

Sentencing the ‘Psychopath’: How Labelling Affects Judges’ Decision-Making in Aotearoa/New Zealand

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Abstract

Antisocial personality disorder (ASPD) and psychopathy are constructs that are associated with ideas of dangerousness and criminality. Current international literature suggests that these labels may have an adverse effect on criminal justice outcomes for offenders, including harsher sentences and a higher likelihood of being civilly detained. This study is the first to be undertaken on ASPD, psychopathy and judicial decision-making in Aotearoa/New Zealand. The research was executed through the extraction of judicial decisions (for the period 2003–2022) from the Judicial Decisions Online database, which resulted in the identification of 87 cases that mentioned either or both labels, and 265 cases where both labels were absent. Comparative analysis of similar cases found a significant difference in the average length of sentence imposed on offenders, with those without a label receiving a sentence of 81.4 months compared with those labelled receiving a sentence of 135.8 months. It is concluded that the use of ASPD and/or psychopathy within the Aotearoa/New Zealand criminal justice system is deeply problematic; offenders are subject to more punitive sentences due to diagnostic classifications of spurious efficacy and based on the idea of future dangerousness—a construct that cannot be adequately predicted.

Keywords: antisocial personality disorder; criminal justice system; preventive justice; psychopathy; sentencing outcomes

Introduction

Labels like *antisocial personality disorder* (ASPD) and psychopathy often evoke fear, as they are linked to perceptions of dangerousness and risk. Dangerousness and risk are, in turn, terms with links to the criminal justice system (CJS). ASPD and psychopathy are seen to be synonymous with one another and synonymous with criminality. This stems from the roots of these labels. They share a common psychiatric history which has attempted to identify a form of moral and/or violent criminality as a mental illness. While these are said to be two separate constructs, they are intrinsically linked to such a degree that they are almost indistinguishable (Jones, 2023). By virtue of this, ASPD and psychopathy cannot be considered in isolation of one another, which is why they are both considered as part of this research. Additionally, ASPD is a widely accepted personality disorder that is frequently utilised within both forensic settings and the CJS (McCallum, 2001, p. 7). Psychopathy, while not currently recognised as a mental disorder, is also a commonly used construct within the CJS to describe offenders (Hare, 1996, p. 28). The *Psychopathy Checklist* (PCL) and its derivatives, the Psychopathy Checklist-Revised (PCL-R) and the Psychopathy Checklist-Screening Version (PCL-SV), developed to test for psychopathic personality traits, are considered the gold standard in evaluating psychopathy (Sanz-Garcia et al., 2021, p. 2). These tests are regularly employed within the CJS, both in Aotearoa/New Zealand and other Western jurisdictions, including the United States (US), as a risk assessment tool (Wilson, 2003, p. 50). (Note that throughout the article, PCL, PCL-R and PCL-SV are used interchangeably.)

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This research examines judges' sentencing summaries and judgments in Aotearoa/New Zealand to ascertain if the labels of ASPD and psychopathy influence sentencing outcomes and the imposition of the preventive justice regimes of extended supervision orders (ESO) and public protection orders (PPO). This is important research to engage with as ASPD, psychopathy and the PCL are somewhat controversial. Scholars fail to agree on many aspects of these constructs, including the reliability and validity of the ASPD diagnosis, psychopathy as a mental disorder, and the efficacy of the PCL as a risk assessment tool (Edens et al., 2014; Edens et al., 2015; Jones, 2023; Kantor, 2006). While the current research is divided on these issues, there is a growing body of evidence to suggest that the use of the ASPD and psychopathy labels are implicit in incarcerating and civilly detaining offenders for much longer periods of time (Cauley, 2007; Kelley et al., 2019; Wayland & O'Brien, 2013).

In most jurisdictions, mental illness is considered a mitigating factor when a sentence is imposed on an offender, if it is considered that this has in some way diminished the capacity of the offender, making them less culpable (Bagaric, 2016, p. 26). However, this appears to be dependent on the diagnosis. Scholars such as Spaans et al. (2011), Bagaric (2016), and Wayland and O'Brien (2013) argue that a label of ASPD or psychopathy has the potential to make legal outcomes particularly draconian or even lethal. It appears that conditions regarded as unamenable to treatment—ASPD, for example—can often work as an aggravating factor when a sentence is imposed (Spaans et al., 2011). Scholars including Bagaric (2016) and Hecht et al. (2018) contend that this is due to the belief that ASPD is an incurable condition and, as such, those with this label are dangerous and pose a higher risk to the public.

