales.ac.uk/cirn/research-projects/reoffending/>.

¹⁹¹ Victoria Department of Justice, *Who Returns to Prison? Patterns of Recidivism Among Prisoners Released from Custody in Victoria in 2002-03* (2007), 10. See also New South Wales Department of Corrective Services, *Recidivism in NSW: General Study* (1995), 29-30.

¹⁹² *Broadhurst, Maller, Maller and Bouhours*, supra note 168 at 1-12.

¹⁹³ *Anderson*, supra note 166.

¹⁹⁴ New Zealand Ministry of Justice, *Reconviction and Reimprisonment Rates for Released Prisoners* (2002).

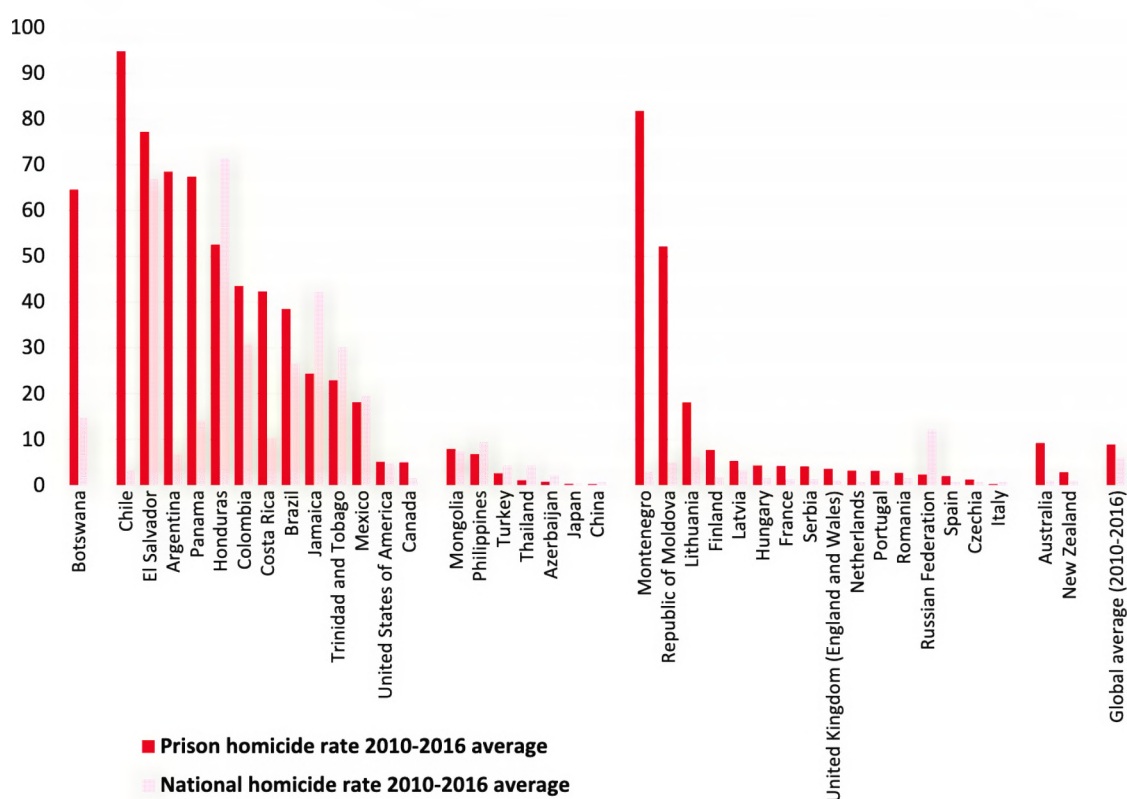
¹⁹⁵ *Ibid.*, at 9–12.

the offence that a person was imprisoned for is not a reliable predictor of the likelihood that they will commit a serious offence in future'¹⁹⁶

In terms of sexual crimes, the 2019 New Zealand Crime and Victims Survey,¹⁹⁷ found that only 23% of all crimes was reported. Less than a quarter (23%) of all crime was reported to the Police over the last 12 months. This proportion is twice as high for household offences (34%), compared to personal offences (17%).

Whether this is consistent with the finding of groups of persons being in a high-risk category is unknown. In terms of comparative data New Zealand has a very low rate or murder, just over 1 per 100,000, so second murders logically must be relatively low.¹⁹⁸

Homicides in prison per 100,000 prison population, selected countries, average for 2010–2016



Source: UNODC homicide statistics.

Note: Excluding countries that reported no homicides in prisons over the reporting period, or for which data on homicide in prisons were not available.

¹⁹⁶ *Ibid.*, at 15.

¹⁹⁷ New Zealand Crime and Victims Survey, *Key Findings Cycle 2 (October 2018 – September 2019) Descriptive Statistics* (2019).

¹⁹⁸ United Nations Office on Drugs and Crime, *Global Study on Homicide* (2019); average 2010-2016.

Mr Genge's actual risk of reoffending.

In one sense his risk does not matter, as no NZ Court is capable of an article 9 ICCPR analysis given the Committee's views in *Miller and Carroll* that the Parole Board is not independent. Accordingly, a long trawl through the parole decisions is not required. Assuming without conceding there is a point to "rehabilitation" as currently made available, it ought to be provided, and be completed before the tariff period expires, so that his risk is reduced. Taking Justice Clark's observations as correct, Her Honour says your author is said to be:

[65] ...Consequently, Mr Genge remains assessed as at high risk of violent re-offending and medium high risk of sexual re-offending.

Using the words of the 4 minority members in *Rameka v New Zealand*¹⁹⁹ discussed in the following section below, which stated that the science underlying such an assessment of potential future dangerousness was in the minorities view unsound, and the forecasts impermissibly vague:

The science underlying the assessment in question is unsound. How can anyone seriously assert that there is a "20% likelihood" that a person will re-offend?

How can anyone say he is a high risk, or medium high risk, this is worse than a 20% risk. What does it mean? Presumably as there is no way of dividing his risk of re-offending into murder, rather than other violent re-offending, that risk is unknown.

In *R v Peta*²⁰⁰ Glazebrook J for the Court of Appeal stated:

[52] Risk assessments and the related judicial decision making for risk management are best informed through an individualised formulation of risk. This should draw upon a variety of different sources of information in an attempt to identify risk factors within an aetiological (causative) framework. This recognises that risk is contingent upon factors that are both environmental and inherent in the individual. Such an approach also helps avoid the shortcomings of a mechanical and potentially formulaic assessment of risk, one that is overly reliant on static historical factors and potentially insensitive to features of the individual that change with time and context. In our view, s 107(2) in any event requires an individualised assessment

[53] The results of a properly conducted risk assessment must be effectively communicated to the Court. Adequate training in this is required. **When reporting the findings of a risk assessment, comparative categorical labels such as high, moderate or low risk should be qualified by probability statements that give corresponding reoffence rates for groups of similar offenders and the numbers of offenders in each category should be specified** (see the tables at paras [25] and [28] above). Any category or label, such as low, medium or high, should be used consistently in any report.

[**Bold Added**]

¹⁹⁹ *Rameka et al v New Zealand*, supra note 34.

²⁰⁰ New Zealand Court of Appeal, *R v Peta*, CA 48/06, Judgment of 28 Feb. 2007, paras. 52-53.

In a 2019 text,²⁰¹ the chapter authors state:

Thirdly, contemporary discourse in the area of risk assessment resembles a heated argument between followers of a particular guide regarding which manual is best, rather than focusing on how to increase the utility of risk prediction. A potential way of achieving the latter would be to initiate a discussion facilitating a more rigorous comparison of diverse techniques, conducted by independent researchers and aimed at identifying their most functional aspects for the purpose of combining them to create new instruments with higher utility. For instance, Ward and Fortune (2016) point out that the prediction of a given behaviour will be most accurate when it is aetiologically driven and consequently call for a unified research framework. **After all, risk assessment involves predictions about the future, and such a task requires cooperation, not contention.**

[**Bold** added]

Neither Mr Genge's or J's risk can realistically be calculated, and hence their detention wrongly based on these current assessments are arbitrary. The HRC in *Fardon*²⁰² advancing on the dissent in *Rameka* were right, that psychiatry is not an exact science, neither is psychology. If reliance cannot be placed on risk assessment individually, a rethink of risk assessment processes needs to be made.

Risk of a murderer committing another murder are low. In New Zealand the rate of murder itself is low in comparison to other OECD countries. On average, 70 people are killed each year. New Zealand's homicide rate of 1.6 per 100,000²⁰³ people is well below the OECD average of 3.6 per 100,000.²⁰⁴ Against those empirical facts it is difficult to see how Mr Genge is a high risk of being a repeat murderer, or a medium high risk of sexual re-offending.

Human Rights Committee Jurisprudence

In *Rameka v Harris and Tarawa v New Zealand*²⁰⁵ the three authors were all sentenced to preventive detention for rape. The Committee was seriously divided in its views; there was a bare majority of seven to six. Strikingly, according to Geiringer,³⁹⁰ providing the most detailed analysis of the case, the HRC's view on the merits was supported by only seven of the 16 members. The remaining nine subscribed to one of five dissenting opinions.³⁹¹ The dissents split broadly into two camps: those who thought there were extensive violations of the Covenant, and those who thought there were none at all. This left the seven members who supported the Committee's official view commanding the middle ground. The majority views held a breach of Article 9.4 in respect of Mr Harris. However, the case against Mr Rameka is

²⁰¹ Mooney and Sebalo, 'Violence Risk Assessment' in J. Ireland, C. Ireland and P. Birch (eds), *Violent and Sexual Offenders: Assessment, Treatment and Management* (2019) 1, at 13.

²⁰² *Fardon v Australia*, supra note 38.

²⁰³ Slightly higher than the chart which is 2015-6. Having just had 51 people murdered at the Christchurch Mosque will distort the figures for some time to come.

²⁰⁴ The DominionPost, *NZ's Problem with Murder Homicide* 14 May 2019; commenting on a new 3-year study of homicide in New Zealand.

²⁰⁵ *Rameka et al v New Zealand*, supra note 34.

the relevant one for consideration. His risk of reoffending was assessed as 20%. As counsel I objected to this as arbitrary, and only one of the three authors winning. Nevertheless, it was the first win in respect of NZ, and a stepping stone for future jurisprudence. *Rameka* was subsequently listed in 50 "Leading cases of the Human Rights Committee" by Raija Hanski and Martin Scheinin.²⁰⁶

One of the 5 sets of minority views included 3 dissenters, Mr Bhagwati, Mdm Chanet, and Mr Ahanhanzo, together with a fourth member, Mr Yrigoyen (dissenting in part), concluding that detention based solely on an assessment of potential future dangerousness was necessarily arbitrary, and thus that preventive detention was violative of the Covenant per se. The minority of 4 said:

The science underlying the assessment in question is unsound. How can anyone seriously assert that there is a "20% likelihood" that a person will re-offend?

