

William Porter

**A Fair Assessment of Risk: Examining New Zealand's Risk
Assessment Practices**

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Faculty of Law
Victoria University of Wellington

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Abstract

Risk assessment is now a key feature of the New Zealand criminal justice system. Risk assessments are relevant to sentencing and parole decisions, and importantly, the imposition of post-sentence measures. The decisions that are informed by risk assessments have serious consequences for the deprivation of liberty of offenders. Despite its growing importance, risk assessment is not widely understood by the legal community.

This paper provides a broad overview of risk assessment practices in New Zealand. In doing so, it explores several shortfalls in the risk assessment process. It appears that the limitations of risk assessment evidence are not well understood. As this paper argues, it is only by truly engaging with risk assessment evidence that proper consideration can be given to the balance between the rights of individual offenders and the interests of the community. To assist with this, this paper argues for a number of changes in the way that risk assessments are carried out.

Key words: *Risk, Risk Assessment, Preventive Detention, Extended Supervision Order, Public Protection Order, RoC*RoI.*

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I Introduction

In the last 20 years there has been a shift in the way that the criminal justice system deals with serious offenders. Increasingly, preventive measures are taken to ensure that these offenders are not given the opportunity to reoffend. The premise of these measures relies both philosophically and practically on the accurate prediction of future behaviour, normally described as an assessment of risk.¹ As a consequence, risk is now one of the central ideas of the criminal justice system.²

Preventive justice is controversial. Some commentators see these policies as philosophically repugnant, with one commentator even suggesting that the New Zealand courts should refuse to apply them.³ This paper does not seek to engage in that discussion. This paper adopts the position that these measures have been validly enacted by Parliament, and it is the courts' role to apply them. Therefore, this paper focuses on the practical aspects of risk assessment. In 2010, Glazebrook J commented that the risk assessment process in New Zealand was "not yet entirely satisfactory".⁴ Since 2010, risk assessment has become even more prominent, and yet the results are no more satisfactory. The laissez-faire approach that New Zealand adopts with risk assessment evidence is inappropriate given that the implications that this evidence can have in curtailing the liberty of individuals.

This paper conducts a broad review of risk assessment in New Zealand. The focus of this discussion is on preventive justice, primarily because that is where risk assessment evidence is accorded the most weight in decision-making. However, the ideas that are discussed apply equally wherever risk assessment evidence is considered. Part I gives some context to the rise of risk in the criminal justice system. Part II will outline why it is so important that risk assessment evidence is analysed robustly. Parts III and IV provide a general overview of risk assessment instruments and the legislative scheme under which risk assessment operates. In Part VI, the robust approach that the Court of Appeal has taken to risk assessment evidence is contrasted with the deferential approach that is taken in lower

¹ Ministry of Justice *Sentencing Policy and Guidance: A Discussion Paper* (November 1997) at 57 and 105; and Andrew Ashworth and Lucia Zeder *Preventive Justice* (Oxford University Press, Oxford, 2014) at 119.

² DA Andrews and James Bonta *The Psychology of Criminal Conduct* (5th ed, Lexis Nexis, New Providence, 2010) at 299.

³ Anthony Gray "Preventive Detention in New Zealand: A Critical Comparative Analysis" (2015) 26 NZULR 577 at 585.

⁴ Susan Glazebrook "Risky Business: Predicting Recidivism" (2010) 17 PPL 88 at 88.

courts. To address the shortcomings identified in earlier sections, Parts VII and VIII argue for a best practice approach to risk assessment. Finally, Part IX suggests some possible changes to the way that risk assessment evidence is assessed in New Zealand.

II Background: Risk Assessment and the Rise of Preventive Justice

A A Philosophical and Practical Shift

Risk is defined as the likelihood of an adverse event occurring.⁵ In the field of criminal justice, that outcome is invariably the risk of reoffending. Risk has not always been at the centre of the criminal justice system. Around the same time as public attitudes were becoming increasingly punitive, identifying and measuring risk was becoming more prevalent across society.⁶ In the field of criminal justice, the fixation with risk was not limited to sentencing; it also extended across town planning and policing.⁷ Identifying those at risk of developing antisocial behaviour also began to inform policy decisions.⁸

Internationally, the rise of risk manifested in the policy of selective incapacitation.⁹ This policy was based on the premise that those at risk of reoffending could be readily identified and prevented from doing so. The simplicity of the policy helped make it popular with legislators.¹⁰

In practice, these preventive measures changed the traditional role of a sentencing judge.¹¹ Instead of considering the circumstances of the offence that was committed, judges were required to consider the characteristics of the offender.¹² To help with this more abstract

⁵ Concise English Oxford Dictionary (12th ed, Oxford University Press, Oxford, 2011) at 1242.

⁶ See generally Nicola Gray, Judith Laing and Lesley Noaks *Criminal Justice, Mental Health and the Politics of Risk* (Cavendish Publishing, London, 2002); and Hazel Kemshall *Understanding Risk in Criminal Justice* (Open University Press, Buckingham, 2003).

⁷ Warren Brookbanks and Julie Tolmie *Criminal Justice in New Zealand* (Lexis Nexis, Wellington, 2007) at 17; and Glazebrook, above n 4, at 89.

⁸ Andrews and Bonta, above n 2, at 300.

⁹ See generally Peter Greenwood *Selective Incapacitation* (Rand, Santa Monica, 1982).

¹⁰ Peter Jones "Risk Prediction in Criminal Justice" in Alan Harland (ed) *Choosing Correctional Options that Work* (Sage Publications, Thousand Oaks, 1996) 33 at 38.

¹¹ Warren Brookbanks and Sandy Simpson *Psychiatry and the Law* (2nd ed, Lexis Nexis, Wellington, 2007) at 4; and C Gavaghan, J Snelling and J McMillan *Better and Better and Better? A Legal and Ethical Analysis of Preventive Detention in New Zealand* (Report for the New Zealand Law Foundation, University of Otago, 7 November 2014) at 6.

¹² Bernadette McSherry and Patrick Keyzer *Sex Offenders and Preventative Detention* (The Federation Press, Leichardt, 2009) at 4.

task, judges were provided with the evidence of forensic experts.¹³ It is this evidence that is the focus of this paper.

B Preventive Justice in New Zealand

In New Zealand, there are four prominent examples of what Elias CJ describes as the criminal justice system's "fixation with the management of risk".¹⁴ First, the scope of eligibility for preventive detention (PD) was broadened in 2002. PD is an indeterminate sentence meaning that an offender is imprisoned indefinitely, unless parole is granted. Even if parole is granted, the offender is subject to recall for life.¹⁵ This change can be attributed to the criminal justice referendum in 1999.¹⁶ The explanatory note to the Bill suggested that the referendum reflected "a high level of public concern over the sentencing of serious violent offenders and a widespread desire for the community to be better protected from dangerous offenders."¹⁷ The range of eligible offences was expanded, while the age of eligibility was lowered from 21 to 18. In the years following the changes, approximately twice as many offenders were sentenced to PD than in the years immediately preceding the changes.¹⁸

In 2004, Extended Supervision Orders (ESOs) were introduced to manage "the long-term risks posed by higher risk child sex offenders who are no longer subject to release conditions or recall from parole".¹⁹ An ESO carries with it a set of standard conditions, such as reporting obligations,²⁰ to which special conditions may be added by the parole board.²¹ Conditions imposed under an ESO may extend as far as around the clock supervision.²² The scope of ESOs was extended in 2014 to include serious sexual and violent offenders.²³

¹³ Brookbanks and Simpson, above n 11, at 4.

¹⁴ Sian Elias "Blameless Babes" (2009) 40 VUWLR 581 at 582.

¹⁵ Parole Act 2002, s 6(4)(d).

¹⁶ The referendum asked "Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?" 91.8 of voters answered in the affirmative: Electoral Commission *Referenda* (4 August 2016).

¹⁷ Sentencing and Parole Reform Bill 2001 (148–1) (explanatory note) at 1.

¹⁸ Brookbanks and Tolmie, above n 7, at 19.

¹⁹ Parole (Extended Supervision) and Sentencing Amendment Bill 2003 (88–1) (explanatory note) at 1.

²⁰ Parole Act 2002, s 107JA.

²¹ Section 107K.

²² Section 107IAC.

²³ Parole (Extended Supervision Orders) Amendment Act 2014.

In 2014, Public Protection Orders (PPOs) were introduced to cater for those who posed a very high risk of imminent sexual or violent offending.²⁴ The Minister responsible for the Bill noted that “[t]he Bill responds to situations where an offender presents an unacceptable risk that cannot be managed through these existing measures.”²⁵ PPOs are an extreme measure imposed at the end of an offender’s prison sentence. The offender must reside at a place designated by the chief executive of the Department of Corrections (Corrections).²⁶ The offender must obey all lawful instructions,²⁷ and is restricted in the items that they may possess.²⁸ In many ways a PPO resembles continued incarceration.

The final and most recent example is the development of a child sex offender register.²⁹ The register was ostensibly created to allow for information sharing between government agencies. This was said to be an “effective way to minimise the risk of harm from reoffending by known child sex offenders.”³⁰ As a consequence of being placed on the register, extensive and ongoing reporting obligations are imposed.³¹ These obligations continue for a period of between eight years and life, depending on the seriousness of the offence.³²

C How Common are these Preventive Measures?

It is important to understand how common preventive measures are in New Zealand. Preventive, risk-based measures are justified on the basis that they protect the majority of society against a small number of offenders.³³ It follows that the degree of scrutiny applied to the application of these measures must be proportionate to the number of offenders subject to them. The more common that preventive measures are, the greater degree of scrutiny must be applied to their application to maintain the argument that the burden imposed on offenders is outweighed by the benefit to the rest of society.

²⁴ (3 July 2014) 700 NZPD 19215.

²⁵ (17 September 2013) 693 NZPD 13441.

²⁶ Public Safety (Public Protection Orders) Act 2014, s 20.

²⁷ Section 22.

²⁸ Section 23.

²⁹ Child Protection (Child Sex Offender Government Agency Registration) Act 2016.

³⁰ Child Protection (Child Sex Offender Register) Bill 2015 (16–1) (explanatory note) at 1.

³¹ Child Protection Act 2014, ss 18-23.

³² Section 35.

³³ Glazebrook, above n 4, at 91.

As of August 2017, 212 offenders were subject to an ESO. This includes 26 people who were made subject to an ESO in 2014, 21 in 2015 and 26 in 2016.³⁴ There is one offender subject to a PPO. This order was made in 2016. As of October 2017, there were 393 offenders subject to a sentence of PD (310 in prison and 83 in the community).³⁵ This includes nine offenders who were sentenced to PD in 2014, 16 in 2015 and 10 in 2016.³⁶ Put together, these figures show that preventive, risk-based measures constitute a significant part of the wider New Zealand sentencing framework.

III Scope of Analysis

A A Practical Approach

As noted in the introduction, this paper does not seek to challenge the effectiveness of the policies that require risk assessment to be carried out. Whether the state should be restricting the liberty of people who have seemingly been held accountable for their crimes is an issue that has been well-traversed.³⁷ Aside from philosophical objections, there is evidence that preventive measures are not effective at reducing recidivism and are disproportionately expensive.³⁸ However, this paper adopts the position that these policies have been validly enacted by Parliament after being pursued by successive governments. That is the political reality and it is unlikely to change. Many of the issues that are discussed in this paper were identified by the Ministry of Justice in the discussion paper that preceded the Sentencing Act 2002.³⁹ Despite this, Parliament expanded preventive measures and has continued to do so for nearly two decades.

³⁴ Figure as of 3 August 2017 (obtained under the Official Information Act 1982 request to the Department of Corrections).

³⁵ Figure as of 3 October 2017 (obtained under the Official Information Act 1982 request to the Department of Corrections).

³⁶ Statistics New Zealand *Adults convicted in court by sentence type - most serious offence calendar year* (2017). As of 2014, only 28 per cent of offenders sentenced to PD had been released on parole at least once. Of those that were released, the average time spent before release was 11 years: Department of Corrections *Topic Series: Offenders on Indeterminate Sentences* (2014).

³⁷ See generally Gray, above n 3; Bernadette McSherry “Throwing away the key: the ethics of risk assessment for preventative detention schemes” (2014) 21 PPL 779; and McSherry and Keyzer, above n 3.

³⁸ Scottish Risk Management Authority *Standards and Guidelines for Risk Assessment* (Paisley, April 2006) at 29.

³⁹ Ministry of Justice, above n 1, at 107.

