

The changing face of preventive detention in New Zealand

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Introduction

- 2 Preventive detention is an indefinite sentence of imprisonment that can be imposed on offenders convicted of specified serious sexual or violent offences. The purpose of preventive detention is to “protect the community from those who pose a significant and ongoing risk to the safety of its members”.¹ Thus, the sentence is protective, rather than punitive in nature.
- 3 On 1 July 2002 the Sentencing Act 2002 and Parole Act 2002 replaced the Criminal Justice Act 1985, which had previously governed the use of preventive detention. The Sentencing Act made significant changes to the sentence by: increasing the number of qualifying sexual and violent offences; lowering the age of eligibility from 21 to 18 at the time of the offence; and removing the requirement that an offender must have previously been convicted of a specified offence.² The mandatory minimum non-parole period (minimum term) was also reduced from ten to five years.
- 4 This paper gives a short history of preventive detention and examines the effects of the 2002 changes. It also examines how the introduction of extended supervision orders for child sex offenders in 2004 has affected the use of the sentence.

A short history of preventive detention

- 5 Preventive detention was introduced in 1954 to replace the previous law applying to ‘habitual criminals’.³ The sentence could be imposed for a range of recidivist offending if the court was satisfied that it was “expedient for the protection of the public that the offender be detained in custody for a substantial period”.⁴ Offenders sentenced to preventive detention were eligible for parole after three years and could be detained for a maximum of 14 years.⁵ However, there was no maximum for offenders convicted of recidivist sexual offending against children, meaning they could theoretically be detained for life.

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¹ Section 87(1) Sentencing Act 2002; see also *R v Leitch* [1998] 1NZLR 420 (CA)

² From 1993 onwards this restriction did not apply to offenders convicted of sexual violation.

³ John Meek, (1995), The Revival of Preventive Detention in New Zealand 1986 – 1993, *Australian and New Zealand Journal of Criminology*, vol 28, 225, 229; *R v Leitch*, 423

⁴ Section 24 Criminal Justice Act 1954

⁵ *Ibid*, section 26(2)

- 6 In imposing preventive detention, the courts were required to take note of reports by probation officers, prison superintendents, and other Department of Justice officials.⁶ The legislation provided that the Parole Board should not recommend that the Minister of Justice release an offender unless it was of the opinion that the prisoner was “not likely to commit crimes”.⁷
- 7 Preventive detention initially enjoyed a degree of favour, with the sentence being imposed on 28 and 27 occasions in 1956 and 1957 respectively. However, the use of the sentence then steadily declined, dropping to an average of less than three per year between 1965 and 1967. The majority (74.3 percent) of offenders sentenced to preventive detention between 1954 and 1967 were convicted of property offences and the sentence was rarely imposed on sex offenders.⁸
- 8 In 1967 the sentence was restricted to offenders aged 25 or over who were convicted of specified sexual offences (generally against children), having previously been convicted of a specified offence on at least one occasion since turning 17.⁹ At the same time the legislation also increased the minimum term to seven years¹⁰ and provided that the Parole Board was to recommend release to the Minister only if it was of the view that the offender was unlikely to commit further sexual offences.¹¹
- 9 The revised sentence was rarely used, with preventive detention being imposed on 23 occasions between 1968 and 1 October 1985, when the Criminal Justice Act 1985 came into force. At least five of these sentences were quashed on appeal and alternative penalties imposed.¹²
- 10 In 1981 the Penal Policy Review Committee recommended that preventive detention be abolished because it was “arbitrary, selective and inequitable”.¹³ However, in 1983 a Commission of Inquiry into the release of a recidivist pedophile from a psychiatric hospital, and his subsequent dealings with the criminal justice system, expressed the opinion that “very great caution should be exercised before deciding to abolish this form of detention”.¹⁴
- 11 The Criminal Justice Act 1985 revised the sentence by allowing the Parole Board itself (rather than the Minister) to approve release of offenders and removed the requirement that the Board believe the offender was unlikely to commit further sexual offences before recommending release on parole.¹⁵
- 12 In 1986 there were several high profile cases of serious sexual and violent offending.¹⁶ In 1987, in response to growing public pressure and a Department of Justice study of

⁶ Ibid, section 25

⁷ Ibid, section 33(1)(a) and (7)

⁸ Meek (1995), 231

⁹ Section 24 Criminal Justice Act 1954 as amended by the Criminal Justice Amendment Act 1967

¹⁰ Section 26 Criminal Justice Act 1954 as amended by the Criminal Justice Amendment Act 1967

¹¹ Section 37A(7) Criminal Justice Act 1954 as amended by the Criminal Justice Amendment Act 1967

¹² Meek (1995), 233

¹³ Ibid, 235; New Zealand Law Society (Geoff Hall and Stephen O’Driscoll), *The New Sentencing and Parole Acts*, June 2002 (seminar materials)

¹⁴ Meek (1995), 236

¹⁵ See sections 94 and 96 Criminal Justice Act 1985

¹⁶ Meek (1995), 236

convicted rapists,¹⁷ the sentence was extended to include a number of serious violent crimes and the age of eligibility was reduced from 25 to 21.¹⁸ The minimum term was also increased from seven to ten years.¹⁹

13 In 1993 the requirement of a previous conviction for a specified offence was removed for offenders convicted of sexual violation. However, the court could only impose preventive detention on a 'first offender' if it had first obtained a psychiatric report on the offender and, having regard to that report, was satisfied that there was "a substantial risk that the offender [would] commit a specified offence on release".²⁰ Provision was also made for the courts to impose a longer minimum term than the statutory ten years if the circumstances of the offence were "so exceptional that a minimum period of imprisonment of more than 10 years [was] justified".²¹

14 In 1997 the Court of Appeal undertook a review of the courts' approach to preventive detention in *R v Leitch*.²² The Court held that factors likely to be relevant to whether it was expedient for the protection of the public for the offender to be detained for a substantial period, or whether there was a substantial risk that the offender will commit a specified offence upon release, were:

the nature of the offending, its gravity and the time span; the category of victims and the impact on them; the response to previous rehabilitation efforts; the time elapsed since any previous offending and the steps taken to avoid re-offending; acceptance of responsibility and remorse for the victims; predilection or proclivity for offending taking account of professional risk assessments and the prognosis for the outcome of available rehabilitative treatment.²³

15 The Court emphasized that the decision to impose preventive detention was at the sentencing court's discretion. Preventive detention was not a sentence of last resort, but the court should consider whether the protective purpose of the sentence could be met by a finite sentence, which could be increased beyond what would otherwise be appropriate for the purposes of public protection.²⁴

16 Between 1987 and 2001 there was an increase in the number of offenders sentenced to preventive detention, with the sentence being imposed nine times per year on average.²⁵ Only part of the increase can be directly attributed to the 1987 changes; between 1987 and 2001 only 7.5 percent of offenders (nine) sentenced to preventive detention were under the age of 25 and only two received the sentence for violent

¹⁷ That study found that 69 percent of offenders convicted of rape between 1966 and 1985 were under 25 at the time of the offending. The study also found that while 15 percent of such offenders had previous convictions for sexual offending, 46 percent had previously been convicted of violent offending. Meek (1995 at 238) states that this study was a dubious basis for the changes that followed, as the definitions of 'sexual' and 'violent' offending included offences other than those qualifying for preventive detention, making it difficult to relate them to the sentence.