To our way of thinking, preventive detention based on a forecast made according to such vague criteria is contrary to article 9, paragraph 1, of the Covenant.

Paradoxically, a person thought to be dangerous who has not yet committed the offence of which he/she is considered capable is less well protected by the law than an actual offender.

In *Isherwood v New Zealand*,²⁰⁷ (a preventive detention for sexual offences) where the author's reply to the State party's response were filed on 31 December 2019, the Committee may well advance the risk analysis further, that decision should be made in 2020/21, is has likely been delayed because of the Covid 19 pandemic, and the postponement of at least two of the three 2020 HRC sessions.

Dissent of Mr Lallah

Mr Lallah went further, than the minority of 4. Mr Lallah—the then longest serving Committee member, and former Chief Justice of Mauritius—was clearly very disturbed by the preventive detention process. For Mr Lallah, the key was a Covenant provision not expressly relied on by the authors, article 15(1), which reads in part: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed'. First, Mr Lallah stated that a criminal offence relates only to past acts. Secondly, the penalty for that offence can only relate to those past acts. It cannot, in Mr Lallah's view, extend to some hypothetical future psychological condition that might or might not lead to further offending. For these reasons, and also because the law does not prescribe a finite sentence, it was Mr Lallah's view that violations of article 15(1) had occurred. Additionally, he said, the facts disclosed violations of article 14(1) (the right to a fair trial), because a fair trial requires the court to have jurisdiction to pass a finite sentence, and that the State party had in effect delegated that jurisdiction to an

²⁰⁶ R. Hanski, M. Scheinin and Institutet för mänskliga rättigheter Åbo akademi, Leading Cases of the Human Rights Committee (2003), [M. Scheinin was a member of the Human Rights Committee 1997-2004, and in the majority on this communication].

²⁰⁷ HRC, *Isherwood v New Zealand*, Appl. No. 2976/2017, awaiting the Committee's views.

administrative body [The Parole Board], that may at some future time determine the length of sentence without Covenant due process safeguards. Additionally, Mr Lallah noted that article 14(2) (the presumption of innocence), was violated as there was an anticipatory assessment of what may happen after 10 years or so, before the benefits of treatment, reformation and social rehabilitation required under article 10(3) had taken place, and that assessment could not meet the essential burden of proof required to overcome a presumption of innocence. Accordingly, if any breach of article 9 was required, Mr Lallah opined that it should be of 9(1) (the right to freedom from arbitrary detention), and not 9(4) as the majority had found.

Accordingly, this is the principled position to start from. Is preventive detention Covenant compliant? If not, then the Committee should have found a breach of articles 9(1), 14, and 15(1) in addition to the findings, as per *Miller and Carroll* of 9(1) and 10(3) breaches. It does not matter at the end of the day what other jurisdictions do, this form of preventive detention is either Covenant compliant, or not.

That is the logical conclusion, preventive detention is non-covenant compliant, as it based on vague and indeterminable risks, the alternative of longer finite sentences (the obvious legislative response) should not influence the logic of whether the current provisions are arbitrary.

Other HRC cases

In *Dean v New Zealand*²⁰⁸ which slightly preceded *Fardon* the HRC recorded without considering:

5.4 With regard to his claim that the nature of the preventive detention regime violates articles 7, 9, 10, 14 and 15 of the Covenant, the author acknowledges that this is the same claim as raised in *Rameka v. New Zealand*, but states that he is relying on the individual opinions appended to the Committee's Views and ask the Committee to revisit its decision.

In *Fardon v Australia*²⁰⁹ by 11-2 the HRC found Mr Fardon's detention arbitrary because the prisoners²¹⁰ were feared to be dangerous, essentially based on psychiatric opinion, not fact. See para 7.4.4.

(4) The "detention" of the author as a "prisoner" under the DPSOA was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation. The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. **It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. The DPSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality**

²⁰⁸ *Dean v New Zealand*, supra note 37.

²⁰⁹ *Fardon v Australia*, supra note 38.

²¹⁰ It was jointly heard with *Tillman* which had similar but differently named state legislation, the ratio of the *Tillman* decision is identical, as are paragraphs 7.4.4 in each case. See HRC, *Tillman v Australia*, Views of 18 March 2010, UN Doc. CCPR/C/98/D/1635/2007.

is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise. To avoid arbitrariness, in these circumstances, the State Party should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State Party had a continuing obligation under Article 10 paragraph 3 of the Covenant to adopt meaningful measures for the reformation, if indeed it was needed, of the author throughout the 14 years during which he was in prison.

[**Bold** added]

The dissenters in *Rameka* should now well represent the majority of today. Justice Michael Musmanno's indispensable and breath-taking article in the *Dickinson Law Review*²¹¹ as one would expect from a Judge with 500 dissents to his name, shines brightly as to why, at p145:

In his brilliant argument before the Commonwealth in Harrisburg, Judge Pannell quoted from Chief Justice Hughes who said:

A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may correct the error into which the dissenting judge believes the court to have been betrayed." 32 J. AM. Jud. SOC'Y 106 (1948).

As Mr Genge is detained post tariff period for the protection of the public, he is no longer being detained for committing a crime, having served his punitive time. He is only detained in this case, in case in future, he was to commit a crime, or more accurately because an unscientific analysis of his risk suggests so. The presumption of innocence is being breached, article 14(2), as no crime has been committed. Equally there is a breach of 15(1) as nothing he has done was a criminal offence at the time, as it is predicated on future behaviour.

Equally, it is not equal treatment before the law, (article 14(1)) only certain types of possible future crimes are subject to advance imprisonment. With respect the *Rameka* dissenters were correct.

European Jurisprudence

ECHR cases have moved on since *Rameka* (2002). The European Court had found the then German system of preventive detention was a breach of Article 5 (arbitrary detention), and awarded 50,000 Euros compensation. The Court in *M v Germany*²¹² reached this conclusion after saying:

134. The Court further reiterates that it has drawn a distinction in its case-law between a measure that constitutes in substance a 'penalty'-and to which the absolute ban on retrospective criminal laws applies - and a measure that concerns the 'execution' or 'enforcement' of the 'penalty' (see para 121 above). It therefore has to determine whether a measure which turned a detention of limited duration into a detention of unlimited duration constituted in substance an additional penalty, or merely concerned the execution

²¹¹ Musmanno, 'Dissenting Opinions', 60 *Dickinson Law Review* (1956) 139-153.

²¹² ECHR, *M v Germany*, Appl. No. 19359/04, Judgment of 17 Dec. 2009.

or enforcement of the penalty applicable at the time of the offence of which the applicant was convicted.

M v Germany has been followed by further ECHR judgments in *Kallweit v Germany* (17792/07) 13 January 2011, *Mautes v Germany* (20008/07) 13 January 2011, *Schummer v Germany* (27360/04, 42225/07) 13 January 2011, all to similar effect. Following the jurisprudence of the Court, the Bundesverfassungsgericht, (German Constitutional Court "BVG") declared that the provisions of the German Criminal Code regarding preventive detention were unconstitutional.

Christopher Michaelson²¹³ noted that the BVG called for legislative change to ensure a liberty-oriented overall concept of preventive detention aimed at therapy, which did not leave decisive issues to the executive's and judiciary's decision-making powers, (but determined their actions in all relevant areas). He further notes that this may affect another nine other European states with similar legislative provisions.

Irish Jurisprudence

The situation in Ireland is that the Supreme Court (1966) stated that preventive detention 'has no place in our legal system' and is 'quite contrary to the concept of personal liberty enshrined in the Constitution'.

Kelly²¹⁴ says that as a general proposition the courts have no power to order the detention of an individual in order to prevent the commission of anticipated future crimes. Carney J²¹⁵ had wanted to sentence Mr Bambrick to life for the manslaughter of two women subject to release when no longer a danger to any community member. However, he demurred having decided in the light of *The People (Attorney General) O'Callaghan*,²¹⁶ *Ryan v Director of Public Prosecutions*,²¹⁷ and *Director of Public Prosecutions v Jackson*,²¹⁸ that it would be unconstitutional.

Kelly continues, observing the former Court of Criminal Appeal in *DPP v McMahon* ²¹⁹ held a life sentence could not be used to avoid anticipated future risk of harm. In their half page footnote that follows they canvass whether a person on a British life

²¹³ Michaelson, 'From Strasbourg with Love, Preventive Detention Before the German Constitutional Court and the European Court of Human Rights' 12 *Human Rights Law Review* (2012) 148, 163.

²¹⁴ G. Hogan, G. Whyte, D. Kenny, R. Walsh and J. Kelly, *Kelly: The Irish Constitution* (2018), para. 7.4.176.

²¹⁵ Irish Central Criminal Court, *People v Bambrick*, 1995 No. 81, Judgment of 26 July 1996.

²¹⁶ Irish Supreme Court, *The People (Attorney-General) v O'Callaghan*, [1966] IR 501, Judgment of 14 Oct. 1966.

²¹⁷ Irish Supreme Court, *Ryan v Director of Public Prosecutions*, [1989] IR 399, Judgment of 18 Nov. 1988.

²¹⁸ Irish Court of Criminal Appeal, *Director of Public Prosecutions v Jackson*, 1992 No. 70, Judgment of 26 April 1993.

²¹⁹ Irish Court of Criminal Appeal, *DPP v McMahon*, CCA No. 161 of 2009, Judgment of 14 Dec. 2011.

sentence with punitive components could be extradited. Noting the Supreme Court by a majority in *Caffrey v Governor of Portlaoise Prison*²²⁰ determined extradition was lawful as the management of the sentence was now governed by Irish law, where life sentences are now exclusively punitive in purpose.

In *Killing Time*,²²¹ Diarmuid Griffin says an assessment that the life sentence is in some manner preventive is more significant in Ireland than elsewhere, as the incorporation of preventive detention or any incapacitative measures into any aspect of criminal justice decision-making creates issues of compatibility with the Constitution *People (Attorney General) v O'Callaghan*.²²² He noted in *People (DPP) v K.(G.)* (2008)²²³ that there is a balance that must be struck between protecting the public, and the States obligation to vindicate the rights of the individual, even if that individual is a recidivist or dangerous. An individual cannot be sentenced for offences which he has not yet committed. This case illustrated that the incapacitative rationale conflicts with the proportionality principle in sentencing, the constitutional right to personal liberty, and the presumption of innocence.