While some may disagree with this pragmatic approach, it is the same approach that the courts in New Zealand are required to take.⁴⁰ Even in jurisdictions where the judiciary can strike-down legislation, the courts have been reluctant to challenge policies predicated on risk assessment. The United States Supreme Court had held for some time that sentences predicated on risk assessment evidence are constitutional, including the death penalty.⁴¹ Closer to home, the Australian High Court in *Fardon v Attorney-General (Qld)* rejected a challenge to PD in Queensland. In that case, Gleeson CJ explained that:⁴²

Many laws enacted by parliaments and administered by courts are the outcome of political controversy, and reflect controversial political opinions. The political process is the mechanism by which representative democracy functions. It does not compromise the integrity of courts to give effect to valid legislation.

B Risk Assessment Evidence Must Be Robustly Scrutinised

While this paper does not challenge the merit of preventive measures, it argues that human rights must be better reflected in the risk assessment process. Human rights concerns arise for the obvious reason that an individual's liberty is being curtailed due to an assessment that a person may commit a criminal act in the future.⁴³ The difficulty with the punishment of future behaviour is that assessments of risk are not perfectly accurate and tend to over-predict risk.⁴⁴ This appears contrary to the rights that sit at the heart of the criminal justice system.⁴⁵ Risk assessment seems to conflict, at least in principle, with the right to be presumed innocent and the aligned right to be presumed harmless. It is also commonly considered that preventive measures are a clear breach of the right to proportionality. This is especially true for measures imposed at the end of a finite sentence, which could also be characterised as a breach of the right not to be subject to double punishment.⁴⁶ Using a

⁴⁰ Glazebrook, above n 4, at 91.

⁴¹ *Barefoot v Estelle* (1983) 463 US 880. See Michael Tonry "Legal and Ethical Issues in the Prediction of Recidivism" (2014) 23 Fed Sentencing Rep 167 at 169.

⁴² *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46, (2004) 223 CLR 575 at 592-593; Kirby J dissenting.

⁴³ Glazebrook, above n 4, at 90.

⁴⁴ *Belcher v Chief Executive of the Department of Corrections* CA184/05, 19 September 2006 at [61].

⁴⁵ Glazebrook, above n 4, at 91.

⁴⁶ This was the Attorney-General's view in report for the Parole (Extended Supervision Orders) Amendment Bill 2014's compliance with the New Zealand Bill of Rights Act 1990: Christopher Finlayson *Parole (Extended Supervision) Amendment Bill: Compliance with the New Zealand Bill of Rights Act* (27 March 2014).

person's past convictions as a predictor of future convictions, while being statistically predictive, is essentially applying additional punishment for past offences.⁴⁷

As has just been alluded to, proponents of preventive measures argue that society has a legitimate interest in protecting itself against people that pose an undue risk to the community.⁴⁸ The Ministry of Justice discussion paper notes:⁴⁹

The fact that these offenders have shown through past behaviour that they are capable of, or highly likely to carry out, extremely harmful actions justifies tipping the balance away from the offenders' rights towards the rights of their potential victims.

It is up to society how the balance between the rights of the individual and the interests of society should best be struck. The thrust of this argument was accepted by the Human Rights Committee in *Rameka v New Zealand*.⁵⁰ The Committee held that PD for protective purposes was not contrary to the International Covenant on Civil and Political Rights due to the existence of adequate procedural safeguards, such as appeals and annual review by the parole board.⁵¹

Notwithstanding this, a risk assessment report must be viewed as a form of evidence that is placed before the court. However, unlike at trial where strict rules govern what evidence is admissible and how it is presented, a laissez-faire approach is taken to risk assessment evidence. Given that risk assessments can have similar consequences for the curtailment of liberty of an individual as an evidential issue at trial, this position is not defensible. Expert witnesses, judges and other legal decision-makers must be acutely aware that their actions are finely balancing offenders' rights with the interests of the community.⁵² Part of this exercise is understanding not only the applications of risk assessment evidence, but also its fallibility. Blackwell has expressed the view that "[s]uch an understanding of the enormous gravity... and far-reaching repercussions that are associated with a [risk] assessment,

⁴⁷ Ministry of Justice, above n 1, at 56.

⁴⁸ Glazebrook, above n 4, at 91.

⁴⁹ Ministry of Justice, above n 1, at 107.

⁵⁰ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, Lexis Nexis, Wellington, 2015) at 371.

⁵¹ *Rameka v New Zealand* (2004) 7 HRNZ 663 (HRC) at [4.3].

⁵² Ashworth, above n 1, at 127; and Suzanne Blackwell "Psychological Reports for the Courts on Convicted Offenders" in Fred Seymour, Suzanne Blackwell and John Thorburn (eds) *Psychology and the Law in Aotearoa New Zealand* (New Zealand Psychological Society, Wellington, 2011) 147 at 153.

mandates careful and thorough assessment according to best practice.”⁵³ As Charlton argues, if the risk assessment process is flawed, the principles of sentencing and rights that are fundamental to the criminal justice system are undermined.⁵⁴

The balance between the rights of the individual and the rights of society is implicit in the statutory language. The stated purpose of PD, ESOs and PPOs is not punitive but rather to protect the community.⁵⁵ The imposition of these measures must be proportionate to the level of risk that the offender poses.⁵⁶ This reasoning also was key to a recent Supreme Court decision that considered interim orders under the Public Safety (Public Protection Orders) Act 2014. The Court held that the standard for an interim order should be the same high standard as that for a permanent order, given the curtailment of liberty that it entailed.⁵⁷ This interpretation was also the most consistent with the New Zealand Bill of Rights Act 1990.⁵⁸ More generally, the Court held that where a less restrictive option was sufficient to adequately deal with the level of risk posed, that option must be favoured.⁵⁹

C Placing Criticism in Context

The title of this paper is “A Fair Assessment of Risk”. While this means that risk should be assessed in a way that is fair to offenders, it also means that risk assessment itself should be analysed in an even-handed way. Much of the criticism of risk assessment is informed by philosophical disagreements with the use of preventive measures, and does not extend to assessing the efficacy of risk assessment itself. Zinger has said that “academics who reject the use of actuarial risk assessment in correctional settings often pay little attention to the evidence that contradicts their respective theoretical framework.”⁶⁰ The consequence is that the critics of risk assessment often fail to critique the alternative options in any detail.⁶¹ If the validity of preventive measures is accepted as a starting point, the only real alternative to risk assessment is unfettered human discretion.

⁵³ Blackwell, above n 52, at 153.

⁵⁴ Anna Charlton “Rape Myths and Invisible Crime: The Use of Actuarial Tools to Predict Sexual Recidivism” (2014) PILJNZ 112 at 134-135.

⁵⁵ Sentencing Act 2002, s 87(1); Parole Act 2002, s 107I(1); and Public Safety (Public Protection Orders) Act 2014, s 4.

⁵⁶ Sentencing Act, s 8(g); Public Safety (Public Protection Orders) Act 2014, s 5(6); and New Zealand Bill of Rights Act, s 25(g).

⁵⁷ *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114 at [34].

⁵⁸ At [36].

⁵⁹ At [37].

⁶⁰ Ivan Zinger “Actuarial Risk Assessment and Human Rights: A Commentary” (2004) 46 CJCCJ 607 at 614.

⁶¹ Zinger, above n 60, at 615; Richard Berk “A Primer on Fairness in Criminal Justice Risk Assessments”

It is now widely considered that human decision-making is imperfect. In a seminal piece of research, Tversky and Kahneman argued that when people make probabilistic estimations, they do not use a normative system to achieve a solution, but use a series of cognitive shortcuts called heuristics.⁶² Humans of all ages, and all levels of expertise rely on these cognitive shortcuts to make decisions.⁶³ Much of the literature which considers these cognitive shortcuts focuses on legal decision-makers. For example, studies have shown that the sentences imposed by expert legal decision-makers can be swayed by irrelevant anchors such as random numbers presented before a decision is made.⁶⁴ In the specific context of risk assessment, a confirmation bias may be observed. People tend to make decisions based on the information that first comes to mind.⁶⁵ Often, what is first to mind is not representative. It is well established that people tend to over-predict the level of violent crime in society.⁶⁶ Therefore, when predicting the recidivism of a particular violent offender, this decision may be implicitly biased by the easy availability of examples of violent crime.⁶⁷

That is not to say that judges are incapable of undertaking rigorous factual and legal analysis. However, what it does show is that human decision-making should not be held out as the gold standard. Andrews and Bonta, the leading researchers in the field of risk assessment, nicely balance the competing viewpoints. They express the view that scepticism from legal and criminological fields is healthy as it “drives new ideas and new research.” However, they go on:⁶⁸

(2016) 5 Penn Criminology Working Papers Collection at 1; and Laura Guy, Kevin Douglas and Stephen Hart “Risk Assessment and Communication” in Brian Cutler and Patricia Zapf (eds) *APA Handbook of Forensic Psychology* (American Psychological Association, Washington DC, 2015) 35 at 70.

⁶² See Daniel Kahneman *Thinking, Fast and Slow* (Penguin Books, London, 2012).

⁶³ Roger Levesque *Psychology of Law and the Criminal Process* (Novo Science Publishers, New York, 2006) at 488.

⁶⁴ See Birte English, Thomas Mussweiler and Frotz Strack “Playing Dice with Criminal Sentencing: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making” (2006) 32 PSPB 188; and Birte English and Thomas Mussweiler “Sentencing under uncertainty: anchoring effects in the courtroom” (2001) 31 J App Soc Psychol 1535.

⁶⁵ Kahneman, above n 62, at 137 and following.

⁶⁶ See Ministry of Justice *Public Perceptions of Crime Survey* (October 2013) at 30.

⁶⁷ Levesque, above n 63, at 488.

⁶⁸ Andrews and Bonta, above n 2, at 399.

...we also have enormous respect for the evidence. If actuarial risk scales that provide a comprehensive survey of risk factors, including dynamic risk factors, predict recidivism, then how can we justify ignoring this information.

Some commentators have expressed the view in even stronger terms that “failure to conduct actuarial assessment or consider its results is irrational, unscientific, unethical, and unprofessional.”⁶⁹ This aligns with Glazebrook J’s view that “[e]ven if such evidence is imperfect, it has to be better than leaving judges (who would have varying levels of background and expertise) floundering without any assistance.”⁷⁰

IV A Beginner’s Guide to Risk Assessment Instruments

This paper advocates for a greater awareness of how risk assessment is conducted, and what risk assessment instruments are. This Part provides a basic overview of risk assessment instruments, and describes a number of risk assessment instruments that are commonly used in New Zealand. Without a basic understanding of risk assessment, it is impossible for judges to give effect to the competing interests that were described in part III. For clarity, the phrase “risk assessment” is used to describe the totality of the process, whereas “risk assessment instrument” is used to describe a single tool that may form part of that process.

A Generations of Instruments

The development of risk assessment instruments is a hot topic in the field of forensic psychology, in part due to the legal ramifications that these instruments have.⁷¹ In fact, the accurate prediction of risk has been described as the “holy grail” of those working in the field.⁷²

As the name suggests, risk assessments instruments seek to identify and quantify risk factors. A risk factor is a variable that precedes and increases the likelihood of reoffending.⁷³ While there is general agreement about what constitutes a risk factor, there

⁶⁹ Zinger, above n 60, at 607.

⁷⁰ Glazebrook, above n 4, at 97.

⁷¹ Jacinta Cording, Sarah Beggs Christofferson and Randolph Grace “Challenges for the theory and application of dynamic risk factors” (2015) 22 PC&L 84 at 84.

⁷² Jacinta Cording, Tony Ward and Sarah Beggs Christofferson “Risk Prediction and Sex Offending” (forthcoming).

⁷³ John Monahan and Jennifer Skeem “Risk Assessment in Criminal Sentencing” (2016) 12 Ann Rev Clin Psychol 489 at 497.

has been a reluctance to specify what level of risk constitutes a dangerous or unacceptable level of risk, other than by using equally elusive terms such as “significant risk”.⁷⁴

The first generation of risk assessment was based solely on clinical judgement. Notwithstanding that these assessments were undertaken by highly-trained clinicians, unstructured clinical judgement was not very accurate. Andrews and Bonta point out that this was due to clinicians using non-observable, informal criteria to make predictions and attending to cues that were not empirically related to criminal behaviour.⁷⁵ Instead, these judgements often relied on the ‘gut feeling’ of clinicians.⁷⁶

The second generation of instruments refer to actuarial instruments, which rely on the statistical link between an offender with a set of characteristics and the likelihood of reoffending.⁷⁷ Second generation instruments were based solely on static factors. Static factors describe those that cannot be changed by an offender. These include age, socio-economic status and past offending. Contrary to what is found in some legal writing,⁷⁸ the leading psychological text on risk assessment asserts that there is a general consensus that actuarial assessments outperform clinical judgement.⁷⁹ However, the flaw of second generation assessments is that they do not capture changes in situational or external influences.