¹⁸ Section 75 Criminal Justice Act 1985 as amended by the Criminal Justice Amendment Act (No 2) 1987

¹⁹ Section 93(3) Criminal Justice Act 1985 as amended by the Criminal Justice Amendment Act (No 3) 1987

²⁰ Section 75(1)(a) and (3A) Criminal Justice Act 1985, as inserted by the Criminal Justice Amendment Act 1993.

²¹ Section 80(1) Criminal Justice Act 1985, as substituted by the Criminal Justice Amendment Act 1993. The Criminal Justice Amendment Act (No 2) 1999 subsequently changed the test to where the circumstances of the offence were "sufficiently serious" to warrant a longer minimum term.

²² [1998] 1NZLR 420 (CA)

²³ Ibid, 429

²⁴ Ibid, 429 – 430; see also *R v C* [2003] 1 NZLR 30

²⁵ www.stats.govt.nz, 22 January 2007

offending.²⁶ However, the public mood and the Government's response in widening the scope of the sentence may have also had a more general effect on judicial decision making.

Preventive detention under the Sentencing Act 2002

17 On 1 July 2002 the Sentencing Act and Parole Act replaced the Criminal Justice Act 1985. The new Acts introduced major reforms and, in particular, responded to a referendum on criminal justice that was held in conjunction with the 1999 General Election.²⁷ The referendum asked:

Should there be a reform of the 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?²⁸

18 Unsurprisingly, 92 percent of voters responded 'yes'. In response to the referendum, the Sentencing Act included "a number of provisions to ensure tougher punishment for the worst offenders".²⁹ In regard to preventive detention, the Sentencing Act:

- increased the number of qualifying sexual and violent offences (a comparison of qualifying offences under the Criminal Justice Act and Sentencing Act is attached as Appendix 1);
- removed the requirement that an offender must have previously been convicted of a specified offence for all offences;
- lowered the age of eligibility from 21³⁰ to 18 at the time of the offending; and
- lowered the mandatory minimum term from ten to five years.

19 Under the Sentencing Act, the High Court may impose a sentence of preventive detention if—

- (a) the offender is convicted of a qualifying sexual or violent offence;

²⁶ Ministry of Justice, Departmental Report on the Sentencing and Parole Reform Bill for the Justice and Electoral Committee, 3 December 2001, 25 – 26

²⁷ The Citizens Initiated Referenda Act 1993 (NZ) allows any person to start a petition asking that a non-binding national referendum be held. Once the requisite approvals have been obtained, the petitioner has 12 months to obtain the signatures of at least 10 percent of all eligible electors. The 1999 referendum was the result of a petition instigated by Norm Withers of Christchurch after his 71 year old mother was brutally attacked while minding his shop. Her attacker was sentenced to 10 years' imprisonment for aggravated assault.

²⁸ The referendum has been widely criticized for requiring voters to give a single yes or no answer to a wide ranging question that involved several different aspects of the criminal justice system.

²⁹ Hon Paul Swain, Acting Minister of Justice, third reading speech on the Sentencing Bill (previously the Sentencing and Parole Reform Bill), 1 May 2002, New Zealand Parliamentary Debates (Hansard), Vol 600, 15908.

³⁰ The relevant provision was silent as to whether the defendant had to be 21 at the time of the offence, conviction, or sentence. In 2005 (three years after the Criminal Justice Act 1985 had been repealed), the Supreme Court held in *R v Mist* that the relevant time was that of the offence. See paras 51 – 52 for more detail.

- (b) the offender was 18 or over at the time of committing the offence; and
- (c) the court is satisfied that the offender is likely to commit another qualifying sexual or violent offence if the person is released at the expiry of any determinate sentence that the court is able to impose.³¹

20 When considering whether to impose preventive detention, the court must consider reports from two appropriate health assessors (psychiatrists or psychologists) about the likelihood of the offender committing a further qualifying sexual or violent offence,³² and take into account—

- (a) any pattern of serious offending disclosed by the offender's history;
- (b) the seriousness of the harm to the community caused by the offending;
- (c) information indicating a tendency to commit serious offences in future;
- (d) the absence, or failure, of efforts by the offender to address the cause(s) of his or her offending; and
- (e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.³³

21 These factors are essentially a codification of the relevant factors identified by the Court of Appeal in *Leitch* under the Criminal Justice Act.

22 If the court sentences an offender to preventive detention, it must order that the offender serve a minimum term of at least 5 years. The minimum term must be the longer of—

- (a) the minimum term required to reflect the gravity of the offence; or
- (b) the minimum term required for the purposes of the safety of the community in the light of the offender's age and the risk posed at the time of sentencing.³⁴

23 At the expiry of the minimum term the offender is eligible for parole, but the Parole Board may only release the offender if satisfied that he or she does not pose an undue risk to the community.³⁵ If released on parole, the offender is subject to parole conditions, including the possibility of recall for the rest of his or her life.³⁶

Imposition of preventive detention between 1997 and 2007

³¹ Section 87(2) Sentencing Act

³² Health assessors often qualify their reports by saying that the prediction of future risk is very difficult, especially predicting future risk at the expiry of a lengthy sentence of imprisonment and without knowing whether the offender will successfully engage in treatment. Often health assessors assess the risk the offender poses at the time of sentencing and outline the offender's static and dynamic risk factors, leaving the court to decide the offender's ongoing risk.