Sentence or detention of “No Hope”

This concept of continuing risk for J, and for Mr Genge, and all others detained in such circumstances raises the issue of whether such sentences, or detentions, become detentions of no hope. This issue has been discussed in the last decade in a series of Grand Chambers of the European Court of Human Rights.²²⁴ I agree with Andrew Ashworth and Lucia Zedner,²²⁵ that the ECHR was right in its *Vinter*²²⁶ judgment that even if, as a result of a predictive sentence, a prisoner has to spend the rest of his or her life in detention because he or she remained a risk to the community, that human dignity requires that there be periodic review, and a real prospect of release. Those

²²⁰ Irish Supreme Court, *Caffrey v Governor of Portlaoise Prison*, SC No. 267 of 2010, Judgment of 1 Feb. 2012.

²²¹ *D. Griffin*, supra note 153 at 50.

²²² *The People (Attorney General) v O'Callaghan*, supra note 216.

²²³ Irish Criminal Court of Appeal, *DPP v K.(G.)*, CCA No. 12/07, Judgment of 31 July 2008.

²²⁴ The Grand Chamber judgment, in ECHR, *Murray v The Netherlands*, Appl. No. 10511/10, Judgment of 26 April 2016, para. 99, states that it is well established that imposition of life is not incompatible with ECHR article 3. However, in ECHR, *Vinter and Others v The United Kingdom*, Appl. Nos. 66069/09, 130/10 and 3896/10, Judgments of 9 July 2013, para. 99, an irreducible sentence was found to be a possible breach of article 3. After a detailed review of the case law, the Grand Chamber held there was “clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter”. ECHR, *Hutchinson v The United Kingdom*, Appl. No. 57592/08, Judgment of 17 Jan. 2017, further develops the jurisprudence.

²²⁵ Ashworth and Zedner, ‘Some Dilemmas of Indeterminate Sentences’, in in J. de Keijser, J. Roberts and J. Ryberg (eds), *Predictive Sentencing Normative and Empirical Perspectives* (2019) 127, at 137.

²²⁶ ECHR, *Vinter and Others v The United Kingdom*, Appl. Nos. 66069/09, 130/10 and 3896/10, Judgments of 9 July 2013, para. 99

authors²²⁷ dwelling on the morality of indeterminate sentencing applaud Duff²²⁸ saying ‘the idea that offenders and prisoners must be accorded the respect and dignity that is still their due remains central to the rhetoric and aspirations of penal policy’. They applaud Duff’s suggestion that ‘we can develop a morally plausible conception of liberal citizenship that portrays it not as a set of rights whose retention depends on good behavior, but as a status that cannot be lost by the commission of even serious crimes’ I agree.

Mr Genge, serving his life sentence for Murder, has now served 25 years, which squarely raises whether this is a sentence of no hope, as his continued detention is based on future risk, is it therefore a breach of s 9, and/or s22 and/or 23(5) New Zealand Bill of Rights Act (**NZBORA**)?

9 Right not to be subjected to torture or cruel treatment

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

22 Liberty of the person

Everyone has the right not to be arbitrarily arrested or detained.

23 Rights of persons arrested or detained

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

The ICCPR equivalent Articles 7, 9, and 10(1) are also in play.²²⁹

Article 10(3) is of course unique to that treaty and requires the benefits of treatment, reformation and social rehabilitation.

I see no reason why a detention of no hope does not arise earlier than 20 or 25 years when the detention is civil, not criminal, and applied to a person with severe disabilities. In the words of the ECHR in *Oliveria v Portugal* persons like J are particularly vulnerable.²³⁰ To this end I intend in 2020 to argue that point before the

²²⁷ *Ashworth and Zedner*, supra note 225 at 144.

²²⁸ Duff ‘Punishment, Dignity and Degradation’ 25 *Oxford Journal of Legal Studies* (2005) 141; Meyerson ‘Risks, Rights, Statistics and Compulsory Measures’, 31 *Sydney Law Review* (2009) 514.

²²⁹ Article 7—No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 9.—1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 10—1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

²³⁰ *Fernandes de Oliveira v Portugal*, supra note 95, para. 113.

Court of Appeal for J, and the 25 year issue for Mr Genge issue proceedings in the High Court.

Three Grand Chamber judgments of very recent vintage *Murray v the Netherlands*,²³¹ *Vinter and others v the UK*,²³² and *Hutchinson v the UK* need further consideration.

The 25-year point is dealt with first. This is based on *Murray* and *Vinter* requiring reconsideration of the detention by the sentencing court at 25 (or 20) years of time served. Obviously, rehabilitation done by that time would be influential, as would his perceived risk of recidivism.

Hutchinson backtracked, but only to the extent that is for the State party to set a time where sentence reconsideration must occur. In the context of New Zealand, the statutory minimum ten-year period, or the actual minimum period sentenced here, 15 years minimum non-parole period is logically the time for reconsideration by a sentencing court, as future detention is only for protective purposes.

The Grand Chamber in *Murray* refer to:

71. The General Comment of the Human Rights Committee on Article 10 further states that "no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner".²³³

Murray further found at para 100, that a prisoner cannot be detained unless there are legitimate penological grounds for incarceration, which include punishment, deterrence, public protection and rehabilitation. While many of these grounds will be present at the time when a life sentence is imposed, they change over time. There needs to be a balance between the penological purposes, and the balance between these justifications for detention which are not necessarily static, and may shift in the course of the sentence. Only at a review of the justification for continued detention at an appropriate point in the sentence, can these factors be properly evaluated (*Vinter*, para 111).

The review required in order for a life sentence to be reducible should therefore allow the domestic authorities to consider whether, in the course of the sentence, any changes in the life prisoner and progress towards his or her rehabilitation are of such significance that continued detention is no longer justified on legitimate penological grounds (ibid para 119). This assessment must be based on rules having a sufficient degree of clarity and certainty, and the conditions laid down in domestic legislation

²³¹ ECHR, *Murray v The Netherlands*, Appl. No. 10511/10, Judgment of 26 April 2016, sections 99-100.

²³² *Vinter and Others v The United Kingdom*, supra note 226.

²³³ Also referring to *Vinter and Others v The United Kingdom*, supra note 226. Tracing the reference back to para 81 of that judgment which reads: 81. *In its General Comment No. 21 (1992) on Article 10, the Human Rights Committee stated inter alia that no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner (see paragraph 10 of the comment).*

must reflect the conditions set out in the Court's case-law (see *Murray* citing *Vinter* at para 128).

Finally, in assessing whether the life sentence is reducible de facto, it may be of relevance to take account of statistical information on prior use of the review mechanism in question, including the number of persons having been granted a pardon. No pardons have been granted in NZ.

Hutchinson needs to be read in full. Without reading the judgments it is difficult to do justice to what the Judges say. Some helpful assistance comes from Mary Rogen which indicates that the ECHR may have led a move from the 25-year approach, at least temporarily.²³⁴

The Court promoted its rehabilitative credentials in *Hutchinson* at some length. It noted a 2015 decision under Article 8 (the right to private and family life), which stated: 'emphasis on rehabilitation and reintegration has become a mandatory factor that the member States need to take into account in designing their penal policies' (*Khoroshenko v. Russia* ((2015) [GC], no. 41418/04, § 121, ECHR 2015)). However, the boldness of the judiciary in *Vinter*, which gave a very strong indication that there must be a 25 year review, was replaced in *Hutchinson* by the more traditional deference to the states in the realm of criminal justice and sentencing. The Court recalled that the date of review should therefore be left to the discretion of contracting states.

Hutchinson illustrates the limitations of the judicial role in shaping policy, and its self-imposed ones. By wrapping itself in the language of the margin of appreciation, the Court blunted its own power, and, perhaps sensibly, avoided exacerbating further clashes with the United Kingdom government. This point was picked up by the dissenting opinion of Judge Pinto de Albuquerque, who excoriated the Grand Chamber for bowing in the face of resistance by a domestic court, expressing bitter disappointment that the case represented a significant dilution of its standard setting for the rights of prisoners in Europe,...

These concerns are well articulated. **However, *Hutchinson's* continued emphasis on the pre-eminence of rehabilitation in European penal policy may be the more enduring element of the case.** Even with the rollback from *Vinter*, the European Court of Human Rights has very clearly established that **rehabilitation should be the pre-eminent goal of sentencing in contracting states.** It is notable, however, that the Court's interrogation of the notion of rehabilitation in *Vinter* and *Hutchinson* is fairly limited. While the Grand Chamber in *Vinter* drew on Council of Europe documents concerning rehabilitation, some of which have been the subject of input by criminologists (though much more work is required to explore how policy is formed in this context), the Grand Chamber has not itself engaged in an extensive assessment of criminological work on the concept of rehabilitation. Instead, the Grand Chamber treated it almost as axiomatic that rehabilitation was, and ought to be, the main purpose of penal practice.

[**Bold** added]

That is, it is married with the rehabilitative provisions of Article 10(3) of the ICCPR.

The lengthy dissenting judgment of Judge Pinto de Albuquerque, with whom Judge López Guerra, and Judge Sajó concur, signal this issue is not finalized yet, and no

²³⁴ Rogen, 'Discerning Penal Values and Judicial Decision Making: The Case of Whole Life Sentencing in Europe and the United States of America', 57 *The Howard Journal* (2018) 328.

doubt, new Grand Chamber cases, and possibly HRC cases (*Isherwood v New Zealand* 2976/2017 discussed above) may arise.

Judge Pinto de Albuquerque usefully says at:

7. In *Murray*, the Court was even more explicit. According to paragraphs 99 and 100 of that judgment, the parole mechanism must comply with the following five binding, "relevant principles":

(1) the principle of legality ("rules having a sufficient degree of clarity and certainty", "conditions laid down in domestic legislation");

(2) the principle of the assessment of penological grounds for continued incarceration, on the basis of "objective, pre-established criteria", which include resocialisation (special prevention), deterrence (general prevention) and retribution;

(3) the principle of assessment within a pre-established time frame and, in the case of life prisoners, "not later than 25 years after the imposition of the sentence and thereafter a periodic review";

(4) the principle of fair procedural guarantees, which include at least the obligation to give reasons for decisions not to release or to recall a prisoner;

(5) the principle of judicial review.