To address this problem, the third generation of instruments combined static factors with dynamic factors. Dynamic factors are defined as “situational and personal characteristics that are both empirically linked to an increased chance of future offending and are, theoretically at least, able to change.”⁸⁰ These include social support for crime, pro-criminal attitudes and substance abuse.⁸¹ Dynamic factors better capture change in risk over time or in response to treatment.⁸² For this reason, the parole board places significant weight on dynamic risk factors.⁸³ Understanding the predictive capacity of dynamic risk

⁷⁴ Scottish Risk Management Authority, above n 38, at 27.

⁷⁵ Andrews and Bonta, above n 2, at 311.

⁷⁶ At 312.

⁷⁷ Jack White, Andrew Day and Louisa Hackett *Writing Reports for Courts: A Practical Guide for Psychologists Working in Forensic Contexts* (Australian Academic Press, Bowen Hills, 2007) at 66.

⁷⁸ Ashworth and Zeder, above n 1, at 137.

⁷⁹ Andrews and Bonta, above n 2, at 312.

⁸⁰ Cording, Beggs-Christofferson and Grace, above n 71, at 85.

⁸¹ Andrews and Bonta, above n 2, at 308.

⁸² Guy, Douglas and Hart, above n 61, at 53-54.

⁸³ David Mather *Parole in New Zealand: Law and Practice* (Thomson Reuters, Wellington, 2016) at

factors is ongoing,⁸⁴ but it has been shown that the addition of dynamic risk factors has added to the predictive capacity of risk assessment instruments.⁸⁵

B How Scores Are Produced

Risk assessment instruments typically involve coding variables (or characteristics), which are empirically related to reoffending, as being present or absent. An algorithmic combination (or sum) generates a total score which places that offender within a band of risk.⁸⁶ That band of risk represents a group of offenders that all display similar levels of risk. With that, a prediction can be made about the likelihood that an offender falling within that group will reoffend.⁸⁷ The following table provided by the Court of Appeal in *R v Peta* gives a visual representation of this:⁸⁸

ASRS Risk Category	ASRS Score	Percentage of Sexual Recidivism after	
		5 years (n=646)	10 years (n=527)
Low	0	2 %	8 %
Medium low	1 – 2	5 %	11 %
Medium high	3 – 4	7 %	16 %
High	5 and above	21 %	36 %
Overall		5 %	11 %

C Common Instruments in New Zealand

Four of the most common risk assessment instruments used by the New Zealand courts and parole board are RoC*RoI, ASRS, PCL:SV, and the STABLE 2007.⁸⁹ This list is not exclusive; there are over 200 established risk assessment instruments.⁹⁰

[9.2.12].

⁸⁴ Mary Alice Conroy and Daniel C Murie *Forensic Assessment of Violent Risk* (John Wiley & Sons, Hoboken, 2007) at 73.

⁸⁵ Cording, Ward and Beggs Christofferson, above n 72.

⁸⁶ Sharon Casey “Dynamic risk and sexual offending: the conundrum of assessment” (2016) 22 PC&L 104 at 106; and Renate Bellve-Wack and Sandy Simpson “Clinical Assessment and Management of Violence” in Warren Brookbanks and Sandy Simpson *Psychiatry and the Law* (Lexis Nexis, Wellington, 2007) 315 at 321.

⁸⁷ Alexander Skelton and others “Assessing risk for sexual offenders in New Zealand: Development and validation of a computer-scored risk measure” (2006) 12 J Sex Aggress 277 at 278; and *Belcher*, above n 44, at [68] and associated criticism of this at [74].

⁸⁸ *R v Peta* [2007] NZCA 28 at [25].

⁸⁹ Mather, above n 83, at 52.

⁹⁰ T Douglas and others “Risk Assessment Tools in Criminal Justice and Forensic Psychiatry” (2017) 42

1 *RoC*RoI*

The most common actuarial instrument used by the courts is likely to be RoC*RoI. It has been developed by Corrections, primarily for internal purposes such as the allocation of rehabilitative resources.⁹¹ The instrument was developed using the criminal histories of 133,000 offenders in three non-consecutive years (1983, 1988, 1989).⁹² RoC*RoI means the risk of conviction multiplied by the risk of imprisonment. In other words, it relates to the likelihood that an offender will be both reconvicted *and* reimprisoned (within a five-year period). In doing so, it attempts to capture the seriousness of future offending. A score between zero and one is produced, with one indicating a 100 per cent likelihood of reoffending.

RoC*RoI is based on static risk factors which can be automatically calculated from the offender criminal history database. These include age, gender, age of first offence, seriousness of first offence and time free in the community since the offender's 13th birthday.⁹³ These variables are combined through a statistical process known as logical regression.⁹⁴

RoC*RoI relates to general offending and its applicability to some fields is limited. Most notably: child sex offending by men, driving while intoxicated, young offenders and offenders with overseas convictions.⁹⁵ For general offending, RoC*RoI has proven to be strongly correlated with an offender returning to prison.⁹⁶

2 *ASRS*

The ASRS (also referred to as the Static-AS) is Corrections' shortened version of the prominent Static 99 instrument.⁹⁷ This measure is specific and relates to the probability of sexual recidivism by male adult offenders against children. It measures static variables. The survey contains seven items which are readily available on the offender criminal history database.⁹⁸ These items are: the presence and quantum of previous sexual offences;

European Psychiatry 134 at 134.

⁹¹ Hugh Magee "The Criminal Character: A Critique of Contemporary Risk Assessment and Preventive Detention of Criminal Offenders in New Zealand" (2013) 19 AULR 76 at 79.

⁹² Blackwell, above n 52, at 158.

⁹³ Department of Corrections *RoC*RoI Explanatory Notes* (1999).

⁹⁴ Waitangi Tribunal *The Offender Assessment Policies Report* (Wai 1024, 2005) at [3.5.1].

⁹⁵ Department of Corrections, above n 93.

⁹⁶ Department of Corrections *What Works Now* (December 2009) at 15.

⁹⁷ For the validation study, see Skelton and others, above n 87.

⁹⁸ *Belcher*, above n 44, at [65].

the commission of a non-sexual offence; a history of non-sexual violence; the number of prior sentencing dates; whether the offenders age is less than 25 years; a history of offences against males; and a history of non-contact sexual offences.⁹⁹ The scores are weighted and then summed.¹⁰⁰ By way of illustration, the coding form below was provided by the Court of Appeal in *R v Peta*:¹⁰¹

Table 2: Static-AS/ASRS Coding Form		
Risk Factor	Codes	Weight
1 Sentences for prior sex offences (excluding current sentence and including only unique result dates)	Sentences None 1 2–3 4+	0 1 2 3
2 Count of unique prior sentences dates (excluding current sentence)	3 or less 4 or more	0 1
3 Any convictions for non-contact sex offences (all convictions)?	No Yes	0 1
4 Current sentence include non-sexual violence?	No Yes	0 1
5 Prior sentences for non-sexual violence	No Yes	0 1
6 Any convictions for male sex victims (all convictions)?	No Yes	0 1
7 Age as at date coded	Aged 25 or older Aged less than 25	0 1

3 PCL:SV

The PCL:SV (psychopathy checklist: screening version) measures psychopathy. The instrument has 12 items, which are split into two factors, one loosely related to interpersonal deficits and the other to antisocial lifestyle.¹⁰² Within psychology, psychopathy is a hotly contested idea.¹⁰³ Psychologists debate what psychopathy is, and

⁹⁹ Blackwell, above n 52, at 162.

¹⁰⁰ *Peta*, above n 88, at [21].

¹⁰¹ At [20].

¹⁰² Robert Hare “Psychopathy and Risk for Recidivism and Violence” in Nicola Gray, Judith Laing and Lesley Noaks *Criminal Justice, Mental Health and the Politics of Risk* (Cavendish Publishing, London, 2002) 27 at 31.

¹⁰³ Devon Polaschek “(Mis)understanding Psychopathy: Consequences for Policy and Practice with Offenders” (2015) 22 PPL 500 at 500.

whether it even exists as a standalone construct.¹⁰⁴ Notwithstanding this, the PCL:SV has been shown to be a valid predictor of criminal offending.¹⁰⁵ While the instrument does not specifically predict recidivism, psychopathy is a risk factor for some forms of future criminal offending.¹⁰⁶ That can be explained because psychopathy's defining characteristics – impulsivity, callousness and lack of empathy, for example – are linked to criminality.¹⁰⁷ An exception is child sex offenders, who have been found to have a low prevalence rate of psychopathy.¹⁰⁸ High scores on the PCL:SV can also indicate a resistance to treatment, which may be relevant to a legal decision-maker.¹⁰⁹ Given that it does not specially predict recidivism,¹¹⁰ best practice dictates that this instrument should be used only in combination with other instruments.¹¹¹ Difficulties with using measures of psychopathy are further discussed in Part VIII.

4 *STABLE 2007*

Amongst the most common dynamic measures is the STABLE 2007. The STABLE 2007 assesses the dynamic risk factors of male sex offenders.¹¹² The Stable 2007 contains 13 enduring but changeable items that reflect five subsections: significant social influences; intimacy deficits; problems with sexual self-regulation; problems with self-regulation; and non-cooperation with supervision. Items are rated out of three, and the scores are summed.¹¹³

D *Who Presents Risk Assessments?*

There are several avenues through which the court or parole board may be presented with risk assessment evidence. For PD, ESOs and PPOs, risk assessment will be provided by a “health assessor”. Section 4 of the Sentencing Act defines a health assessor as a practising psychiatrist who is registered with the Medical Council of New Zealand, or a practising psychologist who is registered by the Psychologists Board. For a standard sentencing hearing, risk assessments will be presented to the court by way of a presentence report

¹⁰⁴ Polaschek, above n 103, at 502.

¹⁰⁵ Russ Scott “Psychopathy – An Evolving and Controversial Construct” (2014) 21 PPL 687 at 693; and Hare, above n 102, at 36.

¹⁰⁶ *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352 at [89].

¹⁰⁷ Bellve-Wack and Simpson, above n 86, at 320.

¹⁰⁸ Blackwell, above n 52, at 164; and Hare, above n 102, at 41.

¹⁰⁹ *Peta*, above n 88, at [39].

¹¹⁰ Bellve-Wack and Simpson, above n 86, at 320.

¹¹¹ Blackwell, above n 52, at 164.

¹¹² Karl Hanson, Leslie-Maaiké Helmus and Andrew Harris “Assessing the Risk and Needs of Supervised Sexual Offenders” (2015) 42 *Crim Justice Behav* 1205 at 1209.

¹¹³ Casey, above n 86, at 112.

prepared by a probation officer.¹¹⁴ For a parole hearing, a risk assessment will be provided to the Board by way of a report prepared by Corrections.¹¹⁵ In reality, most risk assessments in New Zealand are carried out by Corrections.¹¹⁶ For the sake of brevity, this paper will simply refer to “health assessors”. However, the principles discussed are equally applicable to all those who conduct risk assessments for forensic purposes.

V *The Legislative Puzzle*

As will now be clear, risk assessments are pervasive throughout the criminal justice system. What will not be so clear is that there are subtle differences about how risk assessments are presented, by whom, and what specific characteristics are being assessed. This section describes these subtle differences. It will quickly become clear that different requirements are confusing and appear to have no policy rationale. Instead, inconsistencies in the legislation are likely to add confusion to an already complicated area of the law.

When a defendant is first charged with an offence, the court will consider whether to grant bail. Where bail is granted as of right, the court must consider if there is just cause for continued detention.¹¹⁷ As part of this, the court must consider the likelihood that the defendant will commit further offences while on bail.¹¹⁸ At this stage, consideration of risk will be made with reference to the available evidence but it is unusual to hear expert witness evidence about risk at a bail hearing.¹¹⁹

If an offender is convicted, risk will then become relevant at sentencing. One of the purposes of the Sentencing Act is to “protect the community from the offender”.¹²⁰ The risk that an offender poses of reoffending is clearly relevant to this purpose. The risk posed by the offender will be at the forefront of considerations when a judge determines the specific components of a sentence, such as an order for a treatment.¹²¹ Using the terminology described in Part IV, this will entail addressing dynamic risk factors.

¹¹⁴ Sentencing Act 2002, s 26.

¹¹⁵ Parole Act 2002, s 43.

¹¹⁶ This was recognised by the Court in *Miller v Attorney-General* [2010] NZCA 600 at [59].

¹¹⁷ Bail Act 2000, s 7(5).

¹¹⁸ Section 8.

¹¹⁹ Glazebrook, above n 4, at 89.

¹²⁰ Sentencing Act 2002, s 7(1)(g).

¹²¹ Glazebrook, above n 4, at 97.