In the US context, Edens and Cox (2012) conducted research with defence attorneys who stated that when an offender had a diagnosis of ASPD, this information was rarely excluded from trials. It was reported that this diagnosis, more than any other mental disorder, was most likely to be presented to the courts (Edens & Cox, 2012, p. 248). Further to this, the ASPD label along with the use of other labels such as 'psychopath' or 'sociopath' significantly affected trial and sentencing outcomes, resulting in adverse consequences for offenders, particularly when it was introduced as evidence of the offender's future dangerousness (Edens & Cox, 2012, p. 247; Wayland & O'Brien, 2013). Edens and Cox (2012, p. 239) further state that these labels are also used as a means to rebut mitigating evidence. As ASPD is viewed as treatment resistant, longer periods of incarceration are justified as offenders are excluded from treatment programmes (Kelley et al., 2019, p. 636; Wayland & O'Brien, 2013, p. 543).

Research in the US has demonstrated that an ASPD diagnosis in capital cases can also be used to the offender's detriment. Prosecutors will use the diagnosis to prove that an offender poses an undue risk to society in respect of their criminal behaviour and lack of remorse, and as such, it is likely they will continue to commit violent crimes including murder (Wayland & O'Brien, 2013, p. 520). In their research, Edens et al. (2005) found that describing an offender as psychopathic increased the likelihood that the death sentence would be supported. Similarly, Cox et al. (2013, pp. 418–420) found that execution was supported when the offender embodied core psychopathic traits. It was noted that a lack of remorse, more than any other trait, was most significant in support of the death penalty (Cox et al., 2013, p. 421). As a label of ASPD or psychopathy is shrouded in moral judgement and notions of dangerousness, it gives rationale to the death penalty, making it easier to impose (Edens & Cox, 2012).

Edens et al. (2015, pp. 447–448) note that the PCL-R has been criticised for the evaluation score being too heavily influenced by the focus on previous criminal behaviour, that it does not adequately cover the traits deemed central to psychopathy, and that the results are not generalisable to the 'real world'. Cooke et al. (2005, p. 339) found that scores obtained on the PCL-R in the United Kingdom (UK) were not directly comparable with those in the US, cautioning that care must be taken when making decisions guided by the PCL-R. Edens et al. (2015, p. 448) are indeed questioning the reliability of the PCL-R given the emerging evidence suggesting that the scores provided in forensic examinations are not as reliable as published research indicate.

In assessing the potential for false predictions of future dangerousness using the PCL-R, Freedman (2001) noted that while Hare et al. (1991) recommended the threshold for identifying a psychopath to be a score of 30 or over, this score has not been widely tested. In reviewing 11 studies that investigated the false-positive rate of the PCL-R in both prisons and forensic facilities, Freedman (2001, p. 92) found false-positive rates between 50 and 75%, indicating that in a real-world setting, a significant number of individuals are adversely affected by the PCL-R, with Freedman (2001, p. 93) claiming that every other defendant who received a death sentence is receiving the sentence based on a prediction of dangerousness that is potentially inaccurate.

These are crucial issues for the CJS, as such labels can potentially undermine the notion of due process whereby all defendants should be treated equally before the law. To date, research has not been carried out to explore the effects, if any, that these labels may have on criminal justice outcomes in Aotearoa/New Zealand. This research aims to remedy this situation by specifically asking whether, in this country, these labels influence the length of sentence an offender receives and/or the implementation of an ESO or PPO upon completion of a prison sentence. Before explaining the methodology for this study, the following section provides brief definitions of psychopathy and ASPD as well as the specific forms of preventive justice currently used by the CJS in Aotearoa/New Zealand.

Definitions

Psychopathy is a psychological concept that is difficult to define—there is no standard definition of psychopathy, nor has it been authorised as a recognised mental disorder with any psychological or psychiatric organisation (Buzina, 2012, p. 134). While there is no agreed-upon definition, the conceptualisation of psychopathy most familiar and widely accepted today is derived from the work of Robert Hare, the most frequently cited researcher in the area (DeLisi, 2016, p. 35). Hare (1993, p. xi), who has been researching psychopathy since the 1970s, defines psychopaths as:

...social predators who charm, manipulate, and ruthlessly plow their way through life, leaving a broad trail of broken hearts, shattered expectations, and empty wallets. Completely lacking in conscience and in feelings for others, they selfishly take what they want and do as they please, violating social norms and social expectations without the slightest sense of guilt or regret.

The most recent iteration of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM), the DSM-5, describes the individual with ASPD as a person who embodies "a pattern of disregard for, and violation of, the rights of others that begins in early childhood or early adolescence and continues into adulthood" (American Psychiatric Association, 2013, p. 659). It is noted in the DSM-5 that this pattern has also been referred to as "*psychopathy, sociopathy, or dissocial personality disorder*" (American Psychiatric Association, 2013, p. 659, emphasis original).

Within the Aotearoa/New Zealand CJS, there has been a move towards preventive justice over the last 30 years (Gavaghan et al., 2014, p. 9; Snelling & McMillan, 2022, p. 43). These regimes have been ratified under the guise of public safety, justified on the basis that imposing longer and indeterminate sentences will prevent offenders from committing crimes, thus protecting future victims and the public in general (Gavaghan et al., 2014, p. 9). As explained below, the three regimes currently in use within Aotearoa/New Zealand are preventive detention, ESOs and PPOs.