From *Miller and Carroll* the Committee has already determined that the Parole Board and judicial review in higher courts do not meet Covenant requirements. Point 3 recites the 25-year rule.

Mary Rogen fairly picks out that Judge Pinto de Albuquerque somewhat excoriated the majority.²³⁵ At Para 35 his heading is:

V. What lies ahead for the Convention system? (§§ 35-47)

A. The seismic consequences of the present judgment for Europe (§§ 35-40)

38. In this context, **the present judgment may have seismic consequences** for the European human-rights protection system. The majority's decision represents a peak in a growing trend towards downgrading the role of the Court before certain domestic jurisdictions, with the serious risk that the Convention is applied with double standards. If the Court goes down this road, it will end up as a non-judicial commission of highly qualified and politically legitimised 47 experts, which does not deliver binding judgments, at least with regard to certain Contracting Parties, but pronounces mere recommendations on "what it would be desirable" for domestic authorities to do, acting in an mere auxiliary capacity, in order to "aid" them in fulfilling their statutory and international obligations. **The probability of deleterious consequences for the entire European system of human-rights protection is heightened by the current political environment**, which shows an increasing hostility to the Court.

[**Bold** added]

²³⁵

Ibid.—This point was picked up by the dissenting opinion of Judge Pinto de Albuquerque, *who excoriated the Grand Chamber for bowing in the face of resistance by a domestic court, expressing bitter disappointment that the case represented a significant dilution of its standard setting for the rights of prisoners in Europe*,

The High Court Judgment of Justice Clark

The High Court judgment of Her Honour Justice Clark of 15 June 2018 is pivotal. The essence of the judgment is that Mr Genge is not being arbitrarily detained, and has been offered significant rehabilitation. The major difference between the parties is that Mr Genge sought individual rehabilitation, whereas the Department of Corrections offers as mainstream, its group treatment approach. There is no analysis of why group therapy is better than individual therapy. Probably, because there is no such evidence available, and the judgment unsurprisingly exhibits judicial deference to prison authorities. A well-known phenomenon in prison law is judicial deference to prison administrators.²³⁶ Dicta of the US Supreme Court indicate that the treatment of prisoners and the continued application of the law to regulate their conditions of confinement is an indication of a community's maturity.²³⁷ The judicial position portrayed in Edney's survey of US, English and Australian decisions is that judges have moved from the "hands off" approach to prisoners' rights to the "judicial deference" model of prisoners' rights. Edney's key assumption is:²³⁸ Moreover, the key assumption that will be made is that the courts, by relying on an imputed notion of "expertise", have reverted to the hands off doctrine in substance, if not form.

Given the ICCPR is the only major international instrument with an Article 10(3), or similar, then the HRC, will hopefully take the lead, not follow.

The evidence to support the Department views of Mr Genge's treatment comes from the Department's own psychologists, who plainly have a vested interest in the outcome, particularly as they are giving expert evidence, and also evidence as to the facts.²³⁹ See two ECHR cases²⁴⁰ where it was held experts from a different hospital were required.

The first two paragraphs of Justice Clark's judgment say:

²³⁶ Edney, 'Judicial Deference to Expertise of Correctional Administrators', 7 *Australian Journal of Human Rights* (2001) 91-133 (hereinafter referred to as Edney). Law and Justice Foundation of New South Wales, *Taking Justice into Custody: The Legal Needs of Prisoners* (2008), at Ch. 4, full report available at: <http://www.lawfoundation.net.au/report/prisoners>; also referred to in the Queensland Ombudsman, *Justice on the Inside Report* (2009). Also see – Kerr, Wright and Stephenson, 'Contesting Expertise in Prison Law', 60 *McGill Law Journal* (2014) 43-94. Suggesting deference is ostensibly justified by a judicial worry that prison administrators possess specialized knowledge and navigate unique risks, beyond the purview of courts.

²³⁷ Supreme Court of the United States, *Rhodes v Chapman*, 452 US 337, Judgment of 15 June 1981, 364 per Powell J.

²³⁸ *Edney*, supra note 236 at 95.

²³⁹ Her Honour Justice Clark noted:

14...Ms Reynolds gave expert testimony notwithstanding her employment relationship with the Department. Although she has not met Mr Genge nor made any psychological assessment or recommendation specific to his circumstances, in her capacity as Chief Psychologist Ms Reynolds has, in the past, responded to letters from Mr Genge's lawyers.

²⁴⁰ ECHR, *Sara Lind Eggertsdottir v Iceland*, Appl. No. 31930/04, Judgment of 5 July 2007; ECHR, *Shulepov v Russia*, Appl. No. 15435/03, Judgment of 26 June 2008.

[1] On 25 October 1995 Mr Genge was sentenced to life imprisonment with a minimum non-parole period of 15 years for murder. He was sentenced concurrently to 12 years' imprisonment for sexual violation by rape. Mr Genge has been in prison ever since. He was denied parole when he first appeared on 29 September 2009. The Parole Board has declined parole on nine further occasions, most recently on 30 May 2018.

[2] In this application for judicial review Mr Genge asks the Court to declare that he has been arbitrarily detained. He seeks release and compensatory and exemplary damages. The broad basis for Mr Genge's claim is that the Department of Corrections has failed to provide interventions or rehabilitative programmes to accommodate his specific needs. As a result he has been denied the opportunity to present at the New Zealand Parole Board with a realistic prospect of being granted parole and his detention, Mr Genge says, has become unlawful and arbitrary.

What is missing is any analysis of *why* Mr Genge should accept group therapy. It is simply, wrongly taken for granted as the only route forward. There are various problems with this, including cultural competence, and the potential psychological, and physical, risks involved, not only to Mr Genge, but other prisoners sharing therapy sessions.

Before looking at more detail of Mr Genge's desire not to accept group treatment, it is important to observe that whilst Justice Clark finds against him on the evidence, a fair summary is contained in the following four paragraphs. What Her Honour does not say, will become important, and is discussed later:

[61] There is no question that, over time, Mr Genge has received inconsistent messages from custodial staff. For example, the principal corrections officer recorded on 21 April 2016 that Mr Genge had approached him about doing the HRPP course in the High Security Unit at Rāwhiti. The request was declined for a number of reasons including that the course was "designed for difficult and non-compliant prisoners of which prisoner is not". Yet in May 2016 in the context of assessing Mr Genge's security classification, the approving officer recorded that until Mr Genge addressed his threatening, intimidating and non-compliant behaviour "possibly by successfully completing the HRPP" he should not be considered for a huts environment.

[62] Ms Reynolds appropriately acknowledged Mr Genge's "evident frustration" in progressing his treatment. Ms Reynolds referred specifically to the incorrect advice given to Mr Genge in early 2015 that he was to be transferred to the Matapuna STU to commence STURP only for him to be told two hours later he was not going. Ms Reynolds acknowledged Mr Genge should not have experienced this set back and apologised for the error. Ms Reynolds has also provided an explanation for other apparent inconsistencies in terminologies and recommendations of Department staff.

[63] However, in large part, Mr Genge is "sick of people telling him what to do and wasting his time". The evidence shows Mr Genge demands treatment "on his own terms" and that he appears unable to focus on the role his own behaviour has played in treatment failures. Mr Genge's beliefs he is victimised by the system have been described as "well developed and rigidly held, and preclude any insight into his cognitive distortions, and ultimately, openness to support to learn and change". Mr Genge wrote a letter to his case officer Ken Frost on 8 August 2013. In it, he says his file notes are "bullshit". Prison staff seemed "out to get [him]". The things the staff had done to him were "unbelievable" but the staff had realised "the pen is a powerful weapon". When minimal rehabilitative progress is advised because of Mr Genge's behaviour, Mr Genge has accused the Department of "lying and playing games".

[64] Mr Genge is either unable or unwilling to engage with departmental psychologists, and departmental psychologists have been unable to establish a working relationship with

Mr Genge. Putting Mr Genge forward for group treatment without proper preparation is likely to lead Mr Genge to be exited from that treatment. As the Parole Board observed that would be counterproductive.

Abbreviations

HRRP—The High Risk Personality Programme (Mixed Group And Individual Therapy) https://www.corrections.govt.nz/resources/research_and_statistics/journal/volume_3_issue_2_december_2015-evidence_based_practice/the_high_risk_personality_programme_revised_an_evaluation_report.html Accessed 13 May 2019.

Therapy is delivered in a group and individual format, with three group-based weekly sessions of 2-2.5 hours and a one-hour individual session each week for each participant.

STU—[15] There are six prison-based special treatment units (STUs) for violent or sexual offenders and one community-based STU for high risk offenders serving community sentences. Each STU is managed by a principal psychologist who is supported by a team of psychologists and specially trained custodial staff. One of the STUs is at Christchurch Men's Prison where Mr Genge is serving his sentence.

STURP—[16] Four of the STUs, including at Christchurch Men's Prison, provide intensive group-based treatment for high-risk violent offenders through violence relapse prevention programmes (known as STURP).

Group Therapy is not the only route forward

Her Honour's approach is simply wrong. Group therapy is not the only route forward. Individual therapy is as valid as group therapy. A 2014 article's abstract is reproduced here:²⁴¹

There is debate in the literature as to the relative efficacy of group versus individual treatment of sex offenders. Nonetheless, there has been relatively little empirical research on this topic to date. The current study examined the efficacy of the Regional Treatment Centre (Ontario) Sex Offender Program (RTCSOP), which consisted of group plus individual therapy (i.e., full treatment program), versus individual therapy alone (i.e., individual treatment program). The treated sample consisted of individuals deemed to be at high risk of recidivism based on actuarial assessment and/or as presenting with significant treatment needs (i.e., serious psychiatric disorder). A group of 76 sex offenders who were provided with both group and individual treatment was matched to a group of 76 sex offenders who were provided with an individual treatment program alone. **Results indicated that treatment outcome, as measured by rates of sexual, violent and general recidivism, did not differ between the two treatment groups. Both the full treatment program as well as the individual treatment program used in this study appeared to be equally effective methods of treatment based on follow-up.** Differences between the groups, which might help to explain these results, are discussed.

[**Bold** added]

So, there is little research, and what there is shows essentially no difference between group and individual therapy. Justice Clark, dismissing Mr Genge's claim that he had not received proper rehabilitation said:

²⁴¹

Looman, Abracen and Di Fazio, 'Efficacy of Group Versus Individual Treatment of Sex Offenders', 6 *Sexual Abuse in Australia and New Zealand* (2016) 48-56.