For child sex offenders, the court may make an order that the offender be placed on the child sex offender register.¹²² The court has a discretion for offenders who have been sentenced to non-custodial sentences. The court may make this order “only if the court is satisfied that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally”.¹²³

At the stage of sentencing, the High Court may impose a sentence of PD if the offender has committed an qualifying offence, and is likely to commit another qualifying offence after the sentence expiry date.¹²⁴ In determining whether PD is appropriate, the court must, amongst other things, consider the tendency of the offender to commit serious offences in future, and the protection of the community.¹²⁵ Before making a sentence of PD, the court must consider the reports of *two* health assessors about the likelihood of committing a qualifying offence in the future.¹²⁶

When an offender becomes eligible for parole, risk will again become an important consideration. The paramount consideration of the parole board is the safety of the community.¹²⁷ As part of that, the board must consider the likelihood of future offending and the nature and seriousness of any likely subsequent offending.¹²⁸ To assist in this, the board will be provided with a report by Corrections.¹²⁹ This report will contain a risk assessment. The board is allowed to consider any evidence it wishes, including evidence that would otherwise be inadmissible in court.¹³⁰ Even if parole is granted, the offender may be recalled if they pose an undue risk to the safety of the public.¹³¹

The chief executive of Corrections may, at the conclusion of an offender's sentence, apply to the court for an ESO. If an eligible offender¹³² has committed a relevant offence,¹³³ the offender may be made subject to an ESO for a period of up to 10 years. This order will

¹²² Child Protection Act 2016, s 9.

¹²³ Section 9(1).

¹²⁴ Sentencing Act, s 87(2).

¹²⁵ Section 87(4)(c) and (e).

¹²⁶ Section 88(2).

¹²⁷ Parole Act 2002, s 7(1).

¹²⁸ Section 7(3).

¹²⁹ Section 43.

¹³⁰ Section 117(1).

¹³¹ Section 61(a).

¹³² Section 107C.

¹³³ Section 107B.

follow a report made by *a single* health assessor.¹³⁴ For sexual offenders, an ESO may be granted if the offender poses a *high risk* of committing a sexual offence, and displays the following characteristics:¹³⁵

- (a) displays an intense drive, desire, or urge to commit a relevant sexual offence; and
- (b) has a predilection or proclivity for serious sexual offending; and
- (c) has limited self-regulatory capacity; and
- (d) displays either or both of the following:
 - (i) a lack of acceptance of responsibility or remorse for past offending;
 - (ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.

For violent offenders, an ESO may be granted if the offender poses *a very high risk* of committing a violent offence, and displays the following characteristics:¹³⁶

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

It should be noted that if burdensome conditions are imposed, these must be reviewed by the parole board every two years.¹³⁷

For the most serious offenders, the chief executive may apply to the court for a PPO.¹³⁸ The principles of the Public Safety Act 2014 suggest that an order should only be made

¹³⁴ Section 107F(2).

¹³⁵ Section 117IAA(1).

¹³⁶ Section 117IAA(2).

¹³⁷ Section 107RB.

¹³⁸ Public Safety Act 2014, s 8.

where there is a very high risk of imminent serious sexual or violent offending by a person, and the magnitude of that risk justifies the imposition of an order.¹³⁹ The application must be accompanied by the reports of *at least two health assessors, one of whom must be a registered psychologist*.¹⁴⁰ Under s 10, the offender has the right to request an independent health assessor's report,¹⁴¹ the cost of which may be met by legal aid.¹⁴² A PPO may be granted if the offender poses a *very high risk of imminent* serious sexual or violent offending, and displays a severe disturbance in the following behavioural characteristics:¹⁴³

- (a) an intense drive or urge to commit a particular form of offending:
- (b) limited self-regulatory capacity, evidenced by general impulsiveness, high emotional reactivity, and inability to cope with, or manage, stress and difficulties:
- (c) absence of understanding or concern for the impact of the respondent's offending on actual or potential victims...:
- (d) poor interpersonal relationships or social isolation or both.

The PPO must be reviewed by a panel every 12 months to ensure that it remains justified.¹⁴⁴ If not, the panel may direct the chief executive to apply to the court to review the order.¹⁴⁵ In any event, the chief executive must apply to the court for a review of the continuing justification every five years.¹⁴⁶ The offender may also apply to the court for a review.¹⁴⁷

Clearly, there are inconsistencies across the statutory requirements for each decision that relates to risk assessment. For instance, for an ESO, a single health assessor's report is required. For a PPO and PD, two health assessor's reports are required. In the case of a PPO, one of these must be a registered psychologist. For ESOs and PPOs, reference to specific behavioural traits is required, but these are not consistent across the two types of orders. These differences seem to be a result of the ad hoc development of the legislation. There is no discussion in the Parliamentary material that attempts to justify the inconsistencies between these different measures – other than the obvious differences in

¹³⁹ Section 5(a) and (b).

¹⁴⁰ Section 9.

¹⁴¹ Section 10.

¹⁴² Section 10(5).

¹⁴³ Section 13(2).

¹⁴⁴ Section 15.

¹⁴⁵ Section 15(2).

¹⁴⁶ Section 16.

¹⁴⁷ Section 17.

the levels of risk that are required to be met before an order is made.¹⁴⁸ The only deliberate discussion about risk assessment was contained in the final departmental report on the Public Safety Bill that dismissed submissions questioning the validity of risk assessment. Instead, the Department argued that Corrections follows best practice principles as outlined in the international literature.¹⁴⁹

VI *Current Judicial Approach*

A *Principle: A Robust Analysis*

The Court of Appeal has considered risk assessment evidence on several occasions. The Court has stressed that it is not the role of the judge to simply 'rubber stamp' the risk assessment of health assessors.¹⁵⁰ The Court in *Barr v Chief Executive of the Department of Corrections* delivered the leading statement of the law:¹⁵¹

What is required is a careful assessment of all the historical and current factors, along with expert opinions of others, bearing in mind that the ESO [or other sanction] can have a substantial ongoing effect on an offender...

Put another way:¹⁵²

...in the end it is for the Judge to make up his or her own mind after hearing all the evidence and considering all the statistical, historical and current circumstances [of the offender] to decide whether the pre-condition [i.e. statutory criteria] exists...It requires a measure of independent judgement on the part of the Judge, weighing up all the relevant circumstances.

These passages make clear that the decision to impose a particular sentence or grant an order must always remain with the judge. Put simply, the intellectual grunt of the decision must be conducted by the judge, rather than the health assessor. In *Chief Executive of the*

¹⁴⁸ Parole (Extended Supervision Orders) Amendment Bill 2014 (195-2) (select committee report); and Public Safety (Public Protection Orders) Bill 2014 (68-2) (select committee report).

¹⁴⁹ Public Safety (Public Protection Orders) Bill 2014 (68-2) (departmental report) at [53].

¹⁵⁰ *Barr v Chief Executive of the Department of Corrections* CA60/06, 20 November 2006 at [32]; and *Peta*, above n 88, at [7].

¹⁵¹ *Barr*, above n 150, at [32].

¹⁵² *Barr*, above n 150, at [24].

Department of Corrections v CJW, Venning J explained in a more technical tense how a court is to address the task of risk assessment:¹⁵³

Risk is contingent upon factors that are both environmental and inherent in the individual. The Court's risk assessment should draw upon a variety of different sources of information. 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.

Robust judicial scrutiny of risk assessment evidence is required to reflect the fact that the imposition of a preventive measure can result in the serious curtailment of liberty of an individual. This reflects the fact that the appellate courts are aware of the competing interests that were described above in Part III. This was explicitly recognised in *R v Peta*:¹⁵⁴

An ESO has the potential to place major restrictions on the freedom of movement and freedom of association of an offender... This makes it even more important than in the ordinary course of cases for a Judge, when imposing an ESO, to explain clearly to the offender why such an order is being made.

While the Court of Appeal has set a high bar for the judicial scrutiny of risk assessment evidence, the courts have been less demanding about the quality of risk assessments themselves. For example, risk assessment reports do not need to directly address statutory factors, as the court can simply draw inferences from the report.¹⁵⁵ While interviews with offenders are recommended, they are not necessary.¹⁵⁶ Furthermore, despite the apparent conflict of interest, reports can be provided by those working for Corrections.¹⁵⁷ In any event, if the report is flawed, that does not invalidate the report. It will simply be reflected in the amount of weight that is afforded to it.¹⁵⁸ Given that judges are in a limited position to identify and correct errors at the time an application is heard, it is difficult to see how such a relaxed approach can be justified.

¹⁵³ *Chief Executive of the Department of Corrections v CJW* [2016] NZHC 1082 at [64], citing *Peta*, above n 88.

¹⁵⁴ *Peta*, above n 88, at [56].

¹⁵⁵ *McDonnell*, above n 106, at [53].

¹⁵⁶ At [48] and [53].

¹⁵⁷ *Belcher*, above n 44, at [97].

¹⁵⁸ *McDonnell*, above n 106, at [55].

B Practice: Inappropriate Judicial Deference

The robust approach advocated by the Court of Appeal is sensible given the serious consequences that can flow from the imposition of these measures. However, there is a gulf between the principles enunciated by the Court of Appeal and those that are applied in practice by lower courts.

The ambit of this paper does not allow for an empirical survey of judicial analysis of risk assessment. While there is limited empirical evidence available, Vess and Eccleston noted in 2009 that of 150 ESO applications that were made under the previous law, 145 were granted.¹⁵⁹ Of those that were not granted, three applications were dismissed at first instance, and two were initially granted but subsequently overturned on appeal. This would suggest that 96.7 per cent of applications made by the chief executive of Corrections were successful. By any measure, that is surprisingly high.

A brief survey of the available case law is sufficient to find decisions that appear to reflect judicial decision-making that has been effectively delegated to health assessors. The decision of *Chief Executive of the Department of Corrections v McGreevy* provides a good example. Dunningham J briefly summarised the opinion of a single health assessor employed by Corrections before imposing an ESO for the maximum 10-year period.¹⁶⁰ Similarly, in *Chief Executive of Department of Corrections v Dixon*, Gordon J imposed a 10-year ESO after quoting large segments of a health assessor's report, while making brief comments to the effect that the defendant's past offending supported the health assessor's view.¹⁶¹ In some cases, the circumstances make a brief assessment understandable. For example, if the application is not opposed¹⁶² or if it is extending an existing order.¹⁶³ However, even in these circumstances the consequences of a mistaken risk assessment are very serious.

Of course, it is impossible to know for certain that judges are not conducting a robust analysis – perhaps by way of questioning health assessors in court – but not summarising this information in sentencing notes. However, this seems unlikely. Glazebrook J has

¹⁵⁹ James Vess and Lynne Eccleston “Extended Supervision of Sexual Offenders in Australia and New Zealand: Differences in Implementation Across Jurisdictions” (2009) 16 PPL 271 at 274.

¹⁶⁰ *Chief Executive of the Department of Corrections v McGreevy* [2017] NZHC 527 at [7].

¹⁶¹ *Chief Executive of the Department of Corrections v Dixon* [2017] NZHC 1126 at [15] and [18]. See also *Chief Executive of the Department of Corrections v Rimene* [2015] NZHC 2721.

¹⁶² *Chief Executive of the Department of Corrections v Roper* [2016] NZHC 103.

¹⁶³ See *Chief Executive of the Department of Corrections v Aima'asu* [2016] NZHC 603.

previously suggested that the lack of detailed engagement with risk assessment is because:¹⁶⁴

...many judges are stymied in their role by their aversion to undertaking an assessment of scientific evidence... [T]his amounts to an abdication of the role of the judge in ensuring that evidence is sufficiently reliable.

The reluctance of judges to intellectually engage with risk assessment evidence is a view that is supported by experienced defence counsel, Dr Tony Ellis.¹⁶⁵

Judicial deference to expert risk assessment is also consistent with overseas empirical research. Canadian studies have found that judges rely heavily on the risk assessments of expert witnesses. Studying a representative sample of judgments, Blais found that judges' reliance on expert witnesses was 'extreme' in 77 per cent of cases, meaning that the judge accepted all of the evidence without question. Twenty-two per cent of the sample judgments accepted some aspects of the evidence, but rejected others.¹⁶⁶ Judicial deference can be assessed even more intricately. Notwithstanding that it is well understood that structured risk assessment is more accurate than clinical judgement, there is evidence that suggests that decision-makers place greater weight on the latter.¹⁶⁷

The lack of understanding by lawyers is also of some concern. As Ashworth and Zeder point out, unless lawyers are equipped with some basic understanding about how risk assessment works, they will not be in a position to question whether reliance on particular instruments is valid.¹⁶⁸ *Taam v Police* provides an example of a case where a defendant's interests could have been prejudiced by a lawyer's lack of understanding of risk assessment. In that case, the defendant's lawyer appealed a District Court sentencing decision on the basis that he was "caught by surprise" by the judge's use of RoC*RoI.¹⁶⁹ While Fogarty J expressed sympathy for the lawyer's position, the circumstances were such

¹⁶⁴ Glazebrook, above n 4, at 97.