Preventive detention is the sentencing of an offender to an indeterminate sentence; that is, there is no specific end date to the sentence. A minimum period of imprisonment (MPI) is imposed, being the length of time an offender must serve before they are eligible for parole. The sentence must be a minimum of five years (Gavaghan et al., 2014, p. 18). An *extended supervision order* (ESO) is a period of extended supervision—

managed in the community—that can be imposed on offenders who have committed a qualifying sexual or violent crime. An ESO can be imposed for a term of up to ten years at a time and can be renewed (McGovern, 2022, p. 112). ESOs are imposed on offenders who have completed their custodial sentence but are still considered at high risk of committing a further qualifying offence (Gavaghan et al., 2014, p. 25). Finally, a *public protection order* (PPO) is a form of civil detention that allows for the indefinite detention of eligible offenders who have completed a custodial sentence (Snelling & McMillan, 2022, p. 44). PPOs are imposed on offenders who have committed qualifying sexual or violent crimes and are considered to be at very high risk of imminent offending (Snelling & McMillan, 2022, p. 45). These individuals are detained in secure facilities within prison grounds (Department of Corrections, n.d.). While the imposition of a PPO has been described as 'non-punitive', the Aotearoa/New Zealand Appeals Court has claimed that this is misleading and, rather, "amounts to punishment" (Snelling & McMillan, 2022, p. 46). Both Snelling and McMillan (2022, p. 46) and the New Zealand Law Commission (2024) have acknowledged that if PPOs are indeed punitive, this then has important human rights implications. Both ESOs and PPOs are the equivalent to high-intensity supervision and civil detention in the US and are reliant on an element of perceived risk of future dangerousness as part of the decision-making process.

One final issue we would like to raise in this section—which will be repeatedly returned to in our discussion section—concerns the use of the contested concepts of 'dangerousness' and 'risk' within the CJS. Foucault (1988, p. 191, emphasis original) has previously stated that "to be dangerous *is not an offence*. To be dangerous *is not an illness*. It is not a symptom." Scholars such as Magee (2013, p. 82) have questioned whether there can ever be an "objective standard of dangerousness". At what point does an offender become unacceptably dangerous? Similarly, while 'risk' is intrinsically linked to the likelihood of an offender to reoffend and measured by risk assessment tools (Kemshall, 2003, p. 1), there is no consensus as to what risk is or how it should be understood within the criminal justice sphere (O'Malley, 2009, p. 43). The PCL is frequently used despite robust research demonstrating limitations in terms of its reliability and validity (for further discussion, see Boccaccini et al., 2017; DeMatteo et al., 2014; Edens et al., 2015; Hare, 1996; Melko & Topcagic, 2021; Murrie et al., 2008; Rufino et al., 2012). Most crucially, however, the PCL has a high false-positive rate and should not be relied upon to determine an offender's risk of future violence (Freedman, 2001; Martens, 2008). Upon reviewing the utility and reliability of the PCL-R, Martens (2008, p. 455) has stated that the use of the PCL-R in criminal justice decisions is "incorrect, unethical and harmful" and it should be removed from the decision-making repertoire. Despite this, it continues to be used with enthusiasm by the CJS.

Methodology

The aim of this research was guided by the overarching question of whether a label of ASPD or psychopathy influences criminal justice outcomes in Aotearoa/New Zealand. This key theme was addressed by asking two questions: Is there a relationship between sentencing outcomes and the use of the labels? And is there a relationship between whether an ESO or PPO is implemented and the use of such labels?

To explore these research questions, written judicial decision documentation of sentencing outcomes (noted throughout this article as 'court reports' or 'hearings') were extracted, examined and analysed. Rather than observing the sentencing procedures in a single court, this process of gathering secondary data allowed for an overview of numerous courts throughout Aotearoa/New Zealand, making the results more generalisable as well as replicable. Ethics approval was not required to gather this data. The documents themselves contain information relevant to the judicial outcome, with judges typically providing a detailed explanation of how they reached their decision, including details of the reports provided by mental health professionals (MHP) pertinent to the sentence passed down. While they do not include the mental health report in its entirety, the court reports nonetheless provide a standardised research

resource that is manageable and can provide information on the relationships that may potentially occur in judicial decision-making.

The data was obtained from the Judicial Sentences Online database found at <https://forms.justice.govt.nz/jdo/Search.jsp>. This database provides judgments and decisions from the Senior Courts of Aotearoa/New Zealand—the High Courts, the Court of Appeals, and the Supreme Court—and are available from 2005, 2004 and 2003, respectively (Ministry of Justice, n.d.). These documents consist of the decisions that judges make and the rationale for their decisions.