[65] The evidence shows a pattern of attempts over the years to provide Mr Genge with rehabilitative support, through programmes and through one-on-one counselling to prepare him for such programmes. The department has invested some \$12,600 plus GST in Mr Genge's bi-cultural therapist. Mr Genge has had ample opportunity to engage but has resisted engagement on terms other than his own. Consequently, Mr Genge remains assessed as at high risk of violent re-offending and medium high risk of sexual re-offending.

[66] The chief executive's duty to provide rehabilitative programmes is expressly stated to be subject to available resource, and the chief executive's judgment about who will benefit from such programmes. Mr Genge has demonstrated no failure to offer him the opportunities to engage in the rehabilitative programmes, completion of which will enhance his eligibility for parole. The evidence simply does not support Mr Genge's contention, however firmly held.

Dangers of Group Therapy

Andrew Frost in his Canterbury University (NZ) doctorate thesis on child sex offenders says,²⁴² says there is little research on group therapy versus individual therapy, and what there is remains sparse, and is of limited scope.²⁴³ He says:²⁴⁴

I concluded there that the costs to the individual of revealing himself as a molester are likely to be perceived as considerable. In the current chapter, I have outlined the requirements, placed before clients, considered necessary to effectively address such conduct. These include full acknowledgement of culpability for their offending, and their acceptance of responsibility for lifelong safety maintenance. **In short, it is clear that confronting these tasks, especially in the hostile and intimidating context of prison culture, is likely to present a daunting and difficult prospect. Fear, mistrust, shame and alienation not only present obstacles to motivation for the level of disclosure required, but the intensity of these experiences for individuals (who have typically suffered abuse themselves) can evoke various forms of psychological disturbance likely to represent impediments to therapeutic engagement** (Briere, 1989; Ward, Hudson, & Marshall, 1995) or risk to treatment outcome (Ward, Hudson, Johnston, & Marshall, 1997). Of course, these issues will present different levels of difficulty for different men, depending on a range of factors, including the degree to which they have already contemplated and weighed risks and benefits for themselves.

[**Bold** added]

²⁴² Frost, Andrew, *New Connections: The Engagement in Group Therapy of Incarcerated Men Who Have Sexually Offended Against Children* (PhD Thesis, Canterbury University, 2000).

²⁴³ *Ibid.*, at 75.

²⁴⁴ *Ibid.*, at 76.

Whilst child sex offenders are generally at the bottom of the prison social scale, an offender such as your author is but one step higher.²⁴⁵ A 2013 English Master's thesis comments:²⁴⁶

Sex offenders and the sociology of prison

It is commonly noted that – regardless of jurisdiction – sex offenders are at the bottom of the prisoner hierarchy, living in near-constant fear of abuse and assault from prisoners and sometimes staff (Priestley, 1980; Åkerström, 1986; Vaughn and Sapp, 1989; Prison Reform Trust, 1990; Hogue, 1993; Sim, 1994; Genders and Player, 1995; Sparks et al., 1996; Thurston, 1996; O'Donnell and Edgar, 1999; Winfree et al., 2002; Waldram, 2007; Crewe, 2009). Vaughn and Sapp (1989) have further argued that, **although sex offenders in general are at the base of the hierarchy, there is a subdivision within the group, with rapists of adult women having a higher status and paedophiles having the greatest stigma**. Research into the experiences of sex offenders in prison has barely extended beyond this focus on the hierarchy, even though it is likely that the experiences of sex offenders in prison are different to those of other prisoners. Very little is known about how they see themselves or how they experience prison.

[**Bold** added]

Mr Genge objected to group therapy, and wanted individual therapy. In Ms Nicola Reynold's, Corrections Chief Psychologist affidavit heavily relied upon by Justice Clark, Ms Reynolds says:

96.1.1... The report writer commented that Mr Genge had strong views about the deficiencies of the Department's provision of treatment programmes for Maori and that prisoners "including himself, cannot necessarily be compartmentalised into a Western based treatment philosophy."

245

Crime against persons figures as a prominent social issue; sexual crimes, give rise to a special kind of public opprobrium. Those perpetrated against children are considered the most abhorrent of all. This hierarchy appears to be reflected in the sub-culture of prisons, where child sex offenders find themselves at the very bottom of the pecking order. The "inmate code" is enforced by principles of silence and intimidation, creating ideal conditions for victimisation to proliferate. Vaughn and Sapp, 'Less Than Utopian: Sex Offender Treatment in a Milieu of Power Struggles, Status Positioning, and Inmate Manipulation in State Correctional Institutions', 69 *The Prison Journal* (1989) 73-89, in an American study, and Hogue, 'Attitudes Towards Prisoners and Sexual Offenders', in N. Clark and G. Stephenson (eds), *Sexual Offenders: Context, Assessment and Treatment* (1993), 27-32, in a British study, present evidence to suggest that child molesters emerge in the prison setting as "the outcast of outcasts". The mechanism that Vaughan and Sapp propose to account for this is an "importation model". They argue that the values of "free society" (comprising the non-incarcerated population), where aggression is indirectly revered and sexual molestation is especially despised, become distilled in the context of the prison sub-culture. Given the means by which the hierarchical structure of the prison is translated into social control, those convicted of child sexual offences are likely to experience the physical and social manifestations of a hatred, which according to Vaughan and Sapp, begins gathering momentum a long way from the prison gates. It is therefore easy to understand, they continue, why these inmates are reluctant to identify themselves by the behaviour that brought about their conviction. They conclude that volunteering for a programme of therapy not only makes them vulnerable to exposure, but attracts further negative attention by suggesting co-operation with agents of the establishment.

246

Howard League for Penal Reform, *Living Amongst Sex Offenders* (2014). Based on Alice Levins' John Sunley Prize winning Masters dissertation.

99. It also correlates with Mr Barnett's September 2011 psychological report: "At current assessment, Mr Genge clearly articulated his reasons for not wanting to undertake an intensive group treatment programme in prison and little progress has been made in this area in bicultural therapy. It is noted that while an intensive group based rehabilitation programme is the most efficacious treatment available to Mr Genge his lack of motivation, rigid fixation on his perception that his sentence has been mismanaged, personal medical issues and his personality structure characterised by interpersonal deficits and anti-sociality would likely undermine his and other group members ability to profit from treatment and thereby preclude him from treatment. Mr Genge reported that his personality would impair his ability to function in a group treatment environment due to his tendency toward abrasiveness and challenging communication style."

A handwritten note next to this by Mr Genge says "Group treatment vs 1 to 1 I don't wanna hear other peoples problems and issues - I'm not a trained psychologist, I own my own actions, I've pled guilty in 1995."

In Mr Genge's view he would have been doomed to fail a group approach, due to his personality. A 2012 report published on the Department's website assists his viewpoint, it seems to have been paid little attention to by its Departmental sponsors:²⁴⁷

2 Introduction²⁴⁸

Māori over-representation in the offender population is a long-standing issue of concern for the Department of Corrections and the lack of progress in reducing levels of over-representation suggests a need to explore different approaches to rehabilitation. The Department has contracted Katoa Ltd to revise a previous report and to carry out a further synthesis of literature about the transformation of Māori

The final paragraphs of the report state:

Recognise the authenticity of Māori, its culture, its philosophy, its principles and values.

- Build relationships through understanding, a sense of equality, mutual respect and trust.

- Ensure that Māori participate fully in delivery and governance.**

- Provide opportunities for Māori to develop their own priorities** and kaupapa as part of mainstream organisations.

[*Kaupapa Māori* theory asserts a position that to be *Māori* is normal and taken for granted.]

- Incorporate language and culture into policy, management and delivery.

- Ensure strong links and communication with Māori communities.

- Tailor services to Māori needs and preferences.**

²⁴⁷ New Zealand Department of Corrections, supra note 152.

²⁴⁸ Ibid., at 7.

•Ensure that the tools of measurement and evaluation are reliable and valid for specific use with Māori—particularly when they are utilised to assess perceptual, attitudinal and cognitive behaviours.

•Apply research findings to refine policy design and practice.

The points in the two lists above summarise the main implications for programmes that are concerned with successful Māori transformation. The overall challenge is to integrate them within organisations according to their own contexts. We also need to recognise that beyond the achievements and successes referred to in this paper, not all Māori are benefiting and disparities in employment, education, health and socio-economic status remain. This increase in Māori diversity reinforces the call for further long-term research and attention to policy and design.

The final theme we draw from this research is the realisation of Māori potential, from the single individual with his or her own authenticities, through to whānau, hapū iwi and the wider community to the national context. **Emphatic contributions have come from the desire of Māori to take charge of their self-determination and by seeking close involvement with policies and programmes affecting them** and by working to address disparities between Māori and non-Māori on a number of fronts. Much has been achieved and much is to be gained from future research, analysis evaluation and inclusive discussion.

[*Whānau*, in this context means extended family; Hapū and Iwi— *Iwi*. The largest political grouping in pre-European Māori society was the *iwi* (tribe). This usually consisted of several related *hapū* (clans or descent groups). The *hapū* of an *iwi* might sometimes fight each other, but would unite to defend tribal territory against other tribes.

[**Bold** added]

Not taking cognisance of their own report, means it is hardly surprising that courses having little Māori individual input do not work.

In May 2019, the Minister of Corrections said:²⁴⁹

\$98m for Māori prison pathway

Corrections Minister Kelvin Davis said the \$98 million investment from the "Wellbeing Budget" as a major first step to breaking the cycle of Māori reoffending and imprisonment by changing the way Corrections operated **"We are acknowledging that our system does not work for the majority of Māori."** Davis said. "The answer is not another programme. This is a new pathway for people in prison and their whānau to walk together. "This is a system change and a culture change for our prisons – and that change starts today."

Māori make up 62 per cent of high-security prison populations, but only 15 per cent of the New Zealand population.

...

It would initially focus on Māori men under 30 years of age – the group with the highest rates of reconviction and re-imprisonment

No doubt further courses for Mr Genge's age group will follow in due course. A coerced group therapy, could be categorised as lack of dignity and respect, and positively dangerous, especially when the programme does not factor in Māori elements such as recognised by the Minister.

Nevertheless, besides adverse effects on Mr Genge it may also be positively dangerous to other prisoners on group therapy. The Chief Psychologist also quotes from David Riley's prior affidavit from *Miller and Carroll*, which had its moment in the sun during the oral submissions before the Committee, she says:

28. As the literature and evidence based research evolved concerning the efficacy of targeted group based treatment of adult sex offenders,¹⁵ in 2006 the Department piloted a single high intensity eight month programme for a very select group of adult sex offenders (ASOTP pilot).