¹⁶⁵ Interview with Dr Tony Ellis, defence counsel (the author, Wellington, 11 September 2017).

¹⁶⁶ Julie Blais "Preventative Detention Decisions: Reliance on Expert Assessments and Evidence of Partisan Allegiance within the Canadian Context" (2015) 33 Behav Sci L 74 at 81.

¹⁶⁷ Nicholas Scurich "Structured Risk Assessment and Legal Decision Making" in Monica Miller and Brian Bornstein (eds) *Advances in Psychology and Law* (Springer, Cham, 2016) 159 at 162-163.

¹⁶⁸ Ashworth and Zeder, above n 1, at 139.

¹⁶⁹ *Taam v Police* [2012] NZHC 3128 at [6].

that the lack of knowledge about RoC*RoI were not sufficient to upset the initial decision.¹⁷⁰

C Consequences of Inappropriate Judicial Deference

The most serious consequence of the lack of robust judicial analysis is that it fails to take seriously the profound consequences that the imposition of a preventive measure can have on an individual. The high level of risk that is required for the imposition of these measures reflects the fact the curtailment of the liberty of an individual for the benefit of society must be justified on a case-by-case basis. The analysis of evidence before the court must reflect that. Curtailing the liberty of an individual for what is believed to be in the best interest of society requires more than simply ticking procedural boxes.

More specifically, the abdication of judicial responsibility allows mistakes by health assessors to go unnoticed. Judges are sometimes said to be the gate-keepers of expert evidence, ensuring that so called 'junk science' is kept out of the courtroom.¹⁷¹ If judges are not engaging with risk assessments, and alive to the issues with these assessments, there is no way that they can function as the gate-keepers of substandard evidence. The risk of substandard risk assessment is not simply theoretical:¹⁷²

Anecdotal evidence, and that from Health Practitioners Disciplinary Tribunal (HPDT) proceedings, indicates that some practitioners have attempted to provide what has constituted a veneer of science in their reports by using a plethora of unvalidated psychometric tests in their assessment of risk.

This represents a serious threat to the integrity of the justice system. Allowing substandard evidence to be put before the court unchallenged is serious because "unvalidated tests may carry an unwarranted weight in legal proceedings where they are admitted as evidence, with potentially serious consequences for both offenders themselves, and for potential victims."¹⁷³

¹⁷⁰ At [9].

¹⁷¹ Robert French "Measure not on the Scale of Perfection" (paper presented to fifth International Conference on Evidence Law and Forensic Science, Adelaide, 22 July 2015) at 6; and Susan Glazebrook "Together informing justice" (opening address to ANZFSS symposium, Auckland, 19 September 2016) at fn 8.

¹⁷² Blackwell, above n 52, at 156.

¹⁷³ At 156.

In a 2007 decision, the Health Practitioners Disciplinary Tribunal found that 'Dr H' had committed professional misconduct in preparing a health assessor's report for the purposes of opposing an ESO application.¹⁷⁴ The Tribunal found that 'Dr H' had used psychometric tests that had no predictive utility for situation, and the tests may not have reflected current knowledge of the profession.¹⁷⁵ As a result, the Tribunal found that the court could have been seriously misinformed by the report.¹⁷⁶

The facts leading to the decision in *R v Peta* provide a further example of a risk assessment gone wrong. The situation would best be described as a comedy of errors, but for the serious consequences that Mr Peta would have suffered as a result. The first cause of concern was the brevity of reasons given by the District Court judge in granting an ESO.¹⁷⁷ It turned out that the order was made on the basis of a report that "fell far short of best practice."¹⁷⁸ The Court of Appeal described this as "disturbing", as judges should "be able to rely on evidence from the Corrections meeting best practice standards."¹⁷⁹ The health assessor had manually scored a risk assessment instrument, which is normally scored electronically, and had made mistakes doing so.¹⁸⁰ The assessor had incorrectly suggested that the level of risk for offenders in the medium-high risk category was higher in the second five years than the first. This was incorrect.¹⁸¹ The assessor had then advised that a denial of offending increased the risk of recidivism, which is contrary to empirical evidence.¹⁸² The assessor had also purported to conduct an assessment using a dynamic measure called SONAR, but instead conducted a clinical assessment using the SONAR factors. This risked leading "pseudo-scientific validity to findings which were not properly based."¹⁸³

VII A Best Practice Approach: Improving Judicial Understanding

Part III of this paper argued that if the liberty of offenders is to be curtailed on the basis of risk assessment, it is incumbent on judges to engage with risk assessment evidence. In particular, judges must demonstrate a more complete understanding of the limitations and

¹⁷⁴ *Re Dr 'H'* NZHPDT [2007] 147PSY07/73P.

¹⁷⁵ At [33]-[34]

¹⁷⁶ At [44].

¹⁷⁷ Glazebrook, above n 4, at 103.

¹⁷⁸ *Peta*, above n 88, at [62].

¹⁷⁹ At [62].

¹⁸⁰ At [63].

¹⁸¹ At [64].

¹⁸² At [65].

¹⁸³ At [67].

issues associated with risk assessment evidence. Part VI argued that it does not appear this is currently the case. As Glazebrook J has confirmed, judges feel reluctant to engage with risk assessment evidence.¹⁸⁴ Unless judges are in a position engage with and scrutinise risk assessments, the curtailment of liberty on the basis of that evidence becomes much more difficult to justify.

This Part identifies and explains basic issues that all legal actors engaging with risk assessment evidence should have some familiarity with. By understanding these basic concepts and simple issues, the potential fallibility of risk assessment will become more obvious. As a result, the concerns raised in Parts III and VI should become less pronounced.

A Understanding Statistical Limitations

Risk assessment instruments have inherent limitations by virtue of their statistical underpinnings. It is striking how often statistical analysis is misinterpreted in legal settings.¹⁸⁵ The limits of statistical information are often hard for those untrained in statistics to comprehend with any confidence. A basic understanding of the statistical limitations of risk assessments is critical if the fallibility of risk assessments is to be truly understood and considered in decision-making. This will better reflect the magnitude of these decisions, as the argument in Part III explains. An argument for judicial training about statistical evidence is made in Part IX.

At its most basic, risk assessment is an estimate of the probability that an individual will commit a crime in the future. Of course, you cannot draw a causal inference from a probability. If a person flips a coin nine times, and each time it lands on heads, that in no way affects the probability that 10th toss will land on tails, however unlikely that scenario is. Further to that, even a highly accurate prediction of risk does not account for unexpected intervening events. Consider the case of a violent offender who has been assessed as being highly likely to reoffend upon release. However, upon release, the offender is involved in a traffic collision and becomes paralysed. As a result, the offender is no longer in a physical position to reoffend.¹⁸⁶ While this scenario is unlikely, it illustrates that it is simply not possible to predict the future with certainty.

¹⁸⁴ Glazebrook, above n 4, at 97.

¹⁸⁵ See generally Susan Glazebrook "Miscarriage by Expert" (paper presented to Commonwealth Magistrates' and Judges' Association Triennial Conference, Wellington, 17 September 2015).

¹⁸⁶ See generally Ministry of Justice, above n 1, at 57.

1 *Group Statistics*

A single risk assessment instrument cannot pinpoint an individual offender's exact level of risk.¹⁸⁷ As was alluded to in Part IV, risk assessment instruments involve applying group statistics to an individual. Within a band of risk, it is impossible to identify the exact level of risk that the individual poses.¹⁸⁸ The following simple example was argued in *R v Belcher*: if a group has a 50 per cent probability of reoffending, it cannot be determined whether one member of that group has a zero per cent chance of reoffending and another has a 100 per cent chance of reoffending.¹⁸⁹ The courts have accepted that while this is true, it cannot be used to completely undermine the use of risk assessment.¹⁹⁰ As Blackwell points out, an approach in which an individual was required to be treated as unique "would require clinicians to ignore all scientific research and clinical experience."¹⁹¹

The inclusion of dynamic risk factors and protective factors, all of which are personal to the offender, go a long way in ameliorating the consequences of a formulaic application of a single risk assessment instrument.¹⁹² Further discussion on this point can be found in Parts IV and VII of this paper.

2 *Base Rates*

Sexual offending, and to a lesser extent violent offending, have relatively low base rates.¹⁹³ A base rate is defined as the relative frequency of an occurrence of an event in a population.¹⁹⁴ This means that attempting to predict recidivism of these offences will be less successful than predicting offences that occur at higher rates.¹⁹⁵ The issue with base rates was explained by Ogloff and Davies with the following simple example:¹⁹⁶

...the base rate of violence in many populations is generally so low that is difficult to accurately predict whether one is violent. For an example of the effect of base rates on

¹⁸⁷ Glazebrook, above n 4, at 94.

¹⁸⁸ McSherry, above n 37, at 783.

¹⁸⁹ *Belcher*, above n 44, at [74].

¹⁹⁰ *Peta*, above n 88, at [29].

¹⁹¹ Blackwell, above n 52, at 156.

¹⁹² *CJW*, above n 153, at [64], per Venning J.

¹⁹³ Russ Scott "Risk assessments and sentencing of serious sex offenders" (2008) 15 PPL 188 at 198.

¹⁹⁴ Stephen Gottfredson and Laura Moriarty "Statistical Risk Assessment: Old Problems and New Applications" (2006) 52 *Crime & Delinq* 178 at 184.

¹⁹⁵ McSherry, above n 37, at 783.

¹⁹⁶ J Ogloff and M Davis "Assessing Risk for Violence in the Australian Context" in D Chappell and P Wilson (Eds) *Issues in Australian Crime and Criminal Justice* (Lexis Nexis, Chatswood, 2005) 294 at 306.

prediction, imagine being in a room of Australian adults. If you were asked to identify the adults who drink coffee, the task would be easy because most Australian adults drink coffee (that is, the base rate of coffee drinkers is high). Conversely, if you were asked to identify those who do not drink coffee, the task would be prone to failure since so few adults do not drink coffee (that is, the base rate of non-coffee drinkers is low). Thus, for every non-coffee drinker you correctly identified, you would have probably identified many coffee drinkers in error. The same principle holds true for the prediction of violence.

Understanding this basic statistical limitation is key to understanding the fallibility of risk assessment instruments. The issue of low base rate also ties in with the high rate of false positives which is described in detail below. To account for the low base-rate, and to ensure that the rate of false negatives is low, the rate of false positives is necessarily higher. Von Hirsch and Ashworth describes it as such, “[i]t is like trying to shoot at a small, distant target with a blunderbuss: one can strike the target only if much of the discharge hits outside it.”¹⁹⁷

3 *Samples*

Issues may arise out of the sample on a risk assessment instrument was developed. The most prominent concern is that a risk assessment instrument may have been developed on an overseas population.¹⁹⁸ This means that the results that arise from that test may not be valid on a population that is significantly different to the development sample.¹⁹⁹ For example, the Static-99 was developed on a North American population. However, it has been validated in New Zealand.²⁰⁰ Overwhelmingly, risk assessment instruments are developed on white, male samples.²⁰¹ Few validation studies have been carried out on females or ethnic minorities.²⁰² In New Zealand, this is particularly significant for Māori offenders, who are not necessarily comparable to other overseas indigenous or minority populations.²⁰³

¹⁹⁷ Andrew von Hirsch and Andrew Ashworth (eds) *Principled Sentencing: Readings on Theory & Policy* (2nd ed, Hart Publishing, Oxford, 1998) at 90.

¹⁹⁸ Glazebrook, above n 4, at 94.

¹⁹⁹ Guy, Douglas and Hart, above n 61, at 42.

²⁰⁰ *Peta*, above n 88, at [22].

²⁰¹ Cording, Ward and Christofferson, above n 72.

²⁰² Douglas and others, above n 90, at 135.

²⁰³ Charlton, above n 54, at 137-138.

Similarly, Charlton has raised the issue of a sampling bias for sexual offending in New Zealand. She argues that due to low-reporting of sexual offences, those offences that are reported represent an atypical sample of all sexual offending.²⁰⁴ It follows that predictions of future offending are based on the incorrect assumption that the sample is representative of all sexual offending.

This is not an issue that a legal-decision maker can solve. But, it is important that these potential issues are recognised and if concerns arise, a legal decision-maker should seek clarification from a health assessor about the validity of a particular risk assessment instrument.