To obtain the data required for analysis, a list of key words was developed to be entered into the search function of the database to elicit as many relevant cases as possible. As the research was related to the labels ASPD and psychopath, these were the first search parameters. The keywords were 'antisocial', 'anti-social', 'psychopathy', 'psychopathic', and 'psychop'. It was further decided to check 'PCL' to ensure no cases that made mention of the PCL had been omitted from the data pool. The data were then filtered and any cases that were not directly related to a diagnosis or personality trait associated with either ASPD or psychopathy were discarded. This resulted in 87 retained cases. The data were further filtered to identify any cases where the offender had been identified with both ASPD and psychopathy and a new 'both' category was created for these cases.

The data for each label group were first sorted so that the sentencing cases and hearing cases (the latter being for ESO and PPO cases) were separate. It was found that 56 of the cases were in relation to sentencing (37 ASPD, 14 psychopathy, and 5 both) and 22 were in relation to hearings (18 psychopathy, 4 both). The sentencing cases were further categorised by offence type. When there was more than one type of offence, the most serious offence (in terms of length of imprisonment) became the primary offence.

To determine whether a label of ASPD or psychopathy had a specific influence on sentencing outcomes, control groups had to be established so comparisons could be made. To establish these groups, the Judicial Sentences Online database was once again utilised. It was estimated that 30 sample cases per offence type would be sufficient to determine a baseline of sentence length for those who did not have a label of either ASPD or psychopathy.

To obtain the control group data, the same data collection method described above was employed in that each crime type was searched as a keyword in the same database; for example, 'murder', 'sexual violation', 'wounding with intent' and so on. It was not possible to match on other demographics (such as age, for example), as this information was not consistently found in the court reports. Each offence type was searched for in turn. As it was suspected that the results would surpass the 30 samples required, simple random sampling was used to give each case an equal chance of being selected. Once the data were collected, each case was reviewed to ensure that there was no mention of ASPD, psychopathy, PLC or any other factors (such as mental illness) that may have influenced the sentence imposed. If the case was not deemed suitable, the case directly preceding it was examined and so on, until 30 cases (or the closest proximation) was compiled.

To investigate the research questions, a mixed methods analysis was used, which incorporates both qualitative and quantitative methods (Bowen, 2009, p. 28). This approach was chosen as it gave the flexibility to ensure that the most appropriate data were collected, and that it could be manipulated and engaged with critically to reflect the nature of the questions being asked. The method allows for triangulation, which can reduce researcher bias and increase the validity of the findings (Bowen, 2009, p. 28). For this research, both statistical analysis and content analysis were employed.

A combination of both descriptive statistical analysis and inferential statistical analysis was employed. Minitab was used for this analysis. Descriptive analysis was first carried out; this research employed averages and percentages with the intention of identifying trends in sentence length for the first research question. The average sentence length was calculated for each offence type for the label groups and was also calculated for the control groups. Inferential statistical analysis was then carried out to

determine if the results were statistically significant. A one-tail *t*-test was employed to ascertain if any results were statistically significant using a 0.05 significance level.

Deductive qualitative content analysis (DQICA), as described by Kibiswa (2019), was selected because this method of content analysis is most suitable when there is already existing theory or research on the phenomenon in question (Hsieh & Shannon, 2005, p. 1281; Kibiswa, 2019, p. 2061). While there are various strategies that can be used to engage in DQICA (Hsieh & Shannon, 2005, p. 1281), it was decided the most suitable strategy for this research was to predetermine the codes and immediately begin to code the data. The steps taken in the DQICA are outlined below.

The first step was to develop a coding scheme, including themes/codes, subthemes/codes, and in-text codes. The themes detected from the existing literature to be coded were: personality traits, risk, not amenable to treatment, risk assessment reliability, dangerousness, and public protection. The second step was to determine the unit of analysis. It was essential that the entire court report be the unit of analysis, as references to any of the above codes could be made at any time. The third step was to get a sense of the data. This involved reading the court reports and hearings several times to become immersed in the data and to start to locate themes within the data. Themes were highlighted as they were identified in the data. The fourth step involved data analysis. During this step, the data were reread and coded using the predefined coding schemes so that each highlighted portion of text had a code next to it. Coding the highlighted text ensured that each piece of data complied with the operational coding agenda. The fifth step was to make connections, interpretations and draw conclusions. During this step, one additional theme not initially identified was located in the data. This theme related to the way in which results of the PCL test are presented to the court. It was also found that the themes of risk, dangerousness and public protection overlapped. They were therefore considered to be one theme, renamed 'risk and dangerousness'. The sixth step involved verifying the plausibility of the interpretations and ensuring trustworthiness. This was achieved by the researcher demonstrating the processes and findings, and enabling the reader to draw their own conclusions.