Footnote 15

15 Annexed marked "NSMR 2" is a true copy of a redacted version of the affidavit of David Neil Riley, former Director of Psychological Services, dated 29 May 2008 which discusses in detail at [15]-[48] the difficulties in treatment of adult sex offenders, the lack of programmes targeted towards this group worldwide, lack of evidence supporting the efficacy of group treatment, and the development of the pilot programme.

David Riley's Affidavit, 29 May 2008, says at para 31:

Clinical observation suggests that this is particularly the case for sexual offenders, and **mixing high and low risk adult sex offenders in group based treatment programmes** (the treatment modality of choice) **would pose a serious risk of those higher risk offenders actually "contaminating" those lower risk offenders** who may already be highly remorseful about their behaviour and motivated towards change and desistance in the future.

[**Bold** added]

So group therapy may be a serious risk of contamination to other group members, as well as psychologically, and physically, dangerous to Mr Genge. None of this is discussed by Justice Clark, despite the evidence being before her.

Timing of Therapy

If you are capable of successful therapy, it needs to be completed to coincide with parole hearings. If not you remain a "risk" you will not be released. A further arbitrary detention occurs as a result of the timing of therapy. Prior to completion of the tariff period, Mr Genge did not receive therapy. Quoting from and adopting the submissions made by *Miller and Carroll* to the Committee those authors said:

385. The evidence that was provided by the Department of Corrections Psychological Services regarding treatment amounted to the fact that, due to resource constraints, preventive detainees are not provided with any form of specific psychological intervention to address their offending prior to their first Parole Board hearing.

388. Your authors submit that, without receiving any treatment, their chances of obtaining release at the expiry of their non-parole period became effectively non-existent.

This also had the consequence of the Executive rather than the Judicial branch extending their (and other preventive detainees') non-parole periods by at least two years whilst treatment was undertaken.

391. **Dr Wales comments in his affidavit of 30 April 2004, that due to resource constraints preventive detainees are not scheduled to attend special treatment units until after they reach their parole eligibility dates and have appeared before the Board.** This is partially due to the belief that the optimal time in which to deliver specialist treatment to an offender is just prior to release, and up until their first Board appearance preventive detainees have no idea of when they may be released.

398. **At paragraph 36 of his affidavit, Dr Riley notes (as did Dr Wales above) that due to the lack of any dedicated treatment facility or group-based programme, rapists who offended against adults were seen on an individual basis for treatment by Departmental Psychologists.**

399. At paragraphs 49-57 of his affidavit, Dr Riley discusses the issue of the timing of treatment generally. Then, at paragraphs 50-51 Dr Riley notes:

Of course where a prisoner is on preventive detention, the Department does not know what the likely release date will be and **it is true that as a general rule, the Department waits until there has been an indication from the Parole Board that the offender is to be considered for release that targeted programmes, if any, are provided.**

What the Department aims to do as a general policy, is provide intensive treatment some 18 months to two years before release. This treatment is both time consuming and resource intensive. It is very important that the treatment is targeted at the right timing for release into the community because treatment effects degrade over time, especially if treatment is not kept up in an intensive fashion. Further, there is a well-observed corrosive effect of being in prison following a treatment programme, Contact with other prisoners who might not be at the same point in treatment, or indeed have not had treatment at all, tends to erode the positive effects of treatment on the offender.

[Bold added]

411. And Dr Riley notes in his affidavit, at paragraph 56:

I note that the Parole Board typically does not release prisoners serving sentences of preventive detention on their first occasion, or even on their second or third occasions. Many offenders serving sentences of preventive detention have served in excess of 25 years imprisonment. A very recent review undertaken this month of all living preventive detainees indicates that there are nine such offenders who have been released to date who are surviving in the community (out of a total of over 200 preventive detainees), **and further, that the average time taken to release these nine prisoners was 14 years.** Under these circumstances, although various types of treatment can, and indeed do, occur prior to the prisoner's parole eligibility, the timing of intensive treatment in my view, is best organised to coincide as closely as possible to a prisoner's likely time of release, as signalled in advance by the Parole Board, to ensure the greatest chance of that prisoner's successful reintegration into the community.

The Department's approach was that individual therapy was provided, as there no group courses possible, and that release did not occur until an average of 14 years on a ten-year sentence. Now we are told there must be group therapy, not individual.

It is also discriminatory, that finite sentenced prisoners receive therapy in priority to those such as Mr Genge on indefinite detention. It is hardly surprising that Mr Genge achieved his 25th year of detention in 2019.

Cultural Issues

Justice Clarke was seemingly impressed that the department invested \$12,600 in a bi-cultural therapy.²⁵⁰ But that is a ‘drop in the ocean’ compared with the \$120,000 spent annually detaining him²⁵¹. This should be seen in the context of the vast overrepresentation of Māori in the criminal justice system. See the HRC’s Concluding Observations on NZ’s 6th Periodic Report referred to above:

26. Recalling its previous concluding observations (CCPR/C/NZL/CO/5, para. 12), the Committee urges the State party to:

(a) **Review its law enforcement policies with a view to reducing the incarceration rates and the overrepresentation of members of the Māori and Pasifika communities, particularly women and young people, at all levels of the criminal justice system, as well as reconviction and reimprisonment rates;**

(b) Eliminate direct and indirect discrimination against Māori and Pasifika in the administration of justice, including through human rights training programmes for law enforcement officials, the judiciary and penitentiary personnel.

Noticeably, the annual report of the Department of Corrections no longer records the percentage of Māori in prison. The Minister of Corrections was reported as saying in the UK Guardian:²⁵²

Kelvin Davis is from the Ngāpuhi tribe, who make up about half of the nation’s Māori prison population. He is also the corrections minister.

Kelvin Davis describes himself as a member of “the most incarcerated tribe in the world”. The former teacher grew up in New Zealand’s deprived Northland region and has seen childhood friends, schoolmates and relatives locked away.

Appointed the country’s corrections minister in 2017, he is now on a mission to empty the nation’s prisons of Māori inmates. And after just eight months with Davis in the job, the overall prison population has dropped by 8%.

²⁵⁰ Justice Clark at [65] The evidence shows a pattern of attempts over the years to provide Mr Genge with rehabilitative support, through programmes and through one-on-one counselling to prepare him for such programmes. The department has invested some \$12,600 plus GST in Mr Genge’s bi-cultural therapist. Mr Genge has had ample opportunity to engage but has resisted engagement on terms other than his own. Consequently, Mr Genge remains assessed as at high risk of violent re-offending and medium high risk of sexual re-offending.

²⁵¹ \$330 per day i.e \$120,450 p.a excluding the capital cost of building the prison. See New Zealand Department of Corrections, *Annual Report 1 July 2017 - 30 June 2018* (2018).

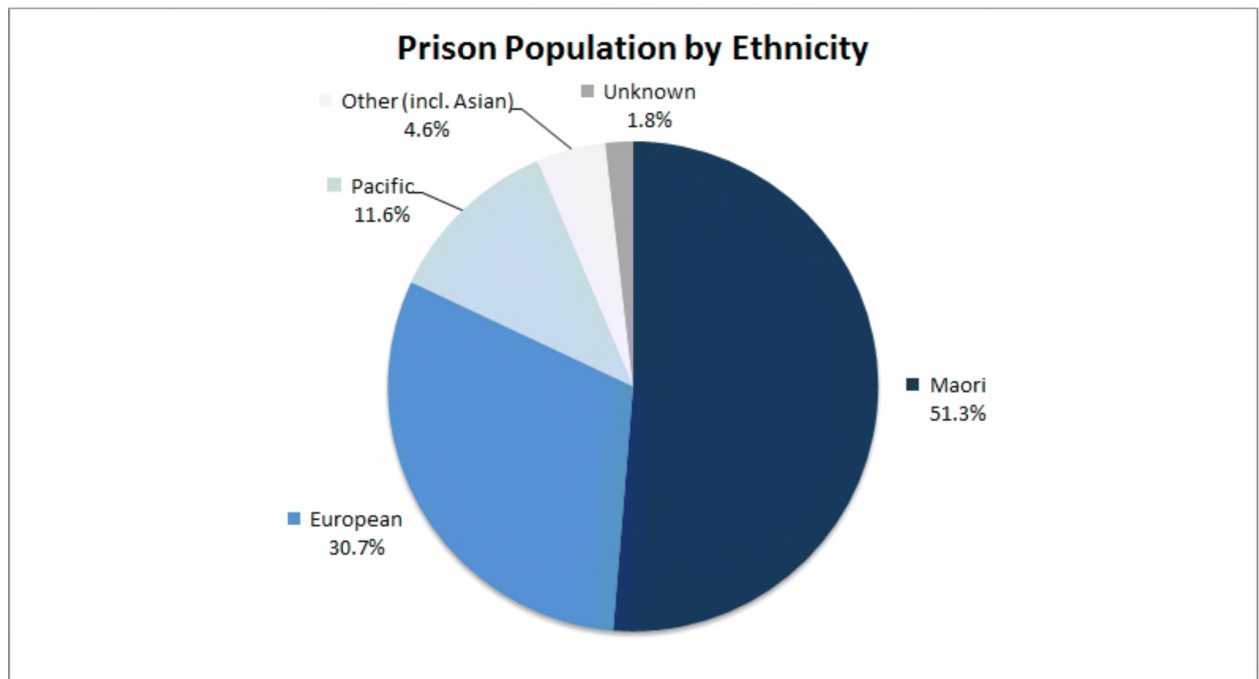
²⁵² The Guardian, ‘The Man on a Mission to Get New Zealand’s Māori out of Prison’, 28 Nov. 2018, retrieved from: <https://www.theguardian.com/world/2018/nov/30/the-man-on-a-mission-to-get-new-zealands-maori-out-of-prison>.

New Zealand has one of the highest incarceration rates in the OECD, and in March the country's prison population hit a record 10,820 people – more than 50% of whom are Māori, despite indigenous people making up only 16% of New Zealand's population.