4 Assessing Accuracy

Assessing the accuracy of risk assessments instruments is itself a complicated question. Every time that a prediction is made as to a future event, four outcomes are possible. These outcomes are summarised in the following table:

	Predicted to reoffend	Predicted not to reoffend
Reoffends	True positive	False negative
Does not reoffend	False positive	True negative

Errors may take the form of a false negative or a false positive. It must not be forgotten that both of these outcomes are incorrect. By way of example, one study has suggested where a cut-off score of 3 (medium-high risk category) is used in the ASRS, the false positive rate is 28 per cent, and the false negative rate is 39 per cent.²⁰⁵

The proportion between false positives and false negatives is essentially one of calibration.²⁰⁶ One commentator noted that this is:²⁰⁷

...a moral rather than a statistical question. Irrespective of how we try to minimise the overall proportion of predictive failures, there will always be a trade-off between false negatives and false positives.

²⁰⁴ Anna Charlton “Actuarial tools and sexual recidivism: useful predictions?” [2015] NZLJ 289 at 292; see also Glazebrook, above n 4, at 96.

²⁰⁵ James Vess “Risk Assessment of Sexual Offenders for Extended Supervision Orders in New Zealand: Basic Principles and Current Practice” (2009) 18 J Child Sex Abuse 174 at 185.

²⁰⁶ Jones, above n 10, at 62.

²⁰⁷ At 62.

If one raises the requisite level of risk, that will reduce the number of false positives, but it will increase the rate of false negatives. The reverse is also true. This calibration exercise is an explicit example of the balance between the rights of the individual and the interests of society that forms the basis of the argument outlined in Part III of this paper. A higher rate of false negatives reflects greater emphasis on the rights of the individual whereas a higher rate of false positive places greater weight on the interest of the community.²⁰⁸ In a sense, it is a real-life application of the situation that William Blackstone posed: “it is better that ten guilty persons escape, than that one innocent person suffer.”²⁰⁹

The accuracy of risk assessment instruments is clearly relevant factor for a legal decision-maker.²¹⁰ Yet, there is no consensus as to the best way to measure the predictive accuracy of a risk assessment instrument.²¹¹ When judges engage with the accuracy of these measures, it is understandably done in a simplistic way. This is compounded because historically proponents of risk assessment tended to only identify the false negative rate, rather than also considering the false positive rate.²¹²

Ultimately, explaining the accuracy of a particular risk assessment instrument is a decision for a health assessor in each case. It is likely that the best way to convey the accuracy of a risk assessment instrument is by using receiver operating characteristics (ROC) analysis.²¹³ Expressing accuracy using ROC analysis allows a health assessor to explain the trade-off between sensitivity (a measure of the true positive rate) and specificity (a measure of the true negative rate).²¹⁴ By providing both of these figures, it allows for a more complete view of the accuracy of any risk assessment instrument. It will also give some indication of the instrumental over-cautiousness which is discussed in more detail below.

²⁰⁸ At 62.

²⁰⁹ As cited in Brian Netter “Using Group Statistics to Sentence Individual Criminals: An Ethical and Statistical Critique of Virginia Risk Assessment Program” (2007) 97 J Crim L & Criminology 699 at 711.

²¹⁰ Gary Melton and others *Psychological Evaluations for the Courts* (3rd ed, Guilford Press, New York, 2007) at 301.

²¹¹ Gottfredson and Moriarty, above n 194, at 186.

²¹² Andrew von Hirsch “The Problem of False Positives” in Andrew von Hirsch and Andrew Ashworth (eds) *Principled Sentencing: Readings on Theory & Policy* (2nd ed, Hart Publishing, Oxford, 1998) 98 at 99.

²¹³ Ian Coyle “The Cogency of Risk Assessments” (2011) 18 PPL 270 at 276-277.

²¹⁴ Douglas Mossman “Evaluating Risk Assessments Using Receiver Operating Analysis: Rationale, Advantages, Insights and Limitations” (2013) 23 Behav Sci Law 24 at 29.

B Addressing Statutory Criteria

As was explained in Part V, many of the instances in which risk assessment is relevant require health assessors to answer specific statutory criteria and/or identify specific behavioural traits which Parliament has deemed to be relevant. These statutory factors do not neatly overlap with the established risk assessment instruments.²¹⁵ Assuming that a particular risk assessment instrument perfectly addresses a specific statutory criteria is problematic for this reason.

The level of risk required to trigger the imposition of a particular measure provides a further example of the uneasy overlap between risk assessment instruments and the legislation. Legislation typically requires the offender to display a high or very high level of risk.²¹⁶ Risk assessment instruments also categorise levels of risk. However, the level of risk that these risk assessment labels represent does not necessarily reflect the level of risk that a legal decision-maker would have to be satisfied of. As Vess points out, in legal decision-making a comparison is usually made between how an offender relates to other offenders, rather than to a random member of the public. This is not necessarily the same comparison that is made by those developing risk assessment instruments.²¹⁷ As a result, judges should be mindful about relying solely on categorical labels without also noting what probability is associated with that category. It may be useful to refer to Table 1 in Part IV for a visual representation of how actual rates of reoffending relate to categorical labels associated with a particular risk assessment instrument.

C Inherent Discrimination

Risk assessment instruments are by their very nature discriminatory: they discriminate levels of risk on the basis of identifiable characteristics. Academic commentary in the United States has focused on whether risk assessment instruments are unconstitutional for this reason.²¹⁸

Gender is often touted as one of the strongest predictors of crime. Yet discrimination on the basis of gender is *prima facie* unlawful by virtue of s 19 of the New Zealand Bill of Rights Act 1990. The inclusion of race in risk assessments is also prominent in the

²¹⁵ Glazebrook, above n 4, at 95.

²¹⁶ See Part V above.

²¹⁷ *Peta*, above n 88, at [27].

²¹⁸ See Sonja B Starr “Evidence-Based Sentencing and the Scientific Rationalization of Discrimination” (2014) 66 *Stan L Rev* 803.

academic literature. And, even if race is not explicitly included, including variables such as socio-economic status can serve as a proxy for race.²¹⁹

The issue of discrimination has previously arisen in New Zealand. In 2002 a claim was filed with the Waitangi Tribunal by a Māori probation officer alleging that RoC*RoI was in breach of the Treaty of Waitangi. The claimant's argument was that because ethnicity was used as a variable in RoC*RoI, and greater weight was accorded to being Māori than any other ethnicity, that it would adversely affect Māori given that RoC*RoI is often used in sentencing decisions.²²⁰ In 2004, after the claim was filed but before the Waitangi Tribunal had heard the claim, ethnicity was removed as a variable. Corrections accepted that removing ethnicity from calculations was partly motivated by public relation concerns.²²¹ It was also thought that given ethnicity's high correlation with other variables, the predictive accuracy could be maintained by recalibrating other variables.²²² In any event, the claim failed as no prejudice could be established.

It is open for debate as to whether this resolution produces a more morally acceptable result. Jones said of this type of resolution:²²³

The statistical laundering of the race effect through other correlates may make the prediction instrument ethically acceptable at a superficial level, but it remains no less discriminatory than a model that explicitly includes race.

Several counter-arguments have been made against charges of discrimination. Slobogin has suggested that using otherwise illegitimate variables is defensible for two reasons: first, these classifications significantly further a compelling government interest.²²⁴ In this respect, one commentator has drawn a parallel with racial profiling in airport security. If resources are scarce, and the prevention of violence can be achieved by using a risk assessment instrument, albeit a discriminatory one, then it may well be justified.²²⁵ Secondly, the government is not seeking to punish or attribute blame to people on the basis of these otherwise illegitimate variables, but rather seeking to prevent harm.²²⁶ While these

²¹⁹ At 837.

²²⁰ Waitangi Tribunal, above n 94, at [1.2].

²²¹ At [6.2.6].

²²² At [6.2.6].

²²³ Jones, above n 10, at 63.

²²⁴ Christopher Slobogin *Proving the Unprovable* (Oxford University Press, New York, 2007) at 113.

²²⁵ Douglas and others, above n 90, at 136.

²²⁶ Slobogin, above n 224, at 113.

arguments are superficially attractive, they ignore the fact of the discriminatory nature of figures upon which risk assessment instruments have been developed. These instruments are discriminatory in the sense that they may not necessarily reflect higher rates of reoffending within a racial (or other) subgroup but rather discriminatory institutional practices. This was conceded by the New Zealand Police before the Waitangi Tribunal.²²⁷ Past discrimination therefore becomes further engrained in the criminal justice system as part of risk assessment instruments.

In practice these arguments may be of limited use to a legal decision-maker who is required to apply risk assessment. Nevertheless, it is important for the legal decision-maker to be alive to these concerns and seek clarification from health assessors if discrimination becomes an issue. In any event, these concerns should inform the development of risk assessment instruments. For example, using a self-report component may provide a better reflection of the true rate of reoffending with subgroups than official crime statistics which may reflect past discrimination by the criminal justice system.²²⁸ This is further discussed in Part IX of this paper.

D Conflicts of Interest

Most of the risk assessment expertise in New Zealand lies within Corrections.²²⁹ This raises the issue of a potential conflict of interest for two reasons. First, in the case of ESOs and PPOs, it is Corrections that is seeking that the order be imposed. Secondly, there is a potential overlap between the therapeutic treatment of offenders, and the forensic role that the same practitioners play. Despite this, the courts have held that Corrections' psychologists are not disqualified from providing health assessors reports.²³⁰ This reasoning is justified on the basis that experts in other situations often have an association with a party to the proceedings.

There is evidence that such a relaxed approach to the impartiality of health assessors does not rest on a sound basis. A recent Canadian study assessed whether partisan allegiance could be found in expert witness risk assessments presented in PD decisions. Worryingly, a partisan allegiance was found for the PCL-R and, to a lesser extent, the Static 99 (even once controlling for differences in training and the information available to each expert).²³¹

²²⁷ Waitangi Tribunal, above n 94, at [2.2.1].

²²⁸ Jones, above n 10, at 46.

²²⁹ Miller, above n 116, at [59].

²³⁰ Belcher, above n 44, at [97].

²³¹ Blais, above n 166, at 77.

Variations of both measures are commonly used in New Zealand. In plain terms, this means that prosecution and defence retained experts were biased in their assessment of offenders. This aligned with an earlier study that sampled actual sentencing decisions and found that prosecution retained expert witnesses scored offenders significantly higher (i.e. more 'risky') on the PCL-R than defence retained witnesses.²³² Previous research has shown that judges and juries find partisan allegiance difficult to detect with a limited understanding of the subject matter.²³³

The cumulative weight of this evidence suggests that it may be preferable to exclude Corrections' psychologists from providing health assessor's reports.²³⁴ The New Zealand Psychology Society's Professional Practice text suggests that such an unconscious bias may be difficult to overcome.²³⁵ For this reason, Vess and Eccleston, have explained that "it may be that the department's psychologists are in a much more difficult position to maintain a neutral and objective stance in the proceedings."²³⁶ This concern must also be seen against the background of the fact that:²³⁷

... there is a lack of risk assessment expertise available to offenders that is independent of the government department seeking a judicial decision against them. When such expertise is not available, it may be difficult for offenders to present a competent challenge to the findings and recommendations of the State. This raises human rights issues related to equal protection under the law, and the underlying principles of freedom and well-being.

Documents released under the Official Information Act 1982 reveal that Corrections are concerned of this potential conflict of interest. A practice note in 2015 stated that:²³⁸

²³² At 77.

²³³ Yvette Tinsley "Science in The Criminal Courts: Tool in Service, Challenge to Legal Authority or Indispensable Ally?" (2013) 25 NZULR 844 at 850.

²³⁴ Realistically, such a change could only be made by Parliament. The statutory wording does not allow for the courts to read in such an exclusion.

²³⁵ Armon Tametea, Nick Lascells and Devon Polaschek "Criminal Justice Psychology in Aotearoa New Zealand: Issues for Practitioners" in Waikaremoana Waitoki and others (eds) *Professional Practice of Psychology in Aotearoa New Zealand* (New Zealand Psychological Society, Wellington, 2016) 463 at 465.

²³⁶ Vess and Eccleston, above n 159, at 281.

²³⁷ At 281.

²³⁸ Practice Note by the Office of the Chief Psychologist "Risk Assessment Reports and Dual Roles" (14 April 2015) at [4] (obtained under Official Information Act 1982 request to the Department of Corrections).

...for example, on more than one occasion the Parole Board has raised concerns about possible loss of objectivity, in particular, when reports have been prepared by either the treating clinician or other staff within the treatment facility. In these cases there has been a perceived or actual loss of objectivity by the report writer in clear contrast to other advice or objective information available on the case. These or similar situations have the potential to mislead the Board or other decision makers, to not serve the best interests of the offender or the community, and to undermine the reputation of the high quality advice that we normally provide in such reports.