³³ Section 87(4) Sentencing Act

³⁴ *Ibid*, section 89

³⁵ Section 28 Parole Act 2002

³⁶ *Ibid*, section 6(4)(d)

- 24 This section examines the imposition of preventive detention over the last 11 years (five and a half years before and after the Sentencing Act came into force) to identify general trends in the use of the sentence.
- 25 In the five and a half years between 1 January 1997 and 30 June 2002, 65 offenders were sentenced to preventive detention at an average of just under 12 per year. In the five and a half years between 1 July 2002 and 31 December 2007, 95 offenders³⁷ were sentenced to preventive detention at an average of just over 17 per year.³⁸ Table 1 shows that, both before and after the Sentencing Act came into force, the vast majority of preventive detention sentences were imposed for sexual offending. Between 1 July 2002 and 31 December 2007, 83 percent of preventive detention sentences were imposed for sexual offending and sexual violation was usually the most serious charge. In 54 percent of cases involving sexual offending in this period, the sentence was imposed for offending against children under 16.
- 26 From 2002 onwards, the courts showed a greater willingness to impose preventive detention for serious violent offending. Although the sentence had been available for some violent offences since 1987, only two offenders had been sentenced to preventive detention for violent offending prior to 2002. Between 1 July 2002 and 31 December 2007, a further 16 offenders were sentenced to preventive detention solely for violent offending, including the only woman to ever receive the sentence.³⁹
- 27 Table 1 also shows that, with the exception of 2004, preventive detention was imposed at a relatively consistent rate over the period 1997 to 2007 (although, as observed above, the average rate was higher for the post Sentencing Act period). The abnormally high number of offenders sentenced to preventive detention in 2004 appears to be an anomaly, and cannot be explained by any policy or legislative change.

Table 1. Preventive detention imposed in 1997 – 2007 by most serious offence*

Most serious offence	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Total
Sexual violation	7	8	16	10	6	9	13	17	9	6	11	112
Attempted sexual violation/ assault with intent to commit sexual violation	2	-	1	-	1	1	1	1	1	3	-	11
Indecent assault (under 16) or doing/permitting an indecent act on a person under 16	1	-	1	3	2	-	1	5	1	2	-	16
Indecent assault (16+)	N/A	N/A	N/A	N/A	N/A	-	-	2	-	1	1	4
Other sexual	-	-	-	-	-	-	1	-	-	-	-	1
Attempted murder	-	-	-	-	-	-	-	-	1	-	1	2
Grievous assault ¹	-	1	-	-	-	-	1	5	1	1	1	10
Aggravated robbery	N/A	N/A	N/A	N/A	N/A	-	1	2	1	-	-	4

³⁷ One offender was sentenced to preventive detention twice in consecutive years for offending that was essentially part of the same series of offending. This offender is only counted once in the 95.

³⁸ If the abnormally high number of offenders sentenced to preventive detention in 2004 is omitted, the average drops to 14 per year.

³⁹ *R v Matete*, Court of Appeal, 17 October 2006, CA 100/06

Other violent	-	-	-	-	-	-	-	1	-	-	-	1
Total	10	9	18	13	9	10	18	33	14	13	14	161

*2006 and 2007 figures are provisional

¹ Wounding with intent to injure or cause grievous bodily harm, injuring with intent to cause grievous bodily harm, and aggravated wounding or injury.

Quantifying the effect of the Sentencing Act changes

- 28 As outlined above, in the five and a half years following the Sentencing Act coming into force, preventive detention was imposed in 30 more cases than the preceding five and a half years. The question is, to what extent was this increase a result of the changes in the Sentencing Act, as opposed to other factors?
- 29 This section examines trends in the number and seriousness of the main offences that qualified for preventive detention across the entire period between 1997 and 2007 (i.e. offences, such as sexual violation, that qualified under both the Criminal Justice Act and Sentencing Act) to identify any changes that may have influenced the use of the sentence independent of the Sentencing Act changes. The effects of the individual changes under the Sentencing Act, including the increased range of qualifying offences, are then examined in detail.

Conviction and sentencing for offences qualifying under both Acts

- 30 Preventive detention can only be imposed for specified qualifying offences. When considering whether the Sentencing Act changes have had an impact on the use of the sentence, it is important to consider any underlying trends in the number and seriousness of qualifying offences that may have influenced the use of the sentence. For instance, it might be expected that the number of offenders sentenced to preventive detention would increase if there was a large increase in the number of convictions and/or custodial sentences⁴⁰ for qualifying offences.
- 31 Figures 1 and 2 respectively show the number of convictions and custodial sentences imposed between 1997 and 2006⁴¹ for the main offences qualifying for preventive detention under both the Criminal Justice Act and Sentencing Act. As would be expected, custodial sentences were imposed in the majority of cases involving the main qualifying offences.
- 32 Convictions and custodial sentences were reasonably stable for most offences between 1997 and 2006, meaning this factor is unlikely to have significantly affected the use of preventive detention. However, from 2001 onwards there was a significant increase in the number of convictions and custodial sentences for grievous assault. This increase may, at least in part, explain the increase in the use of preventive detention for this kind of offence.

⁴⁰ Custodial sentences are used as an indication of seriousness.

⁴¹ 2007 figures were not available at the time of writing.