Results

To analyse the data, descriptive statistics were first explored. The length of each sentence was converted into months and then the means calculated for the control group, the ASPD group, the psychopathy group, and the 'both' group. The means for each label group was calculated as one combined group for each of the offence types. The results can be seen in Table 1, and they demonstrate that, for most of the offences, there is a longer average sentence imposed on those who receive either the label of ASPD or psychopathy. It is worth noting here that for life sentences and sentences of preventive detention, the MPI was used; the offenders are likely to be incarcerated for substantially longer periods.

The averages from each group were then calculated for comparison (see Table 2). When the totals for each offence type are combined, it shows that those offenders with either label—ASPD or psychopathy—have a longer sentence imposed on them than those who do not. And for those offenders who have been labelled with both ASPD and psychopathy, the sentence is even longer—the offenders have an average sentence over twice as long as the control group. It is important to note, however, that the labelled groups make up a much smaller number of cases than the control group.

Analysis was subsequently undertaken to see if the results were statistically significant. It is important to again note here that while these averages indicate a relationship, the sample sizes in question are small, which can impact the validity of the results. As can be seen in Table 3, ASPD, psychopathy and combined were found to be statistically significant, indicating that these labels do in fact influence criminal justice outcomes.

Table 1: Average length of sentence by offence type: Control versus label (average in months)

| Offence type | Control | ASPD | Psychopathy | Both | Combined |
|---|----------------------------|---------------------------|---------------------------|------------------------|---------------------------|
| Murder | 166.8 (<i>n</i> = 30) | 181.3 (<i>n</i> = 12) | 180 (<i>n</i> = 1) | 312 (<i>n</i> = 2) | 198.7 (<i>n</i> = 15) |
| Sexual violation | 113.4 (<i>n</i> = 30) | 118.8 (<i>n</i> = 8) | 120.1 (<i>n</i> = 10) | 96 (<i>n</i> = 2) | 117.2 (<i>n</i> = 20) |
| Attempted murder | 110.9 (<i>n</i> = 30) | — | 120 (<i>n</i> = 1) | — | 120 (<i>n</i> = 1) |
| Sexual connection with a child under 12 | 74 (<i>n</i> = 3) | 60 (<i>n</i> = 1) | — | — | 60 (<i>n</i> = 1) |
| Kidnapping | 60.5 (<i>n</i> = 30) | 60 (<i>n</i> = 1) | 120 (<i>n</i> = 1) | — | 90 (<i>n</i> = 2) |
| Arson | 41.6 (<i>n</i> = 18) | 36 (<i>n</i> = 1) | — | — | 36 (<i>n</i> = 1) |
| Wounding | 83.7 (<i>n</i> = 30) | 95 (<i>n</i> = 7) | — | — | 95 (<i>n</i> = 7) |
| Aggravated robbery | 69.8 (<i>n</i> = 30) | 84 (<i>n</i> = 1) | — | — | 84 (<i>n</i> = 1) |
| Sexual connection with a young person under 16 | 47.1 (<i>n</i> = 19) | 60 (<i>n</i> = 1) | — | 31 (<i>n</i> = 1) | 45.5 (<i>n</i> = 2) |
| Burglary | 22.3 (<i>n</i> = 30) | 31.5 (<i>n</i> = 2) | — | — | 31.5 (<i>n</i> = 2) |
| Assault with intent to sexually violate | 46.7 (<i>n</i> = 13) | 57.7 (<i>n</i> = 3) | — | — | 57.7 (<i>n</i> = 3) |
| Sexual exploitation of a person with a significant impairment | 41 (<i>n</i> = 2) | — | 60 (<i>n</i> = 1) | — | 60 (<i>n</i> = 1) |
| Total | 877.8 (<i>n</i> = 265) | 784.3 (<i>n</i> = 37) | 600.1 (<i>n</i> = 14) | 439 (<i>n</i> = 5) | 995.6 (<i>n</i> = 56) |

Note: '—' indicates no cases fell under this category.

Table 2: Average length of sentence for all offence types: Control versus label (average in months)

| Control | ASPD | Psychopathy | Both |
|---------------------------|---------------------------|---------------------------|--------------------------|
| 81.4 (<i>n</i> = 265) | 116.2 (<i>n</i> = 37) | 120.1 (<i>n</i> = 14) | 169.4 (<i>n</i> = 5) |

Table 3: Statistical test results for average length of sentence for all offence types: Control versus label

| ASPD | Psychopathy | Both | Combined |
|---------------------------------------|-----------------------------------|-----------------------------|---------------------------------------|
| $t(36) = 3.41$, $P = 0.0008^{**}$ | $t(13) = 2.68$ $P = 0.009^{*}$ | $t(4) = 1.46$ $P = 0.11$ | $t(54) = -4.26$ $P = 0.00004^{**}$ |

Note: $*P < 0.05$; $**P < 0.001$

While there are numerous factors that contribute to a sentence of preventive detention, the rates of preventive detention versus finite sentence were compared for the control groups and label groups. Sentences of preventive detention are typically only imposed on those who have committed crimes of a serious violent or sexual nature; therefore, the only groups that have been examined for this analysis are the categories of sexual violation, assault with intent to commit sexual violation, and wounding with intent. The details of the cases, shown in Table 4, indicate that a sentence of preventive detention was more likely to

be imposed when labels were specifically mentioned in the court reports as opposed to when they were not. Using a significance level of 0.05, these results were found to be statistically significant ($t(2) = -2.32$, $P = 0.04$).