The practice note also said that there was “no common understanding or practice of role separation of the treatment provider and the risk assessment report writer.”²³⁹ In response, the chief psychologist instructed Corrections’ psychologists to develop regional plans to ensure that the treatment and risk assessment roles were sufficiently delineated.²⁴⁰ It is not clear whether these plans have been implemented.

For the purposes of the current discussion, it is important for judges to be aware of potential conflicts of interest. Solutions for resolving the challenges posed by the apparent conflict of interest are considered in Part IX of this paper.

E Incentive for Caution

Existing alongside potential conflicts of interest is a systematic bias that favours overly cautious risk assessments. As was discussed earlier in this Part, there is a trade-off between false negative and false positive errors. A false negative has much more immediate, and often high profile consequences than a false positive. As the *Professional Practice of Psychology in Aotearoa New Zealand* notes:²⁴¹

An especially powerful influence is the cost to the psychologist of getting the prediction wrong. If a person’s risk is assessed as low and they reoffend, there is a considerable cost to the victim and the community, and the psychologist may be held accountable for their “mistake”. However, a “false positive” error, identifying a person as high risk when they actually present a lower risk, often brings no obvious cost to the psychologist because the person may have no opportunity to prove them wrong.

Ashworth and Zeder explain that “[u]nless legal decision makers push back against this institutional pressure, it will lower the requisite level of required risk, unjustifiably limiting

²³⁹ At [6].

²⁴⁰ At [7].

²⁴¹ Tametea, Lascells and Polaschek, above n 235, at 465.

the liberty of individuals.”²⁴² The 96.7 per cent success rate of ESO applications before 2009, described in Part V of this paper, suggest that this is not currently the case.

Judges should see pushing back against overly cautious risk assessments as part of their role of conducting a robust judicial analysis of risk assessments. Otherwise, there will be a lowering of the level of risk required, which would unjustifiably – and unlawfully – curtail the liberty of individuals.

F An Example of Robust Judicial Analysis

While this paper has been critical of the judiciary's approach to risk assessment evidence, such a criticism is not universal. One of the most comprehensive applications of a risk assessment is that of Paul Davison J in *Chief Executive of the Department of Corrections v McCord*.²⁴³ After a thoughtful and prolonged explanation of the statutory criteria, as well as RoC*RoI, ASRS, STABLE 2007 and another measure called the Spousal Assault Risk Assessment guide,²⁴⁴ his Honour delivered the following summary:²⁴⁵

In my view, the evidence in the present case is cogent and compelling. While [the health assessor's] written report was relied upon by the [chief executive] as providing the material and information to establish the requirements for the making of an ESO, [the health assessor] also gave viva voce evidence and was cross-examined by [defence counsel]. I was impressed by the thorough and measured approach she took to her task of assessing and reporting on [the offender], and I have no hesitation in accepting her evidence, and specifically her expert opinion evidence, as being reliable and well informed. Although I have found her evidence and opinions to be of considerable assistance, I have nevertheless addressed and applied my own judgment to all of the issues and each of the statutory requirements myself, so as to make an independent assessment of those matters, rather than relying exclusively on [the health assessor's] report and her conclusions. Having done so, I am well satisfied that the evidence presented in support of the application both satisfies the statutory prerequisite criteria, and demonstrates that there is a high risk of [the offender] committing a relevant sexual offence in the future, and a very high risk of him committing a relevant violent offence in the future.

This paragraph demonstrates, at least superficially, that the judge is attempting to serve the role as the gate-keeper of evidence. His Honour has been guided by the evidence of the

²⁴² Ashworth and Zeder, above n 1, at 119-120.

²⁴³ *Chief Executive of the Department of Corrections v McCord* [2017] NZHC 744.

²⁴⁴ At [42]-[48].

²⁴⁵ At [68].

health assessor, but has clearly conducted his own independent analysis. The summary of both the legislation and the risk assessment instruments suggests that the judge is well-informed and thereby in a better position to weigh the competing interests that are involved in the imposition of an ESO.

VIII A Best Practice Approach: Maintaining a High Standard of Assessment

This paper is addressed to a legal audience and therefore that is where much of the focus of analysis lies. However, it is pertinent to make some brief comments about the role of health assessors.

A Quality of Risk Assessments

The health assessor's first duty is always to the court.²⁴⁶ As part of this duty, the health assessor must strive to present an impartial risk assessment, and the quality of the report conveying this information must always be high. It is important that the risk assessment be tailored for the specific situation, addressing as closely as possible the relevant legal question that is to be answered.²⁴⁷ This task is not easy, given the inconsistencies that were pointed out in Part V of this paper.

It is generally accepted that static risk factors should form the core of any risk assessment. However, static risk assessment should be supplemented by dynamic risk factors.²⁴⁸ The inclusion of dynamic factors helps ameliorate the shortcomings of static, actuarial measures.²⁴⁹ Including dynamic risk factors in an assessment is important for a number of reasons. It gives the decision-maker information about factors that are amenable to change, which should be influential in legal decision-making.²⁵⁰ From the offender's perspective, if only static factors are used to assess risk, there is little incentive for that offender to address antisocial tendencies because it will not affect the risk level that is presented to the decision-maker. Protective factors should also be identified alongside dynamic risk factors.²⁵¹ These include psychological qualities (such as a high IQ and emotional

²⁴⁶ *R v Hutton* [2008] NZCA 126 at [169].

²⁴⁷ Blackwell, above n 52, at 165.

²⁴⁸ James Vess "Risk Assessment of Sexual Offenders for Extended Supervision Orders in New Zealand: Basic Principles and Current Practice" (2009) 18 *Journal of Child Sexual Abuse* 174 at 186.

²⁴⁹ Glazebrook, above n 4, at 99. See also Part IV above.

²⁵⁰ Andrews and Bonta, above n 2, at 308.

²⁵¹ Glazebrook, above n 4, at 98.

resilience), social skills and supportive social relationships.²⁵² Protective factors, much like risk factors, are predictive of future offending.²⁵³ The imminence of any future reoffending should then be assessed by examining factors such as the pattern of past offending, current behaviour and life circumstances.²⁵⁴

A particularly important consideration for a health assessor to consider is ensuring that all information put before the legal decision-maker is directly relevant to the legal question. This is particularly important for measures of psychopathy. Scott noted that:²⁵⁵

Misuse of psychopathy measures may be especially prejudicial, given the pejorative misconceptions of psychopaths and the nihilism in relation to their treatability. In practice, a label “psychopath” invariably operates as an aggravating factor in the disposal of a convicted offender.

Scott went on to quote the prominent Australian commentator, Ian Freckelton QC, who expressed the view that psychopathy is “the high watermark in contemporary forensic stigmatisation.”²⁵⁶ For some types of offending or groups of offenders, measures of psychopathy will not be relevant. It follows that health assessors should be conscious to only reference measures of psychopathy where it is empirically related to the type of offending that is being predicted. Otherwise, it is highly likely that conveying this information to the legal decision-maker will have a prejudicial effect.²⁵⁷

B Communication

The success of a robust risk assessment process relies heavily on effective communication between health assessors and legal actors (judges and lawyers). It does not matter how advanced risk assessment instruments become if this information is not accurately conveyed.²⁵⁸

This task is naturally challenging because the legal and scientific professions operate on wholly different conceptual bases. Thus, the scope for miscommunication is great. The

²⁵² Department of Corrections, above n 96, at 22.

²⁵³ At 22.

²⁵⁴ Vess, above n 248, at 186.

²⁵⁵ Scott, above n 105, at 698.

²⁵⁶ At 698.

²⁵⁷ See generally, Conroy and Murie, above n 84, at 46.

²⁵⁸ Vess, above n 248, at 175.

manner of reasoning between the two fields is fundamentally different.²⁵⁹ Legal reasoning often seeks to establish a causal relationship based on incomplete facts. Scientific reasoning seeks to disprove all alternative explanations in the hope that a consensus will slowly build as to the existence of a causal relationship. This disconnect is made more difficult by the fact that most legal actors will have no background in risk assessment and statistics.²⁶⁰ Buckleton and Ruane have noted that:²⁶¹

...the language used by scientists to describe their findings may mean quite different things to the scientist than to the lawyer. Coupled with the fact that most lawyers have an Arts or Commerce rather than Science background, there have often been misunderstandings of the evidence given by forensic scientists.

This is further complicated given that statistics and science often seem infallible to those with no subject knowledge. It has been shown that scientific evidence therefore plays a prominent role in decision-making.²⁶²

Therein lies the challenge: health assessors must be true to their backgrounds by arguing according to science, and yet make these arguments accessible and useful to legal audiences.²⁶³ Therefore, it is crucial that health assessors explain concepts in simple terms. Blackwell, writing on behalf of the New Zealand Psychology Society, expressed the view that risk assessment:²⁶⁴

...should be communicated in as clear a manner as possible in language that is accessible to the judiciary, lawyers, the offender, himself/herself, as well as any victim(s), or others involved in the legal process.

Conroy and Murie argue that it may be appropriate for health assessors to assume the role of educator.²⁶⁵ By translating jargon into more understandable language, it makes it much more likely that the legal actors will be able to comprehend the risk assessment and importantly, its limitations. Similarly, Glazebrook J has noted that part of the role of the

²⁵⁹ See Melton and others, above n 210, at 7-15.

²⁶⁰ Glazebrook, above n 4, at 98. See for example, in *Taam*, above n 169.

²⁶¹ Dr John Buckleton and Craig Ruane "Forensic Evidence" (NZLS Seminar, September 2008) at 81.

²⁶² As was recognised by the Court of Appeal in *R v Aymes* [2005] 2 NZLR 376 (CA) at [134].

²⁶³ Grant Galpin "Writing Court Reports" in Warren Brookbanks and Sandy Simpson *Psychiatry and the Law* (Lexis Nexis, Wellington, 2007) 265 at 320.

²⁶⁴ Blackwell, above n 52, at 166.

²⁶⁵ Conroy and Murie, above n 84, at 119.

health assessor is to translate terminology arising out of the medical field into language that is useful for a court.²⁶⁶ It is critically important that terms such as “high risk” be explained in the context that they are given. For the reasons that were described in Part VII of this paper, the likelihood of reoffending should be noted prominently alongside any categorical label. This will help to overcome the difficulties that have already been identified.

In some cases, it might also be appropriate for health assessors to confront common misconceptions that may otherwise influence legal decision-makers.²⁶⁷ This is particularly relevant for child sex offenders. For example, misconceptions that child sex offenders are more likely to reoffend, or form a group distinct from other offenders, are generally not supported by evidence.²⁶⁸

The effect of better communication will be to identify the fallibility of risk assessment, which will result in more informed decision-making. More informed decision-making will then create a more appropriate balance between the rights of the individual and the interests of the community as a whole. As McSherry and Keyzer argue “expert witnesses have an ethical obligation to point to the limitations of the ‘science’ of risk prediction in every case.”²⁶⁹

IX Possible Changes

Even if a best practice approach is taken in every case, there remains a strong argument that changes should be made to the way that risk assessments are carried out in New Zealand. These changes recognise conducting, interpreting and applying risk assessments are challenging tasks, and the system should be structured in such a way that health assessors and legal actors are adequately supported in performing their respective roles.

A Judicial Training

It is not immediately clear how much training, if any, the judiciary receives about risk assessment.²⁷⁰ However, as was pointed out in Part VI of this paper, it appears that the

²⁶⁶ Glazebrook, above n 4, at 98.

²⁶⁷ Glazebrook, above n 4, at 101.

²⁶⁸ See Blackwell, above n 52, at 159.

²⁶⁹ McSherry and Keyzer, above n 12, at 108.

²⁷⁰ The judiciary is not subject to the Official Information Act and judicial training information is not publically available.

judiciary is still reluctant to engagement with risk assessment in any detail, and deference to the opinion of health assessors is common.

Judicial understanding of scientific evidence, particularly statistical evidence, is of growing importance. The former Australian Chief Justice, Robert French AC, has argued that because scientific literacy is key to modern decision-making, the courts must be able to engage with it.²⁷¹ Risk assessment is simply one example of this.

There is a strong argument that judges should be provided with training so that they have a basic understanding of the uses and limitations of statistical evidence.²⁷² Such an understanding would not only be valuable for risk assessment, but for a range of expert evidence. Countless miscarriages of justice have arisen due to the misunderstanding and misapplication of scientific evidence, which often has a statistical or probabilistic component.²⁷³ Of course, the growth of science in the courtroom does not mean that all judges and lawyers must have science degrees, but ongoing education should strive to ensure that legal actors have more than a bare understanding.²⁷⁴ Equally, there is a strong argument that counsel should undertake training so that they are familiar with basic statistical evidence.²⁷⁵

B Accreditation of Health Assessors and Risk Assessment Guidelines

1 Following Scotland's lead

Scotland has taken a unique approach to the challenges posed by risk assessment. In that jurisdiction, a Risk Management Authority has been established. That Authority accredits health assessors who provide reports for judges in making an Order for Lifelong Restriction.²⁷⁶ This represents an amalgamation of the preventive measures available in New Zealand.