Figure 1. Number of convicted cases, by offence category, 1997-2006

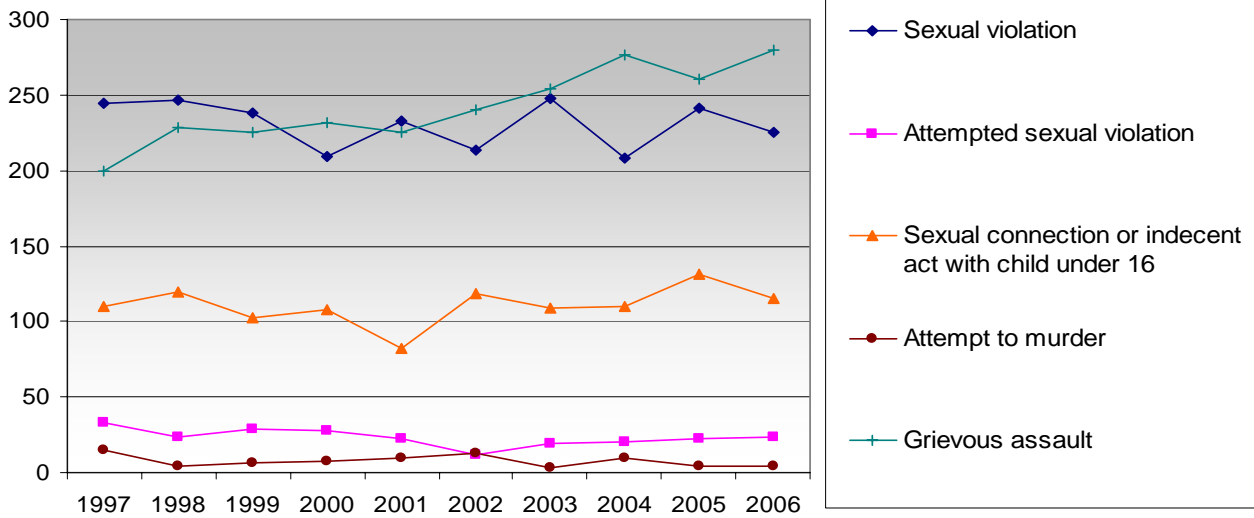
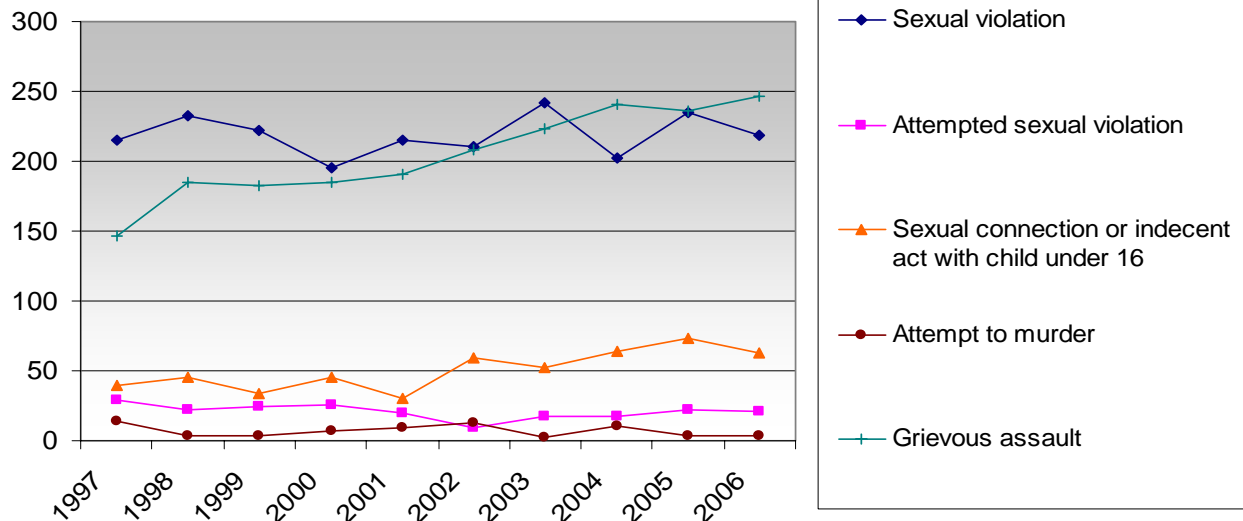


Figure 2. Number of convicted cases resulting in custodial sentences, by offence category, 1997-2006



Notes on figures:

1. Source: Ministry of Justice.
2. Figures for 2006 are provisional.
3. The system used to log cases was updated in 2004 (from LES to CMS). This may cause changes in the figures and trends that are observed prior to 2003 and following 2004. In particular, any changes in the number of cases in 2004 may not represent a true change in offender patterns. Accordingly, extreme caution should be used when making inferences based on any change between 2003 and 2004.
4. Charge outcome date has been used to determine year.
5. For the purposes of this data, a case is defined as the group of charges against a single person at the same time. The most serious charge (with the most serious outcome or penalty) is used to denote the characteristics of that case.

Qualifying offences

33 The Sentencing Act increased the range of offences qualifying for a sentence of preventive detention. The Act added several additional sexual offences, including

indecent assault on a person aged 16 or over, and greatly increased the range of qualifying violent offending.

- 34 Of the 95 offenders sentenced to preventive detention between 1 July 2002 and 31 December 2007, 20 offenders were 'transitional' offenders who committed their offending entirely prior to 1 July 2002. Transitional offenders could only be sentenced to preventive detention if they would have been sentenced to preventive detention under the Criminal Justice Act criteria.⁴² Consequently, these offenders were not eligible to be sentenced to preventive detention under the expanded range of qualifying offences.
- 35 Of the 75 non-transitional offenders, 24 received a sentence of preventive detention for at least one offence that was not previously a qualifying offence. Nine offenders received preventive detention solely for previously non-qualifying offending; the most serious offence for four offenders was indecent assault on a person 16 or over, aggravated robbery for another four, and using a firearm against a law enforcement officer for the remaining offender.

Previous conviction for a specified offence

- 36 Prior to the Sentencing Act, an offender was only eligible for preventive detention if he or she had previously been convicted of a specified offence. The only exception to this requirement, introduced in 1993, was if an offender was convicted of sexual violation. The Sentencing Act removed this requirement for all specified offences.
- 37 A 'pattern of serious offending' is one of the main factors that the courts take into account when deciding whether to impose preventive detention because it is one of the most reliable indicators of future risk. On the basis of offenders' criminal histories (as reported in their sentencing notes), between 1 July 2002 and 31 December 2007 there were eight cases where preventive detention was imposed on offenders with no previous convictions for specified offences.⁴³ Six of these cases involved convictions for sexual violation, so would have qualified for preventive detention under the Criminal Justice Act. In four of these cases⁴⁴ the offender was sentenced to preventive detention for serious sexual offending against children, committed over significant periods of time and, in all but one case, against multiple victims. In the other two cases,⁴⁵ the offenders were convicted of very serious offending against adult complainants. In both cases the offending involved abduction for a significant period of time (in one case nine hours and in the other ten days) before the complainant managed to escape. In all six cases the offender was assessed as having a moderate or high risk of re-offending.
- 38 The remaining two offenders with no previous convictions for qualifying offences were convicted of violent offending, so would not previously have been eligible for preventive detention. In *R v Ormsby*⁴⁶ the offender pleaded guilty to charges of wounding with intent to injure, threatening to kill, and breach of a protection order. The complainant

⁴² Section 153 Sentencing Act

⁴³ For the purposes of this analysis, a 'specified offence' was taken to be any specified offence under the Sentencing Act.

⁴⁴ *R v Grinder*, Court of Appeal, 26 August 2003, CA78/03; *R v Bryant*, Court of Appeal, 16 December 2003, CA236/03; *R v Harvey*, Invercargill HC, 18 December 2003, CRI 2003 025 276872; and *R v Hutchison*, Court of Appeal, 8 March 2007, CA258/06.