Table 4: Total number of cases that resulted in preventive detention: Control versus label

| | Control | Label |
|----------------------------|----------------|--------------|
| Sexual violation | 7/30 | 15/20 |
| Attempted sexual violation | 4/13 | 3/4 |
| Wounding with intent | 3/30 | 2/7 |

Note: The first digit is the number of cases resulting in a sentence of preventive detention; the second digit is the total number of cases for each category.

The analysis of the data further indicated that ASPD and psychopathy labels are closely associated with the implementation of ESOs and PPOs. While conducting the analysis, two interim supervision orders (ISO) hearings were identified. An *interim supervision order* is an order that can be imposed prior to an ESO being determined (Parliamentary Counsel Office, 2002, s. 107FA). There were 16 ESO hearings and four PPO hearings. In four hearings, the offender was labelled with both ASPD and psychopathy. In the remaining 16 hearings, the offender was labelled with psychopathy. There were no hearings involving ASPD as a standalone label. In one hearing, a PPO was declined and an ESO imposed instead. This has been included with the ESO data. The outcomes of these hearings can be seen in Table 5.

Table 5: Outcomes of ISO, ESO and PPO hearings: Label group

| | Imposed | Not imposed |
|-------|----------------|--------------------|
| ISO | 2 | 0 |
| ESO | 14 | 2 |
| PPO | 3 | 1 |
| Total | 19 | 3 |

Discussion

The results section has demonstrated that a label of ASPD and/or psychopathy in Aotearoa/New Zealand court proceedings will lead to a longer custodial sentence, and the likelihood of a negative outcome in preventive detention hearings. Utilising content analysis of court reports along with reference to previous research, this section will further illuminate how the judges—often relying on the expert assessments of MHPs and their PCL tests—justified such longer sentences. The concern we highlight here is that the judges are drawing on a repertoire of concerning and unsubstantiated stereotypes; namely, when defendants score high on the PCL and are then marked as ‘psychopathic’, they are considered to be dangerous, unamenable to treatment, and at a higher risk of reoffending, therefore requiring longer periods of incarceration.

PCL scores and their presentation

Despite the contested nature of the PCL as a measurement tool (Jones, 2023; McCallum, 2001), high scores were often used in the court reports as convincing evidence for psychopathy, the likelihood of reoffending, and the imposing of longer sentences on defendants, as evidenced by the following report extracts.

They [PCL-R and PCL-SV] indicated that [offender] meets the diagnostic criteria for psychopathy. [MHP] expressed the view that people who are assessed with a high level of psychopathy similar to [offender], have a greater likelihood of impulsivity and repetitive

predatory criminal behaviour. (The Chief Executive of the Department of Corrections v Chisnall [2017], para. 103)

The personality traits and behaviours associated with a high [PCL] score are likely to act as a barrier to the individual's ability to change. (Chief Executive of the Department of Corrections v Wilson [2021], para. 21)

[The offender] scored well above the average [PCL score] found in a study of imprisoned New Zealand offenders, with his [offender] total score being in the range found to identify those at very high risk of serious reoffending within five years of release. (Hepi v R [2020], para. 18)

In terms of the Psychopathy Checklist: Screening Version (PCL:SV), you [offender] fall in the high risk of serious offending within five years and very high risk of sexual recidivism. Overall, you are assessed as a high risk of violent offending and a very high risk of sexual violence offending. (R v Webster [2021], para. 25).

He [MHP] notes that you [offender] meet the criteria for a diagnosis of psychopathy, and [PCL] testing places you in the very high range of psychopathy characteristics, and that further raises your risk status. (R v Charlton [2018], para. 31)

The way in which the PCL scores were presented in the court reports differed across the cases. While the judges typically summarised the mental health reports, there is no reason to assume that they varied greatly from what was reported, particularly when it comes to conveying results. In some instances, the PCL score was presented using the numerical score. For example, in *The Chief Executive of the Department of Corrections v McIntosh* [2020], the MHP gave the offender's score as 24 out of 24 (para. 19), denoting that he could not score any higher. Similarly, some results were given in terms of percentiles. The MHP in *Department of Corrections v Turi* [2021] reported that the offender scored in the 100th percentile (para. 41), while in *Chief Executive, Department of Corrections v Pori* [2021], the MHP reported that the offender scored in the 98th percentile (para. 45). Presenting the results in this way denotes that there is very little to no room for the offender to score any higher. As shown in some of the extracts above, the most common way the results were presented was in the context of a five-year reoffending band, typically "a high risk of serious re-offending within five years" (*The Chief Executive of the Department of Corrections v Hawkins* [2021], para. 19). In some instances, this was reported as a percentage, for example: "Those with a similar high total score had a very high reoffending rate with 80 per cent reimprisoned for serious reoffending in the five years following release" (*Chief Executive, New Zealand Department of Corrections v Amohanga* [2017], para. 28).