[**Bold** added]

The prison statistics issued by Corrections at March 2019 show:²⁵³

Ethnicity of Prisoners



The 2018 census showed that the population contained 16.5% Māori, and 8.1% persons of Pacific origin. The Department's 2017-8 annual report states that 21% of staff are Māori. A 2015 report²⁵⁴ says:

Māori Psychology Workforce Data

The Ministry of Health (2014) acknowledges that inaccurate and unreliable workforce data collections have been an issue for some time. This is a particular issue for the psychology workforce, with there being no single data set able to accurately and reliably describe the psychology workforce in detail. The annual psychology workforce survey was discontinued post 2010, although DHB Shared Services does provide a dataset pertaining to the DHB psychology workforce.

[DHB is District Health Board]

²⁵³ New Zealand Department of Corrections, 'Prison Facts and Statistics - March 2019', 31 March 2019, retrieved from: https://www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_march_2019.html#ethnicity.

²⁵⁴ Michelle Levy and Waikaremoana Waitoki, *Māori Psychology Workforce & Māori Course Content Data* (2015).

As at February 2015, the New Zealand Psychologists Board reports a total of 4600 psychologists on their Register. Of these, 2745 hold current Annual Practising Certificates (APC).

Māori Psychology Workforce

As at 13/5/2014, of the total number of registrants who provided ethnicity data (2058 out of 4477), a total of 134 identified as Māori (either as a first or second ethnicity). Of these, 105 were APC holders (New Zealand Psychologists Board, 2014).

The census data from 2013 shows that of the total 2052 who identified their occupation as psychologist, **6% (n=120) identified as Māori**. Of that 6%, most (n= 108) identified as clinical psychologists (Statistic New Zealand, 2015).

Of those active psychologists who responded to the 2010 annual workforce survey, 4.5% (n=60) were Māori. This was an increase from 3.8% (n=38) in 2005, but was a decrease from 5.3% (n=65%) recorded in 2009 (Ministry of Health, 2011b). Consistent with gender trends overall, in 2010, just over two-thirds of psychologists identifying, as Māori were female.

...

The following data has been sourced from directly from the relevant agencies:

As at 26/2/15 **of the total 164 psychologists employed by the Department of Corrections, 12 identify as Māori** (Brian Nicholas (Department of Corrections), Personal Communication, February 26, 2015).

[**Bold** added]

So, in 2015, the HRC called for (NZ's Concluding Observations 6th Period Report)—

b) Eliminate direct and indirect discrimination against Māori and Pasifika in the administration of justice, including through **human rights training programmes for law enforcement officials, the judiciary and penitentiary personnel**

[All **bold** in original]

As noted earlier, over 50% of the prison population is Māori, 21% of prison staff are, and 7.3% of psychologists are. (Lawyers have less than 6% Māori ethnicity). Small wonder Mr Genge was engaging well with a bicultural therapist, who left, and he cannot get one now. They are in short supply. It would seem the HRC's concluding recommendations fell on stony ground. As the HRC rightly observed the problem is endemic,—*law enforcement officials, the judiciary and penitentiary personnel*.

Dr Richard Porter, a Psychiatrist giving an assessment on Mr Genge in 2015 says:

18. Suggested Treatment

a) In my opinion, it is highly appropriate that Mr Genge continue counselling with Matiu Zijlstra. Matiu is essentially the only person with whom Mr Genge has been able to engage over the last 20 years and it is highly unlikely that he is going to make sufficient progress to impress the Parole Board or to function better and resolve some of his psychological symptoms without this sort of relationship and ongoing counselling.

Plainly, he needs specifically focused psychological treatment from an emphatic Māori provider, not group treatment.

Suffice it to say, this form of indirect discrimination is not confined to penitentiary staff. For example the New Zealand Law Society said in 2011:²⁵⁵

Māori under-represented in legal profession

Statistics obtained by the New Zealand Law Society show Māori are still under-represented in the profession.

...

Using data from the 2006 census of 9,411 legal professionals broken down into ethnicity, Māori were estimated to make up around 5.5% of the profession. The information was collected from jobs broken down by ethnicity collected by Statistics New Zealand. For this purpose, lawyer included barrister, solicitor, judge, tribunal members, or magistrates.

The Law Society keeps records of the ethnicity of lawyers who voluntarily disclose it, but only 6900 lawyers have elected to do so (62% of all lawyers). Of these 3.5% have said they are Māori.

Notably the Ministry of Health in (2014) acknowledged that inaccurate and unreliable workforce data collections have been an issue for some time, in respect of data on Māori psychologists, and the Department of Courts provided incorrect data on Judges. The New Zealand Herald the largest circulating newspaper in New Zealand reported on 2 May 2019²⁵⁶—Justice Joseph Victor Williams has become the first Māori judge of the Supreme Court, yet Māori TV reported on 14 March 2019, some 6 weeks prior that—Māori has achieved a milestone in our country's judicial history. The first Māori Chief Justice of New Zealand was today sworn in at the Wellington Supreme Court.²⁵⁷ The Māori TV webpage with that detail was withdrawn, presumably when the Journalist discovered she was not Māori. This does not reassure that Māori cultural competency issues in this area, are taken seriously.

In terms of Judges, whilst women a more numerous “minority” have made great strides,²⁵⁸ and now 31.7% of Judges are female as of 2017,²⁵⁹ not so Māori, albeit

²⁵⁵ New Zealand Law Society, ‘Māori Under-Represented in Legal Profession’, 11 May 2012, retrieved from: <https://www.lawsociety.org.nz/practice-resources/research-and-insight/practice-trends-and-statistics/mori-under-represented-in-legal-profession>.

²⁵⁶ NZ Herald, ‘Justice Joe Williams Becomes First Māori Supreme Court Judge’, 2 May 2019, retrieved from: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12227349.

²⁵⁷ Māori Television, ‘New Chief Justice Sworn Today’, accessed 9 May 2019, retrieved from: <https://www.maoritelevision.com/news/regional/new-chief-justice-sworn-today> [withdrawn].

Dame Georgina Catriona Pamela Augusta Wallace DBE was the first woman in New Zealand to be appointed as a judge to the District Court in 1976. 4 years before the first Māori Judge was appointed in 1980. Michael John Albert Brown went on to be Principal Youth Court Judge.

²⁵⁹ New Zealand Law Society, ‘New Zealand Judiciary Statistics at 1 January 2017’, 1 Jan. 2017, retrieved from: <https://www.lawsociety.org.nz/practice-resources/research-and-insight/practice-trends-and-statistics/new-zealand-judiciary-statistics-at-1-january-2017>.

some notably shift to 1 of the 6 Supreme Court Judges has been made since May 2019.²⁶⁰

Radio New Zealand reported in 2015:²⁶¹

The Māori legal profession is questioning why the Government's data on the number of judges who identify as tāngata whenua is out-of-date.

...

Officials first told Radio New Zealand there were 28 judges of Māori descent, but later conceded the tally was wrong.

Radio New Zealand originally reported there were no tāngata whenua judges in the Supreme Court, Court of Appeal, Environment Court or Employment Court.

...

There are approximately 243 judges in Aotearoa and the new figures show 31 of those are of Māori descent.[13%]

Definitely if there are issues in relation to the numbers and if the numbers are not being accurately counted then there are bound to be issues in relation to whether Māori judges are bringing critical Māori thinking to the bench, which is at the end of the day what we're after.

"If there's no system in place to monitor even the number of judges who associate with being Māori then there's some deep issues here."

On 10 June 2019 a Te Ao interim report was released²⁶² it said:

Māori have got the message across to an independent review group that racism is embedded in every part of the criminal justice system and a Māori-led 'total rethink' is required.

The independent Safe and Effective Justice Advisory Group released its interim He Waka Roimata (A Vessel of Tears) report today, in which it says Māori they have spoken to have driven home the point that the current justice system is both racist and stacked against Māori.

"A consistent message throughout our conversations has been that racism is embedded in every part of the criminal justice system. We heard that the system often treats Māori, and Māori ways, as inferior and that individuals acting within the system hold active biases against Māori (consciously and unconsciously)," the report says.

²⁶⁰ There are usually only 5, and temporary judges—retired judges of the Supreme Court, or Court of Appeal sit when others are unavailable. At the time of writing there are six judges as one is unavailable chairing a Royal Commission.

²⁶¹ [Radio New Zealand, 'Messy Data on Māori Judges', 17 March 2015, retrieved from: https://www.radionz.co.nz/news/te-manu-korihi/268885/messy-data-on-maori-judges.](https://www.radionz.co.nz/news/te-manu-korihi/268885/messy-data-on-maori-judges)

²⁶² [Human Rights Foundation, 'Te Ao: Report – Māori Led 'Total Rethink' of Racist Criminal Justice System Needed', 10 June 2019, retrieved from: https://humanrights.co.nz/2019/06/10/te-ao-report-maori-led-total-rethink-of-racist-criminal-justice-system-needed/.](https://humanrights.co.nz/2019/06/10/te-ao-report-maori-led-total-rethink-of-racist-criminal-justice-system-needed/)

The advisory group is helping lead public discussion around fixing failures in the country's criminal justice system.

Plainly, then cultural and racial issues intersect with ascertainment of risk.

Mr Genge identifies as Maori, a group without validation of numerous risk assessment instruments. J is Tongan/Australian and Intellectually disabled with ASD, the chances of risk instruments validated on such a population are zero.

Importance of Ethnicity of Therapy Providers

Whilst there is a wealth of literature on this issue, sticking succinctly to the NZ issue here, the ethnicity of therapy providers may well be important to success or otherwise, of treatment. See Dr Armon Tamatea & Brown,²⁶³ (the lead author being an ex-corrections Māori psychologist.):²⁶⁴

Cultural differences and lack of awareness of the impact of differences between the practitioner and an offender can be major barriers to the process of service delivery. Indeed, consideration of cultural factors can greatly inform an offender's engagement in rehabilitation, from building rapport in the therapeutic working relationship to designing, implementing and evaluating appropriate intervention programmes and executing therapeutic strategies...The responsivity principle of offender rehabilitation requires that treatment programmes are delivered in a manner that is compatible with the abilities and learning styles of offenders. **Historically, the emphasis of correctional resources was guided by risk (who to treat) and need (what to target in treatment) principles; however, the responsivity (how to deliver treatment) principle has become increasingly prominent** as a heuristic to inform treatment suitability and effectiveness with a range of offender variables, such as gender, age, level of intellectual ability and religious and cultural identity. **However, the demographic composition of offenders in New Zealand, culture has emerged as a pressing concern for correctional and forensic agencies, and as a major social issue.**

[Bold added]

Cultural Competence—Access to Justice

Mr Genge's and J's access to justice, are inextricably intertwined with each man's arbitrary detention, and a lack of respect for inherent dignity. As they and all such detainees in similar positions are entitled to have their NZBORA, and Covenant rights observed, having a lawyer naturally assists.