⁴⁵ *R v Cumming*, Court of Appeal, 2 November 2005, CA43/03 and *R v Eagle*, Napier HC, 12 May 2006, CRI 2006 041 199.

⁴⁶ Napier HC, 29 October 2004, CRI 2003 020 5950

was his former partner and he had, on a number of occasions, been convicted of assaulting her and breaching the protection order she had taken out against him. None of his previous offending had been serious enough to qualify for preventive detention, but his offending had escalated and the Judge considered that he was at a high risk of killing the complainant. The offender was sentenced to preventive detention with a minimum term of five years.

- 39 In *R v Johansen*⁴⁷ the offender was sentenced to preventive detention with a minimum term of ten years on a charge of attempted murder. At the time of the offending, the offender was serving a life sentence for a murder committed when he was 16. Four years into his sentence he attacked an Asian inmate with a plastic knife melted into a sharp point in what the Judge described as a racist attack. Technically, the offender did not have any prior convictions for qualifying offences because murder is not a qualifying offence. Murder is excluded from the list of qualifying offences because it almost inevitably results in life imprisonment, which is, in all practical respects, the same as preventive detention.
- 40 All eight cases where the offender had no previous qualifying convictions involved serious offending by offenders who posed a reasonably high risk of re-offending. This indicates that the courts will only impose preventive detention on the worst ‘first time’ offenders.

Age of eligibility

- 41 The Sentencing Act reduced the qualifying age for preventive detention from 21 to 18 at the time of the offence. The Ministry of Justice’s Departmental Report on the Sentencing and Parole Reform Bill, prepared for the Justice and Electoral Committee⁴⁸, outlined the reasons for the reduction. The Ministry stated that 18 is the internationally accepted age for adult criminal responsibility and that some very dangerous offenders were in their late teens. The Ministry also noted that, while a person could change significantly over their lifetime, there is “some evidence that some traits closely associated with repeat offending are firmly established by 18”.⁴⁹
- 42 The Ministry expressed the view that it would be “extremely rare” for an offender under 21 to be sentenced to preventive detention for three reasons. First, the courts would be reluctant to impose the sentence on an offender under 21, given the low number of offenders aged between 21 and 25 sentenced to preventive detention under the criminal Justice Act. Second, it would be less likely for a young offender to have acquired a pattern of offending sufficient to justify preventive detention. Third, it considered that the additional guidance provided by the Sentencing Act would limit preventive detention to offenders at a very high risk of further sexual or violent offending. The Ministry also noted that the effect of the sentence would be mitigated by the more flexible parole regime.⁵⁰

⁴⁷ Auckland HC, 2 June 2005, CRI 2004 083 1849

⁴⁸ The Justice and Electoral Committee was the Parliamentary select committee that considered the Bill. Select committees are comprised of Members of Parliament from different parties. They examine a Bill after its first reading and provide a report to Parliament suggesting any changes. Select committees receive public submissions and advice from officials.

⁴⁹ Above, n26, 26

⁵⁰ *ibid*

- 43 Table 2 groups offenders sentenced to preventive detention between 1 July 2002 and 31 December 2007 by their age at the date of the most recent qualifying offence.⁵¹ The majority of offenders sentenced to preventive detention were between the ages of 25 and 50 at the time of their most recent qualifying offending. There was only one case (*R v Hoggart*⁵²) where an offender under the age of 21 at the time of the offence was sentenced to preventive detention and two where the offender was aged between 21 and 24.

Table 2. Approximate age of offenders sentenced to preventive detention 1 July 2002 - 31 December 2007 at date of most recent qualifying offence*

Age at most recent qualifying offence	Number
18 – 20	1
21 – 24	2
25 – 29	19
30 – 39	37
40 – 49	24
50 – 59	9
60 +	3
Total	95

* The figures in this table are approximate and are derived from sentencing notes and associated material.

- 44 Four cases are of note in regard to offenders under 21 years of age considered for preventive detention.⁵³ The first is *R v Robertson*⁵⁴ where the offender, who was 18 at the time of the offending, was found guilty of kidnapping a child and performing indecencies upon her. He was also found guilty of attempting to kidnap two other children on the preceding day. The offender continued to deny the offending, had previous convictions for low to moderate level violent offending that had resulted in short prison sentences, but had no previous convictions for sexual offending.
- 45 The Court declined to impose preventive detention because it could not be confident that the offender had an entrenched deviancy and considered that, given time and treatment, the offender might change. The Court stated that the offender was “not to be assumed to be a lost cause at 19” and sentenced him to eight years’ imprisonment with a minimum term of two thirds.
- 46 A second case where preventive detention was not imposed on an offender under 21 was *R v Leatigaga*.⁵⁵ In that case the offender was 19 at the time of the offending and entered early guilty pleas to two charges of sexual violation by rape, three of sexual violation by unlawful sexual connection, and one each of indecent assault, aggravated burglary, and burglary. The sexual offending involved four complainants (three aged 15 and one aged 21) and occurred over a number of months.
- 47 All three health assessors who assessed the offender, including one retained by his counsel, considered that the offender posed a significant risk of further offending unless he addressed the causes of his offending. The Court considered that a lengthy determinate sentence was appropriate given that the defendant had never served a

⁵¹ The most recent qualifying offence is used because offenders sentenced to preventive detention are often sentenced for offending spanning a number of years.

⁵² Hamilton HC, 19 February 2004, T 030376

⁵³ Also of interest is *R v Yorke*, Whangarei HC, 8 October 2004, T 036785, which involved an offender aged 21 at the time of the offending.

⁵⁴ Tauranga HC, 4 October 2006, CRI 2005 070 453

⁵⁵ Christchurch HC, 19 October 2006, CRI 2005 009 014538

prison sentence and had not previously had access to treatment. The Court also noted that the offender would qualify for an extended supervision order at the expiry of his sentence. The offender was sentenced to 11 years' imprisonment with a minimum term of seven years.