These findings are similar to those made by DeMatteo et al. (2014, p. 102) who note that the way in which such percentiles are presented by a MHP can be misleading and have an undue influence on the way in which the results are interpreted in court. There is a phenomenon known as 'the framing effect', which is a cognitive bias where an individual is more influenced by the way in which information is presented than by the information itself (Druckman, 2001, p. 1042). While the PCL scores of different offenders might be similar or even identical, it may not be discernible due to the different presentation of the results. Research has shown that, when making legal decisions, judges can be highly influenced by the use of numbers (Englich et al., 2006, p. 195). To present the likelihood of reoffending as 'high' does not quite have the same level of severity to it as stating that there is a 'more than an 80% chance' of reoffending, indicating that one offender may be a higher risk than the other. The use of discourse inclusive of statistical

probabilities could indicate to the information recipient (in this case, the judge), that one offender is potentially more dangerous than the other.

Dangerousness and risk

Following a high score on the PCL, and facilitated by accompanying expert narratives from the MHP, offenders are framed by judges in the court reports as demonstrating the remorseless and unempathetic psychopathic personality that poses an inherent danger and risk to the public of reoffending, as can be seen in the following extracts.

You [offender] have not been deterred by the presence of children; the proximity of prison guards; or the sternest sentence the law can impose. You are unremorseful. And dangerous. (R v Katipa [2017], para. 52)

[The offender's] pattern of offending and noted clinical factors of early traumatisation resulting in pervasive maladjustment, anti-social personality disorder, and impulsivity, denote a high risk for further anti-social and violent offending in addition to sexual offences. (Parker v R [2020], para. 40) [Judge direct quoting MHP]

The appellant [offender] had been diagnosed with anti-social personality disorder and Dr Kemp [MHP] considered he revealed "traits that could be described as psychopathic [that] would increase the risk of reoffending". (Rosewarne v R [2015], para. 23) [Judge direct quoting MHP]

The analysis of the hearings also provided support for the notion that the construct of dangerousness is linked to the personality traits that characterise psychopathy and limited treatment prospects. The personality traits indicated by 'lack of remorse' and 'lack of empathy' were the most commonly referred to, with remorse being mentioned 83 times and empathy 63 times in the judges' summaries. In some cases, this was directly linked to psychopathy, as demonstrated in the excerpts below.

Across both sexual and violent offending, she [MHP] notes [offender] does not either accept responsibility or show remorse for his past offending, and lacks empathy for the victims of that offending. She characterises him as exhibiting "psychopathic personality traits, including manipulation [and] deceitfulness". (Chief Executive, Department of Corrections v Paniora [2018], para. 15) [Judge direct quoting MHP]

He [offender] was seen as having a determination and capacity for deceitfulness and manipulation with his offending against the youngest victims ... He was assessed as reflecting callousness and a sense of entitlement to meet his deviant sexual needs ... He has no empathy or concern for the wellbeing of his victims. (Department of Corrections v Miller [2017], para. 22–23)

[The offender's] lack of empathy for his victims, and his lack of understanding for the impact of his violent offending on them, is endemic in his offending. (Chief Executive of the Department of Corrections v Waiti [2019], para. 46)

In their research, Edens et al. (2013, p. 178) found that lack of remorse was the most influential trait in support of the death penalty. The analysis of the personality traits mentioned in the court reports lends

support to the findings of these researchers in that this was the trait most frequently mentioned when orders were imposed on offenders.

Most of the hearings included some discussion on treatment the offender had either been offered or undergone. However, much emphasis was placed on psychopathic personality traits impeding meaningful engagement with treatment programmes. For example:

He [offender] has repeatedly declined to engage in treatment, and it is considered that the presence of the aforementioned personality traits may act as a responsivity barrier for treatment. (Chief Executive, Department of Corrections v Paniora [2018], para. 11)

The writer [MHP] concludes the presence of psychopathy personality traits and deviant sexual arousal support your [offender] membership of a group at a far higher risk of sexual recidivism, and provide barriers to treatment. (R v Cheesman [2017], para. 11)

These examples demonstrate that those with a label are perceived as treatment resistant, which in turn is linked to their risk of reoffending. What these comments ultimately demonstrate is that the psychopathic personality is closely linked with the ideas of risk and dangerousness, and that this in turn amplifies the perceived threat posed by these individuals to society.