²⁶³ Tamatea and Brown, 'Culture and Offender Rehabilitation in New Zealand: Implications for Programme Delivery and Development', in K. McMaster and D. Riley (eds), *Effective Interventions with Offenders: Lessons Learned* (2011) 168-190.

²⁶⁴ He is a Senior Lecturer at the University of Waikato, NZ His profile says in part— Armon Tamatea is a clinical psychologist who served as a clinician and senior research advisor for the Department of Corrections (New Zealand) before being appointed senior lecturer in psychology at the University of Waikato. He has worked extensively in the assessment and treatment of violent and sexual offenders, and contributed to the design and implementation of an experimental prison-based violence prevention programme for high-risk offenders diagnosed with psychopathy.

Right to counsel for Mr Genge

Mr Genge presented his challenges in the NZ Courts in 21 of his 22 cases, in all civil cases he was unrepresented. As was the case before Justice Clark. In only his criminal appeal (leave to appeal out of time by 20 years) was he represented, and leave was not approved. Access to justice is hard pressed to achieve, when unrepresented against the Crown. Challenging risk even for counsel is hard, challenging your own “risk” is even harder.

A defendant’s need for a lawyer (or as here an applicant’s release from prison claim) is nowhere better stated than in the “moving words” of Justice Sutherland in *Powell v Alabama*,²⁶⁵ (cited by Blanchard J in *R v Condon*) still the *locus classicus* of all judicial, and other discussions of the right to counsel:

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. **He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he may not be guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect”**

[**Bold** added]

NZ is facing a major challenge to access to justice. Chief Justice Winkelmann being sworn in to that office in March 2019, said in her acceptance speech:

I acknowledge what has been said today about access to justice. There are significant and troubling obstacles to the achievement of this ideal. Without knowledge of the law many do not know they have a problem with which the law can help them. The cost of legal representation is so great that it is only the well to do who can afford a lawyer to represent them in court. **There are few lawyers practising civil legal aid, and fewer still in areas of need.** For those who decide to go it alone and attempt to represent themselves, there is still the considerable cost barrier of court fees, and the difficulty of court procedure.

[**Bold** added]

Albeit, the Chief Justice’s speech was not a measured legal opinion, but nevertheless was an inspiring address, the first half hour of the 2-hour speech being in Māori, however Her Honour’s articulated concept of access to justice is limited, it is more than an “ideal”. It is an international human right norm. HRC General Comment 32/10 notes:

...The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in

²⁶⁵ Supreme Court of the United States, *Powell v Alabama*, 287 US 45, Judgment of 7 Nov. 1932.

paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it.

Mr Genge attempted to appeal the Justice Clark decision to the Supreme Court by a frog²⁶⁶ appeal direct to the Supreme Court, but his was rejected. The primary issue here being he was required to pay security for costs in the Court of Appeal, but could not afford the \$6,600 security for costs required, as he only earns less than \$10 a week.²⁶⁷ The Supreme Court said:²⁶⁸

[4] Mr Genge filed an appeal from the decision of Clark J in the Court of Appeal. He was directed to pay security for costs of \$6,600. Mr Genge then sought dispensation of payment of security. The Deputy Registrar declined to dispense with security. Mr Genge did not seek a review of that decision but instead has sought leave to appeal directly to this Court. He says there are exceptional circumstances justifying a direct appeal, namely, that he could not pay the security for costs and the Deputy Registrar declined his application for dispensation.

[5] As Mr Genge seeks to appeal directly to this Court, in addition to the usual criteria, he must establish that there are exceptional circumstances justifying that course. The situation in which Mr Genge finds himself does not meet the threshold for an exceptional circumstance.

I wrote to the Minister of Justice on 24 July 2018 complaining that only 199 lawyers of 13,000 members of the New Zealand Law Society had taken a civil legal aid case in the last year. The scarcity of civil legal aid lawyers is an added hurdle for a Māori murderer, and sex offender, not the prime target for those accepting legal aid assignments. Inevitably the absence of representation means some issues do not get raised or argued to the full extent as a represented client.

As of 18 February 2020, the number of civil legal aid lawyers had dropped to 127 active lawyers,²⁶⁹ of the now 14,177²⁷⁰ NZ lawyers with practising certificates. This is a national disgrace.²⁷¹

²⁶⁶ Leapfrogging the Court of Appeal.

²⁶⁷ Statistics New Zealand reported New Zealanders were earning an average personal income (before-tax) of \$51,527 p.a. from all regular sources. See Stats NZ, *Household Income and Housing-Cost Statistics: Year ended June 2018* (2018).

²⁶⁸ New Zealand Supreme Court, *Genge v Chief Executive of Department of Corrections*, BC201861388, Judgment of 5 Oct. 2018.

²⁶⁹ New Zealand Law Society, 'The Rebirth of a Civil Legal Aid Provider', 18 Feb. 2020, retrieved from: <https://www.lawsociety.org.nz/practice-resources/the-business-of-law/access-to-justice/the-rebirth-of-a-civil-legal-aid-provider>.

²⁷⁰ New Zealand Law Society, *Annual Report* (2018).

²⁷¹ Stuff, 'Missing out on Civil Legal Aid a Justice Issue, Lawyers Say', 12 Aug. 2018, retrieved from: <https://i.stuff.co.nz/national/105887174/missing-out-on-civil-legal-aid-a-justice-issue-lawyers-say> — Human rights lawyer Tony Ellis says "The system is, with respect, a national disgrace, and should be reviewed, as it's clearly not fulfilling its purpose in providing timely civil legal aid to the disadvantaged."

Conclusions

Assuming for the moment that both J, and Mr Genge, need assistance with rehabilitation, Persons detained as long as either of these should have enhanced psychological and social assistance, not restricted. See the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment “CPT” Standards’²⁷² approach to long-term prisoners:

Life-sentenced and other long-term prisoners

33. ...

Long-term imprisonment can have a number of desocialising effects upon inmates. In addition to becoming institutionalised, long-term prisoners may experience a range of psychological problems (including loss of self-esteem and impairment of social skills) and have a tendency to become increasingly detached from society; to which almost all of them will eventually return. In the view of the CPT, the regimes which are offered to prisoners serving long sentences should seek to compensate for these effects in a positive and proactive way.

The prisoners concerned should have access to a wide range of purposeful activities of a varied nature (work, preferably with vocational value; education; sport; recreation/association). Moreover, they should be able to exercise a degree of choice over the manner in which their time is spent, thus fostering a sense of autonomy and personal responsibility. **Additional steps should be taken to lend meaning to their period of imprisonment;**

[**Bold** added]

Persons detained for such long periods are in danger of being institutionalized, which make release even more difficult. Robyn Mooney and Ivan Sebaló’s 2019 text²⁷³ reminds us of another Grand Chamber case (discussed in the author’s *Miller and Carroll*’s submissions to the Committee):

However, it was in *James, Wells & Lee v. UK* where the IPP; on the basis that it contravened Article 5(1). After much legal argument and discussion, the ECHR upheld the complainants case. This verdict stipulated that the failure to provide resources to aid in the reduction of risk rendered the continued detention of IPP prisoners arbitrary and in contravention of Article 5(1).

[Indeterminate imprisonment for the public protection, or “IPP sentences”]

²⁷² CPT, *CPT Standards* (2002).

²⁷³ Williams, ‘Preventive Detention and Extended Sentences’, in J. Ireland, C. Ireland and P. Birch (eds), *Violent and Sexual Offenders: Assessment, Treatment and Management* (2019) 462; Mooney and Sebaló, *supra* note 201 at 13.

Inadequate resources were provided, by not providing far less dangerous individual therapy. That case takes us back to the proposition that prisoners change over time. *James, Wells and Lee v the UK* says:²⁷⁴

The Court reiterates that where reasons of dangerous are relied upon by the sentencing courts for ordering an indeterminate period of deprivation of liberty, these reasons are by their very nature susceptible of change with the passage of time (see *Weeks*, cited above, § 46).

However, trying to accurately predict your author's change in terms of risk of future offending, is as reliable as predicting tomorrow's weather by sticking a finger in the air.

Forcing Mr Genge to undertake group therapy to be released, is simply further entrenching the psychologists role as gate keepers, and significantly breaching his rights.

Locking up J in the first place was the first step in his 14 or 16 years detention or more, whilst those without intellectual disabilities would merely face a maximum period of imprisonment of 3 months. The discrimination is readily apparent.

I adopt the words of Andy Williams²⁷⁵ who says that health practitioners are now risk adverse under media spotlights who skew results towards false positives rather than false negatives.

Even if we knew the margin of error of psychologists risk assessments, (which will be self-assessed, and of uncertain reliability), there is no way of ever checking whether the psychologists risk assessment is correct, unless the prisoner is released, and then a multitude of other factors intervene which could influence re-offending or not. So ultimately it comes down to blind faith, not a scientific approach. Williams quoting Janus²⁷⁶ says prevention has taken the wrong fork we have adopted laws to remove risky people from society before they do harm. Finally Williams²⁷⁷ says:

While there is a small group of individuals who try to work with these offenders in a constructive and rehabilitative manner, they're fighting against a tsunami of cuts in funding, excessive workloads, a deskilling of the workforce, and the wrath of public opinion. Preventive and extended sentences will turn from being regressive to truly progressive only when offenders receive the adequate rehabilitative support to ensure that any additional time served is geared towards responding to their risk needs in an effective and appropriate manner.

Plainly more work needs to be done on the topics canvassed in this article, including some better progress in the Court of Appeal for J, and in the High Court for Mr Genge which will hopefully be achieved. The responsibility of academic researchers does not

²⁷⁴ *James, Wells and Lee v The United Kingdom*, supra note 146.

²⁷⁵ *Ibid.*

²⁷⁶ E. Janus, *Failure to Protect: America's Sexual Predator Laws and the Use of the Preventive State* (2006).

²⁷⁷ *Williams*, supra note 273 at 472.

end with publication. Nor does counsel's work end at the end of writing a working paper, or at the end of a first instant case in a domestic court. Even a Tale of Two Cities had a sequel.²⁷⁸ The issues raised may have multiple sequels both domestically, and before international human rights bodies.

Dr Tony Ellis

29 June 2020

²⁷⁸ D. Meyer, *Evrémonde, a Sequel to A Tale of Two Cities* (2005).