- 48 *Robertson and Leatigaga* can be compared with *Hoggart* where preventive detention was imposed on a young offender with a history of serious offending. In that case the offender was 19 when, after consuming a quantity of alcohol, he accused his girlfriend of sleeping with his mother's partner (an accusation that had no basis). He seriously assaulted and choked his girlfriend in their bedroom and threatened to kill her if she did not confess. Thinking she was going to die, the victim 'confessed'. The offender then went into the lounge and beat his mother's partner, stabbing him repeatedly with a large pair of scissors.
- 49 The offender pleaded guilty to charges of wounding with intent to injure, wounding with intent to cause grievous bodily harm, and threatening to kill. He had previously been sentenced to two years' imprisonment for aggravated robbery in 1999 (at age 15), and two years and 14 days in 2001 for assault with intent to injure in circumstances strikingly similar to the current offending (the current offending occurred while the offender was on parole from this sentence). Other offending had also been dealt with in the youth jurisdiction.
- 50 The health assessors' reports described the offender as having a high risk of further violent offending, noting that he had impaired cognitive functions as the result of a brain injury and significant problems with alcohol and drug abuse. Previous treatment for substance abuse and violence had also failed. The Court concluded that the appropriate finite sentence would be in the range of seven to seven and a half years. However, even assuming he served his entire sentence, the Court considered that on release "he would still be short of a maturity that might mitigate his offending tendencies", and that a finite sentence would not give him sufficient incentive to address the causes of his offending. He was sentenced to preventive detention with a minimum term of five years.
- 51 Another case of interest is *R v Mist*⁵⁶, where the offender was convicted of serious sexual offending against five girls (aged seven to 15) between October 1998 and January 2002. The offending came to an end when the offender was arrested and charged with murdering his 17 year old partner. Prior to the trial and sentencing for the sexual offending, the offender was found guilty of his partner's manslaughter and sentenced to ten years' imprisonment with a minimum term of six years.
- 52 At the time of the sexual offending the offender was aged between 17 and 20. The main issue was whether the offender qualified for preventive detention. The offending occurred before the Sentencing Act came into force and the relevant section did not specify whether the offender had to be 21 at the date of offending, conviction, or sentencing. The Court of Appeal held that the relevant date was the date of conviction and sentenced the offender to preventive detention on the basis of the seriousness of his offences and his high risk of re-offending. The Supreme Court (New Zealand's highest court) held that the relevant date was that of the offending and quashed the

⁵⁶ [2005] NZSC 29

sentence of preventive detention. After a further appeal the offender was sentenced to 20 years' imprisonment with a minimum term of ten years.

- 53 The cases mentioned above demonstrate that the main reasons why young offenders are not sentenced to preventive detention are that they are unlikely to have a 'pattern of serious offending', to have served significant terms of imprisonment, or to have had appropriate treatment for their criminogenic needs. The absence of these factors makes prediction of future risk more difficult and militates against preventive detention. However, in cases such as *Mist*, where the offending is particularly serious and the risk of re-offending high, the courts will impose preventive detention on a young offender.

Minimum terms

- 54 The Sentencing Act reduced the mandatory minimum term on a sentence of preventive detention from ten to five years. The lower minimum term applied to the sentencing of all offenders sentenced after the commencement of the Sentencing Act, regardless of when the offending occurred.
- 55 The Ministry of Justice's Departmental Report on the Sentencing and Parole Reform Bill stated that the major reasons for reducing the mandatory minimum term were to ensure greater proportionality between the offending and the sentence imposed, and to mitigate the extended scope of the sentence.⁵⁷ In addition, it was considered that the ten year minimum term discouraged use of the sentence when it would otherwise be desirable.⁵⁸
- 56 In *R v Bailey*⁵⁹, one of the first preventive detention cases heard by the Court of Appeal following the commencement of the Sentencing Act, the Court considered whether the lower minimum term meant that preventive detention should be imposed in less serious cases:

[Counsel] invited us to consider whether there should be greater willingness to impose the sentence now that the minimum period before eligibility for parole is five years rather than ten years as it was under the Criminal Justice Act 1985. We would not discount that as a relevant consideration, but it should be seen as providing greater flexibility in sentence administration rather than ground for a reduction in the level of seriousness of the offending as justifying preventive detention. So regarded it would be difficult to reconcile with the express considerations in s87(4) and in particular the principle that a lengthy determinate sentence is preferable if that provides adequate protection for society.⁶⁰

- 57 The Court of Appeal made further comment on this issue in *R v Hutchison*⁶¹ at paragraph 18:

The fact that since the Sentencing Act came into force in 2002 eligibility for parole may arise after five years (rather than 10) does not indicate that less serious offending is required to justify the imposition of the sentence. The real issue

⁵⁷ Above, n26, 30

⁵⁸ Ministry of Justice advice on the Sentencing and Parole Bill to the Justice and Electoral Committee, 4 September 2001, para 30.

⁵⁹ 22 July 2003, CA102/03

⁶⁰ Ibid, para 19

⁶¹ 8 March 2007, CA 258/06

remains whether the offender should receive an indeterminate sentence because he or she poses a significant and ongoing risk to the safety of the community. The minimum term to be served before parole may be considered is a subsequent question, arising only when the prior statutory test for imposition of the sentence is satisfied.

- 58 With the exception of 2004, preventive detention was imposed at a relatively steady rate between 1997 and 2007, suggesting that it is has not been imposed in less serious cases under the Sentencing Act. In addition, from 2004 the availability of extended supervision orders for child sex offenders has, in some cases, militated against the imposition of preventive detention for less serious offenders (discussed below).
- 59 While the majority of minimum terms imposed after 2002 were for less than ten years (see table 3), this appears to be explained by the nature of the sentence and the circumstances in which it is imposed, rather than the sentence being imposed in less serious cases, although this cannot be discounted. Preventive detention is a protective rather than punitive sentence. It is often imposed for offending that is not of itself serious enough to warrant a determinate sentence much in excess of five years, let alone a minimum term of that length.⁶² Therefore, unless a minimum term of five years is insufficient to protect the public, these offenders are likely to receive that minimum term. In addition, the courts sometimes refrain from imposing long minimum terms to give the offender an incentive to address the causes of his or her offending.⁶³

Table 3. Minimum non-parole periods on sentences of preventive detention 1997 - 2007

Non-parole period (years)	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
5	N/A	N/A	N/A	N/A	N/A	-	5	19	4	5	5
> 5 – 7	N/A	N/A	N/A	N/A	N/A	1	4	6	4	3	2
> 7 – < 10	N/A	N/A	N/A	N/A	N/A	2	6	2	2	4	2
10	10	7	17	13	9	6	1	4	3	1	1
>10 – 12	-	1	1	-	-	1	1	1	1	-	-
>12 – 14	-	-	-	-	-	-	-	1	-	-	-
>14 – 16	-	-	-	-	-	-	-	-	-	-	2
>16 – 18	-	-	-	-	-	-	-	-	-	-	-
>18 – 20	-	-	-	-	-	-	-	-	-	-	-
>20	-	1	-	-	-	-	1	-	-	-	1
Total	10	9	18	13	9	10	18	33	14	13	14
Average	10	11.6	10.1	10	10	9.4	7.8	6.5	7.4	6.8	9.3