Negotiating the psychopath and ASPD labels

As outlined in the introduction of this article, there remain serious issues with the validity of both the psychopath and ASPD labels (Jones 2023). Despite the former not appearing as a legitimate mental disorder in the DSM-5, the label and its PCL measuring tool remain popular within the CJS, not as a means of mitigation but as a way to further punish the offender. Due process is being compromised by these spurious but long institutionalised labels, which are in turn still legitimised by MHPs and the court system.

Unsurprisingly, judges' court reports are highly influenced by the assessments of MHPs; research indicates that while judges do not always understand risk assessment tool scores and the different factors that impact such findings (Stevenson & Slobogin, 2018, p. 654), there is simultaneously a heavy reliance on and acceptance of the reports given by MHPs (Blais, 2015, p. 81). Yet the uncertainties inherent in the labels is leading to the reinforcement of mythologies concerning the psychopathic personality that can have serious consequences for those so labelled. This includes the ability of judges themselves to deny the offender may have a mental illness at all. In the following examples, it is striking how ambivalent the judges are to conceptualise and accept ASPD (along with other personality disorders) as a legitimate mental disorder, despite its continued presence in the DSM:

I want to repeat, you [offender] show no signs of mental disorder, no mental disability, but rather, your tragic upbringing has resulted in an anti-social personality disorder. (R v Alexander [2018], para. 106)

He [MHP] considered you [offender] meet the criteria of antisocial personality disorder, and cannabis and methamphetamine use disorder. These diagnoses are not considered mental illnesses. (R v Sio [2021], para. 38)

You [offender] do not present with any major mental disorder but do meet the criteria for a diagnosis of personality dysfunction [sic], probable antisocial personality disorder... (R v White [2022], para. 57)

To note here, the DSM-5 lists not only ASPD as a mental illness but also cannabis use disorder (American Psychiatric Association, 2013, pp. 509–516) and stimulant use disorder (American Psychiatric Association, 2013, pp. 561-567); methamphetamine is frequently cited under the latter mental disorder. Though such statements as those above were only identified in a small number of the court reports, they are obviously of concern and perhaps signify a more general issue in judges' assessments of those labelled as psychopathic. Unfortunately, analysing judges' summaries alone does not allow us to fully identify where such false knowledge on mental disorders originates—are the judges taking their cues from the highly influential MHP assessments here or are judges themselves re-storying medical knowledge (see, for example, Harbusch, 2021) in a way that rationalises their professional narrative that psychopaths require longer sentences? Despite the seeming contradiction here, the implication may be that it is easier for judges to rationalise longer sentences for serious criminal behaviour if the legitimacy of the mentally ill status of those labelled as ASPD and/or psychopathic remains somewhat in doubt.

Conclusion

In summary, this research has found that there is an adverse criminal justice outcome for offenders labelled with ASPD and/or psychopathy in Aotearoa/New Zealand. Furthermore, a high score on the PCL often results in the imposition of an ESO or PPO. Given the concerns that have been raised throughout this article, it is perturbing that Aotearoa/New Zealand continues to engage in risk assessment practices that utilise the PCL. If our CJS insists on continuing with this practice (and it seems unlikely this will end), there are other risk assessment tools (such as the Risk of Reconviction*Risk of Imprisonment measure (Bakker et al., 1999; Nadesu, 2009)) that are better suited to the task and do not discriminate based on certain personality factors such as 'shallow affect' or 'superficial charm'. Furthermore, the use of ASPD and psychopathy labels by the CJS are inconsistent with their use of other mental disorders.

This study has left a wide scope for potential areas of future research. It is recommended that this research be carried out on a larger scale using matched samples. While this is not possible within Aotearoa/New Zealand currently, research could be carried out in larger jurisdictions such as Australia to replicate this study. Research could also be carried out with other key actors in the CJS including MHPs and defence and prosecution lawyers. This research captured only the sentencing and order hearing stages of the CJS. While this was suitable for exploring the impact of labels on sentencing outcomes, it would be interesting to explore other aspects of the CJS. For example, does a label of ASPD or psychopathy also influence whether an offender receives bail or parole? To further test the validity of our findings, future research should consider the use of a control population of offenders who have been labelled with other mental disorders, so as to compare, with more accuracy, whether a diagnosis of ASPD or psychopathy is the key aggravating variable in judges' sentencing behaviour. In addition to this, more exploratory research (for example, through semi-structured interviews) is required to more fully understand judges' rationale for imposing harsher sentences on those with an ASPD or psychopathy label.

It seems the time is overdue for a decision to be made: we cannot have a mental disorder that should mitigate the offender's actions on the one hand, and then use that label to impose more draconian sentences on the other. Either we remove these labels from our legal repertoire, or we acknowledge and treat them as viable mental disorders that could reduce an offender's culpability. The current CJS cannot have its proverbial cake and eat it too.

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