Alongside the accreditation scheme, the Authority publishes a set of guidelines to which all assessors must adhere. The guidelines set out mandatory requirements that ensure a robust risk assessment process takes place. There is also a standard form risk assessment

²⁷¹ French, above n 171, at 7-8.

²⁷² Glazebrook, above n 185, at 6.

²⁷³ See generally Glazebrook, above n 185.

²⁷⁴ French, above n 171, at 7-8.

²⁷⁵ Glazebrook, above n 185, at 5.

²⁷⁶ Scottish Risk Management Authority, above n 38, at 1.

report, which ensures both clarity and relevance to the legal question.²⁷⁷ While the guidelines in Scotland allow for a degree of flexibility to cater for the unique needs of each offender, consistency is important to guarantee legal relevance and satisfaction of ethical requirements.²⁷⁸ As part of this, bands of risk are clearly defined and well understood. Offenders will be placed within a 'high', 'medium' or 'low' risk category.²⁷⁹

Such guidelines make the process entirely transparent and available for review by all stakeholders.²⁸⁰ This better accords with rules of natural justice and due process.

2 *Risk Assessment Guidelines in New Zealand*

Scotland's Risk Management Authority has been well received.²⁸¹ While the published guidelines only apply to an Order for Lifelong Restriction, the standardised approach is being used by other agencies that are required to assess risk, creating a degree of consistency across the criminal justice system.²⁸²

A body like the Risk Management Authority is clearly resource intensive. While Scotland has a similar population base to New Zealand, it is difficult to see a standalone body being set up in New Zealand. However, it is possible that a set of guidelines could be published in a similar way. Legislation could be passed that required the Ministry of Justice, or another appropriate agency, to periodically publish a set of best practice guidelines. It is preferable that this body not be Corrections. While much of the expertise in this area lies within Corrections, a degree of separation should exist between those that are assessing the offenders, and those that are creating guidelines for assessment.²⁸³ These guidelines would be produced in consultation with the appropriate bodies, namely the New Zealand Psychologists' Board and the Royal Australian and New Zealand College of Psychiatrists.

A standard form approach would be particularly useful in New Zealand given that the layout of current reports is "often the product of clinical or institutional tradition, individual preferences, or are based on what seems most relevant to a clinician."²⁸⁴ This is not

²⁷⁷ At 2.

²⁷⁸ At 2.

²⁷⁹ At Appendix A.

²⁸⁰ Guy, Douglas and Hart, above n 61, at 54.

²⁸¹ McSherry and Keyzer, above n 12, at 65-66.

²⁸² At 64.

²⁸³ New South Wales Sentencing Council *High-Risk Violent Offenders Sentencing and Post-Custody Management Options* (Sydney, May 2012) at 27.

²⁸⁴ Tametea, Lascells and Polaschek, above n 235, at 466.

surprising given the wider framework within which New Zealand psychologists operate. While there is a general code of conduct that governs psychologists, it is incumbent on psychologists to apply this code to their practice area.²⁸⁵ This situation contrasts with the United States where the American Psychological Association publishes the *Specialty Guidelines for Forensic Psychology*.²⁸⁶ In the psychiatric profession, the Royal Australian and New Zealand College of Psychiatrists publishes a set of guidelines for practitioners preparing medico-legal reports.²⁸⁷ However, these guidelines are worded in general terms and do not specifically address risk assessment.

A clear set of guidelines may help psychologists and psychiatrists feel more comfortable overcoming questions of ethical obligations that are the focus of much discussion within these professions.²⁸⁸ It would also force the appropriate bodies to confront ethical difficulties that are posed by the inclusion of certain questionable variables in risk assessment measures.²⁸⁹ This was discussed in Part VII of this paper.

To assist with the production of these risk assessment guidelines, there is a growing body of research that addresses how forensic reports should best be structured. By way of example, Witt has suggested a 10-point checklist to which every psychological forensic report should adhere:²⁹⁰

1. Forensic referral question stated clearly;
2. Report organized coherently;
3. Jargon eliminated;
4. Only data relevant to forensic opinion included;
5. Observations separated from inferences;
6. Multiple sources of data considered, if possible;
7. Psychological tests used appropriately;

²⁸⁵ At 467.

²⁸⁶ American Psychological Association *Specialty Guidelines for Forensic Psychology* (October 2012).

²⁸⁷ Royal Australian & New Zealand College of Psychiatrists *Professional Practice Guideline 11: Developing reports and conducting independent medical examinations in medico-legal settings* (February 2015).

²⁸⁸ Psychiatrists opposed the Public Safety (Public Protection) Act principally on the basis of uncertainty about risk assessments: Dr J Barry-Walsh on behalf of the New Zealand branch of the Royal Australian and New Zealand College of Psychiatrists "Public Safety (Public Protection Orders) Bill". See also Galpin, above n 263, at 282-283.

²⁸⁹ Gottfredson and Moriarty, above n 194, at 186.

²⁹⁰ Phillip Witt "Forensic Report Checklist" (2010) 2 OAJFP 233. See also Thomas Grisso "Guidance for Improving Forensic Reports: A Review of Common Errors" (2010) 2 OAJFP 102.

8. Alternate hypotheses considered;
9. Opinions supported by data; and
10. Connection between data and opinions made clear.

3 *Accreditation Scheme*

The Ministry of Justice, or other such body, could adopt an accreditation scheme such that only those who could demonstrate a sufficient level of training and experience with risk assessment would be accredited to present risk assessment evidence. An accreditation scheme would therefore help avoid the issues that were discussed in Part VI of this paper about unqualified experts presenting risk assessment evidence.

An accreditation scheme would also add a level of independence that is sorely lacking in New Zealand. This would partially address the concerns about the existence of conflicts of interest that were discussed in Part VII of this paper. Corrections' psychologists could then still produce risk assessments but, by virtue of accountability to an independent third party, perceptions of a conflict of interest would be significantly lessened.²⁹¹

C *Restricting the Definition of Health Assessors*

If an accreditation system is not favoured, at the very least the definition of "health assessor" should be restricted for the purposes of presenting risk assessment evidence.

There are currently several rules that should prevent psychologists and psychiatrists who are not qualified from presenting risk assessment evidence. For example, Section 2.2.1 of the *Code of Ethics for Psychologists Working in Aotearoa/New Zealand 2002* states that "psychologists must attain and maintain adequate levels of knowledge and skills in order to practise in a particular area."²⁹² Breaching these rules could result in sanction by the Health Practitioners Disciplinary Tribunal. Likewise, *R v Hutton* confirms experts in criminal trials should only give evidence on matters within their area of expertise.²⁹³ Yet, as the examples in Part VI of this paper show, the statutory definition of "health assessor" is flexible enough to allow cavalier practitioners without adequate experience or training to slip through the cracks.

²⁹¹ Daniel C Murrie and others "Rater (dis)agreement on risk assessment measures in sexually violent predator proceedings" (2009) 12 *Psychol, Public Policy and Law* 19 at 48.

²⁹² New Zealand Psychologists Board *Code of Ethics For Psychologists Working in Aotearoa/New Zealand 2002* (Wellington, 2002).

²⁹³ *Hutton*, above n 246, at [169].

The definition currently reads:²⁹⁴

health assessor means a health practitioner who—

- (a) is, or is deemed to be, registered with the Medical Council of New Zealand continued by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of medicine, and who is a practising psychiatrist; or
- (b) is, or is deemed to be, registered with the Psychologists Board continued by section 114(1)(a) of the Health Practitioners Act 2003 as a practitioner of the profession of psychology.

By way of comparison, a more restricted definition is presented in the Evidence Act:²⁹⁵

clinical psychologist means a health practitioner—

- (a) who is, or is deemed to be, registered with the Psychologists Board continued by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of psychology; and
- (b) *who is by his or her scope of practice permitted to diagnose and treat persons suffering from mental and emotional problems.*

The definition in the Sentencing Act should be amended to restrict the presentation of evidence for the purposes of risk assessment to those who, by way or training and clinical experience, are qualified to present evidence on risk.²⁹⁶ This would likely require the psychologist or psychiatrist to demonstrate experience in forensic psychology or psychiatry, and specifically with risk assessment instruments. As part of restricting the statutory definition, it would be pertinent for Parliament to address whether it is in the interests of justice to allow psychologists from Corrections to provide health assessor's reports. As was discussed in Part VII, there is a strong argument that health assessors should be independent of the party seeking the order.

²⁹⁴ Sentencing Act 2002, s 4.

²⁹⁵ Evidence Act 2006, s 56(6) (emphasis added).

²⁹⁶ See Evidence Act, s 4.

D *Concurrent Presentation of Oral Evidence*

Reconciling the differences between opposing expert witnesses poses a challenge for courts in many different contexts. The challenge arises because the fact finder rarely has any background in the subject matter.²⁹⁷ Risk assessment evidence is no exception.

Concurrent evidence presentation of oral evidence has been suggested as a possible solution for this problem. Concurrent evidence, also known as 'hot-tubbing', has been described as:²⁹⁸

...a procedure where evidence is given by all of the experts together at the same time. It resembles a discussion in which co-operative endeavour is engaged [in] to help identify the relevant issues and where possible, arrive at an agree resolution of them. To the extent appropriate, the joint evidence is subject to judicial control, much like the control by a chair of a meeting, although all necessary formality is observed.

Concurrent evidence has several benefits. It refines issues to those that are essential and makes experts less likely to adopt an adversarial approach as they are confronting one another in person. The result is that experts are typically more concessional and state matters more frankly and reasonably.²⁹⁹

Concurrent evidence is uniquely suited to risk assessment evidence. One concern with risk assessment, which has not been the focus of this paper, is inter-rater subjectivity. This describes the idea that two health assessors may differ in their subjective opinion about items on a risk assessment scale. As a result, two assessors applying the same test may reach a different conclusion.³⁰⁰ By requiring the two experts to present oral evidence concurrently, differences in opinion may be explained and debated. As a result, the judge should come to a more informed conclusion about why experts differ in their risk assessment.

Another challenge that has been raised in this paper is the lack of understanding of judges and counsel. If counsel do not have a background in risk assessments, it is difficult to know what questions to ask of health assessors. By requiring experts to present oral evidence

²⁹⁷ See Steven Rares "Using the 'Hot Tub': How Concurrent Evidence Aids Understanding Issues" (paper presented to Judicial Conference of Australia Colloquium, Sydney, 12 October 2013).

²⁹⁸ *John v Henderson (No 1)* [2013] NZSWC 1435 at [11], as cited in Ian Freckelton and others *Expert Evidence and Criminal Jury Trials* (Oxford University Press, Oxford, 2016) at 54.

²⁹⁹ Freckelton and others, above n 298, at 57.

³⁰⁰ Murie and others, above n 291.

concurrently, health assessors will be able to question each other directly, thereby adding a layer of accountability that might otherwise not exist.

X Conclusion

This paper has conducted a wide-ranging review of risk assessment in New Zealand. Risk assessment is now a key feature of criminal justice in New Zealand. Risk is considered at many stages from whether to grant bail through to detention after an offender's prison sentence is ostensibly complete. Risk assessments can and do have significant implications for the curtailment of liberty of offenders.

Despite its growing importance, this paper argued that judges are reluctant to engage with risk assessment evidence. This is a cause for concern. Several issues with risk assessments were identified and explained. It is clear from the way that many judges currently interpret risk assessment evidence that they have a limited understanding of the limitations of risk assessment. Without understanding fallibility risk assessment evidence, it is much harder for judges to fairly balance the rights of offenders with the interests of the community.

To assist with achieving a best practice model of risk assessment, it was argued that a government body should publish a set of best practice risk assessment guidelines. This could be tied to a system of accreditation for health assessors. Alternatively, the definition of "health assessor" should be restricted to a clinical psychologist or psychiatrist that can demonstrate familiarity with risk assessment instruments. It was also suggested that oral risk assessment evidence by different experts should be presented concurrently. This would better achieve a consensus between competing viewpoints, as well as adding a degree of accountability between experts.

The place of risk assessment in the New Zealand criminal justice system must be explored in much more detail. There is a wealth of international literature of risk assessment but the application of this knowledge to a New Zealand legal context has been largely non-existent. Consideration must be given to improving risk assessment practices in New Zealand, such as adopting the suggestions that were given in this paper. However, these suggestions merely scratch the surface. It is hoped that this paper will provide a spring-board on which further discussion can take place.

Word Count

The text of this paper (excluding table of contents, footnotes and bibliography) comprises approximately 14,448 words.

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