Extended supervision orders⁶⁴

- 60 On 8 July 2004 the Parole (Extended Supervision) Amendment Act 2004 came into force. The Act amended the Parole Act 2002 by creating extended supervision orders

⁶² See, for example: *R v Thompson*, Hamilton HC, 27 October 2006, CRI 2005 019 9131 (indecent assault on person over 16 – the Court indicated that a determinate sentence of five to six years, with a minimum term of 3 to 4 years, would be appropriate); *R v Akarana*, Court of Appeal, 2 October 2006, CA40/06 (injuring with intent to cause grievous bodily harm – the sentencing court indicated that a determinate sentence of around four years with a minimum term of two thirds would be appropriate); and *R v Waller*, Auckland HC, 23 November 2004, CRI 2004 092 423 (indecent assault on a girl under 12 – the Court suggested that a determinate sentence of 3 to 4 years would be the most that could be imposed).

⁶³ See, for example, *R v Miller*, Christchurch HC, 14 July 2006, CRI 2005 009 13007; *R v Tonga*, Hamilton HC, 3 August 2004, CRI 2003 019 024144; *R v Retimana*, Invercargill HC, 19 February 2004, CRI 2003 025 007189; and *R v Rangī*, Auckland HC, 13 February 2004, CRI 2003 004 038932

⁶⁴ See generally Part 1A of the Parole Act 2002 as inserted by the Parole (Extended Supervision) Amendment Act 2004

(ESOs) for child sex offenders. ESOs were intended to provide a regime for managing the release of child sex offenders who had not been sentenced to preventive detention, but were assessed as having a high risk of re-offending against children on release.⁶⁵

- 61 If an offender has been convicted of specified sexual offences against children, the Chief Executive of the Department of Corrections may apply for an ESO at any time before the offender ceases to be subject to a sentence of imprisonment or any release conditions. A court may, after receiving an assessment from a health assessor, impose an ESO for a period of up to ten years.
- 62 ESOs involve the offender being subject to standard parole conditions and any special conditions imposed by the Parole Board for the duration of the order. The offender may also be subject to home detention type restrictions for the first 12 months of the order.
- 63 The Court of Appeal considered the relevance of ESOs to preventive detention in the cases of *R v Mist*⁶⁶ and *R v Pārahi*⁶⁷. In *Mist* the Court stated that the possibility of an ESO was now an “inherent quality” of a determinate sentence for a relevant offence. As such, it could not be ignored when having regard to the principle that a lengthy determinate sentence is to be preferred if it would provide adequate protection to the public.⁶⁸
- 64 In *Pārahi* the Court stated that, in a finely balanced case, an ESO has the advantage of allowing risk assessment to be undertaken close to release, rather than at the time of sentencing.⁶⁹ However, the Court warned that:

Sentencing Judges should not see what might be termed a “backup” or a “backstop” in the form of an extended supervision order as presenting an agreeable alternative to preventive detention and thus relief from the burdensome task of determining whether the sentence should be imposed. Care must always be taken to determine both the precise criminality and the sentence proportionate to the offending in its total context. If preventive detention is called for, it should be directed, at the time of sentence.⁷⁰

- 65 Between 8 July 2004 (when the Parole (Extended Supervision) Amendment Act came into force) and 31 December 2007, preventive detention was imposed in 24 cases where the offending qualified for an ESO.⁷¹ However, there were a number of cases, usually involving lower level offending, where the possibility of an ESO, either of itself or

⁶⁵ In particular, ESO’s were intended to apply to a small number of people with a predisposition to sexual offending against children who were released from psychiatric institutions in 1992 because their condition did not fit the new definition of “mental disorder” under the Mental Health (Compulsory Assessment and Treatment) Act 1992. Several of these people subsequently committed serious sexual crimes against children, but received finite prison sentences because they were not eligible for preventive detention under the regime at the time: Justice and Electoral Committee report on the Parole (Extended Supervision) and Sentencing Amendment Bill (88-2, 2004), 1 (www.parliament.nz).

⁶⁶ [2005] 2 NZLR 791

⁶⁷ [2005] 3 NZLR 356

⁶⁸ Above, n65, para 101

⁶⁹ Above, n66, paras 32 – 33

⁷⁰ Ibid, para 59

⁷¹ In two of these cases, the offender was subject to an ESO, which he breached by re-offending.

in combination with other factors, resulted in the court declining to impose preventive detention.⁷²

- 66 *R v Gibson*⁷³ is a good example of the kind of case where the availability of an ESO will tip the balance against preventive detention. In 1992 the offender was sentenced to four and a half years' imprisonment on 14 charges of sexual offending against children under 12. The sentencing Judge at the time stated that if the offender had had previous convictions, he would almost inevitably have sentenced him to preventive detention. The Judge also warned the offender that further offending would likely result in that sentence.
- 67 In 2006 the offender offended against a five year old boy. The offending was a single, opportunistic incident, and the offender immediately reported it to the Police. He subsequently pleaded guilty to two charges of doing an indecent act on a child under 12. The Court declined to impose preventive detention because the offending involved a single incident, the offender had not offended for 14 years, recognised he had a problem and was motivated to address his behaviour, and immediately confessed. The offending had occurred at a time of stress and the offender recognised that he needed ongoing support. The Court agreed that the offender needed support and thought that this could be addressed through an ESO, which the offender indicated he would consent to.

Conclusion

- 68 In 2002 the Sentencing Act made a number of significant changes to preventive detention that greatly increased the potential scope of the sentence. The Act increased the number of qualifying offences; lowered the age of eligibility; removed the previous qualifying conviction requirement; and reduced the mandatory minimum term.
- 69 In the five and a half years since the Act came into force, there has been a modest increase in the use of the sentence. Since 2002, preventive detention has been imposed on an average of 17 offenders per year, compared with an average of 12 over the preceding five and a half years. This increase may be due to a range of factors. For instance, some of the increase may be due to the increase in the number of convictions and custodial sentences (indicating seriousness) for grievous assault from 2001 onwards.
- 70 It is clear that at least some of the increase in the use of preventive detention can be attributed to the changes in the Sentencing Act. In particular, there have been 12 cases where the offenders would not previously have qualified for the sentence: nine had not committed a specified offence; two were being sentenced for offences other than sexual violation and had not previously been convicted of a specified offence; and one would have been too young.⁷⁴

⁷² See, for example: *R v Pārahi* [2005] 3 NZLR 356, *R v Clark*, 6 December 2005, Auckland HC, CRI 2003 044 006564; *R v M*, 21 February 2006, Auckland HC, CRI 2004 090 007513; *R v Moore*, 9 May 2006, Hamilton HC, CRI 2006 019 001786; *R v H*, 18 September 2006, Court of Appeal, CA101/06; and *R v Webster*, 15 March 2007, Auckland HC, CRI 2006 090 0072

⁷³ Rotorua HC, 15 June 2006, CRI 2006 470 754

⁷⁴ This is not to say that these offenders would not have received preventive detention at a later date if the criteria had not changed.

- 71 It is interesting to note that only two offenders were affected by removal of the prior qualifying conviction requirement, and only one was affected by the lower age of eligibility. These changes did not have a significant effect on the number of offenders sentenced to preventive detention because the underlying principles and matters the court must take into account have not changed significantly, at least since the 1997 decision of the Court of Appeal in *Leitch*. In particular, the Court must still be satisfied that the offender is likely to reoffend at the end of any finite sentence that could be imposed. Young offenders and offenders without previous convictions for qualifying offences are unlikely to have a ‘pattern of serious offending’, to have served significant terms of imprisonment, or to have had appropriate treatment for their criminogenic needs. The absence of these factors makes prediction of future risk more difficult and militates against preventive detention. However, the courts will impose preventive detention on young offenders and those without prior qualifying convictions in cases where the current offending is particularly serious and the risk of re-offending high.
- 72 It is possible that the reduction in the mandatory minimum term from ten to five years has resulted in preventive detention being imposed for less serious offending in some cases. However, the Court of Appeal in *Bailey* stated that the lower mandatory minimum term should be seen as providing greater flexibility in sentence administration, rather than a ground for imposing preventive detention for less serious offending.
- 73 To an extent, the effect of the Sentencing Act changes have been offset by the introduction of extended supervision orders for child sex offenders in 2004. In some cases of child sexual abuse involving lower level offending, the possibility of an ESO has, either of itself or in combination with other factors, tipped the balance in favour of a lengthy determinate sentence rather than preventive detention. ESOs have the advantage of allowing risk assessment to be undertaken close to release, rather than at the time of sentencing.
- 74 In addition to increasing the scope of preventive detention, the Sentencing Act has changed the nature of the sentence through the lower mandatory minimum term. The minimum terms under the Sentencing Act are, on average, much shorter than those under the Criminal Justice Act. The shorter minimum term means that, if appropriate, offenders will receive treatment earlier⁷⁵ and have a greater incentive to change. Similar to ESOs, shorter minimum terms also have the advantage of allowing risk assessment to be undertaken at an earlier stage by the Parole Board.
- 75 Overall, preventive detention is a far more flexible sentence under the Sentencing Act. The sentence can be imposed for a wider range of offending that is arguably as serious as that previously qualifying for the sentence. The sentence can be imposed on offenders who begin offending at a very young age and who continue to be a risk to the community, and on offenders who do not have a history of serious offending, but whose conduct and ongoing risk is such that indefinite imprisonment is required. Finally, it can be tailored more effectively to the circumstances of the offence and the offender through the lower minimum term. A sentence that was once described as “arbitrary, selective and inequitable” has evolved into a useful sentencing option for serious offenders.

⁷⁵ Treatment is usually delivered close to release as this is when it will have the most effect on an offender’s conduct in the community.

Appendix

Qualifying offences for preventive detention under the Criminal Justice Act 1985 and Sentencing Act 2002

All offences listed below are offences qualifying for preventive detention under the Sentencing Act. The shaded offences are those qualifying for preventive detention under the Criminal Justice Act as amended in 1987 (or their equivalent).

Crimes Act 1961 sexual offences

Section	Description	Max penalty
128	Sexual violation	20 years
129(1)	Attempted sexual violation	10 years
129(2)	Assault with intent to commit sexual violation	10 years
129A(1)	Sexual connection with consent induced by certain threats	14 years
130	Incest	10 years
131(1)	Sexual connection with dependent family member	7 years
131(2)	Attempted sexual connection with dependent family member	7 years
131B	Meeting young person under 16 following sexual grooming etc (new offence in May 2005)	7 years
132(1)	Sexual connection with child under 12	14 years
132(2)	Attempted sexual connection with child under 12	10 years
132(3)	Doing an indecent act on a child under 12	10 years
134(1)	Sexual connection with young person under 16	10 years
134(2)	Attempted sexual connection with young person under 16	10 years
134(3)	Doing an indecent act on a young person under 16	7 years
135	Indecent assault	7 years
138(1)	Exploitive sexual connection with person with significant impairment	10 years
138(2)	Attempted exploitive sexual connection with person with significant impairment	10 years
142A	Compelling indecent act with animal	14 years
143	Bestiality	7 years
144A	Sexual conduct with children or young people outside New Zealand	7 – 14 years
144C	Organising or promoting child sex tours	7 years

Crimes Act 1961 violent offences

Section	Description	Max penalty
171	Manslaughter	Life
173	Attempt to murder	14 years
174	Counseling or attempting to procure murder	10 years
175	Conspiracy to murder	10 years
176	Accessory after the fact to murder	10 years
188(1)	Wounding with intent to cause grievous bodily harm	14 years
188(2)	Wounding with intent to injure	7 years
189(1)	Injuring with intent to cause grievous bodily harm	7 years
191(1)	Aggravated wounding	14 years
191(2)	Aggravated injury	7 years

198(1)	Discharging firearm or doing dangerous act with intent to cause grievous bodily harm	14 years
198(2)	Discharging firearm or doing dangerous act with intent to injure	7 years
198A(1)	Using a firearm against a law enforcement officer	14 years
198A(2)	Using a firearm to resist lawful arrest or detention	10 years
198B	Commission of crime with a firearm	10 years
199	Acid throwing	14 years
208	Abduction for purposes of marriage or sexual connection	14 years
209	Kidnapping	14 years
210(1)	Abduction of young person under 16	7 years
210(2)	Abduction of young person under 16 (receiving)	7 years
234	Robbery	10 years
235	Aggravated robbery	14 years
236(1)	Aggravated assault with intent to rob	14 years
236(2)	Assault with intent to rob	7 years