Risk Assessment in sentencing and corrections

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Contents:

PART A. INTRODUCTION

This research has been funded by the Criminology Research Council. Its aim is to explore the concept of 'risk' as it relates to the treatment of offenders at various points in the criminal justice system. Clearly, a coherent criminal justice 'system' is not a thing which exists in practice, nor is it a goal which all would see as desirable (Wright, 1980; Garland, 1998). Furthermore, it is evident from only a brief examination that there are differences in approach to risk at the various points in the criminal justice process. For example, notions of 'risk' and 'dangerousness' have had, and continue to have, a limited but growing role in the *legislation* governing sentencing, however Australian courts of appeal have generally re-affirmed the centrality of principles of 'proportionality' or 'just deserts' in sentencing *practice*, particularly as they relate to adult offenders.

Any project with risk as a central concept stands to benefit considerably by linking the specific context of its application with other social contexts. Accordingly, Part B of this report takes a broad overview of the notion of risk in modern societies. Our understanding of the importance of 'risk' in criminal justice is considerably enhanced through this consideration of risk in other areas and also through the links that can be made between different areas of criminal justice. It is clear that risk has become so important a principle that it is considered by some writers to be a defining element of modern industrial societies. Indeed, the concept of risk is of such significance that it has come to be seen as a core organising concept in late the 20th century world. Part B provides a discussion of risk in this broader context, together with a discussion of its impact on criminal justice.

Part C of this report, written by Neil and Irene Morgan, examines the concept of risk in sentencing and parole decision making. It draws on Australian cases and Western Australian legislation. The analysis makes it clear that risk and risk assessment are coming to play a greater role in legislation - a role that does not seems likely to diminish. However, current legislation does not clearly or consistently define risk and there are no risk assessment instruments which actually address the specific questions of risk which the legislation poses. Furthermore, the increasing use of risk raises

profound and difficult issues of principle. In particular, risk can be subversive of just and proportional sentences and has a potentially discriminatory impact.

Part D of the report draws on the results of empirical research on risk assessment in Western Australia funded by the Western Australian Ministry of Justice. It relates these results to the 'risk' literature which has come to dominate discussions of correctional supervision and treatment programs in North America and, to a lesser extent, in the United Kingdom. In Australian corrections notions of risk have become more central to decision making about offenders in recent years. Several Australian correctional jurisdictions[1] have adopted formal risk assessment instruments, most of which have been adapted from North America. Part D examines risk in the context of offender supervision and assesses the suitability of the instrument for use in pre-sentence reports. It is clear that

- Tensions between considerations of risk and other principles of 'treatment'are a common feature of the discussion, however,

- Principles such as 'rehabilitation', 'concern for human needs', 'proportionality' and 'risk' are given different consideration in alternative contexts, such as juvenile sentencing and supervision, the adult sentencing context, adult correctional supervision or in parole decision making.

- Parts C and D both draw attention to the ambiguous meaning of 'risk' and offer suggestions as to how thinking about risk may be clarified.

Finally, Part E briefly summarises some of the common themes emerging from the study.

[1] These jurisdictions include Western Australia, South Australia, Victoria, Queensland and New South Wales?.

PART B. RISK IN SOCIETY AND ITS APPLICATION TO CRIMINAL JUSTICE

Johnston (1997) makes the claim that risk has become so central to society that it is an inherent feature of contemporary life. A preoccupation with risk invades every sphere of human conduct. As Johnston expresses it:

> Eating is risky (pesticides, additives, 'E' numbers, BSE). Breathing is risky (atmospheric pollutants). Work is risky (job-induced stress, fear of unemployment, sexual and racial harassment, repetitive strain injury). Sexual activity is risky (AIDS and other sexually transmitted conditions). Walking the street is risky (robbers, muggers, stalkers). So is staying at home (burglars, domestic accidents).

Furthermore, the fear of crime literature makes it abundantly clear that we are concerned not only about ourselves but also about our spouses and children (Warr, 1992)

Johnston points to two dominant explanations for the modern preoccupation with risk. The first draws heavily on the work of Giddens (1990) and Beck (1992) through their analysis of the sociology of modernity. The second explanation is centred on Foucault's later writings on the theme of 'governmentality', an approach which has provided a powerful framework for the analysis of crime 'problems' and their control. Feeley and Simon's (1992, 1994) writings on the 'new penology' and 'actuarial justice' represent important examples of this approach.

1. RISK SOCIETY

While Beck's (1992) analysis of 'Risk Society' has few direct references to crime or criminal justice, his work and that of Giddens (1990) provide an important backdrop to any discussion of risk in modern society. Both authors point to structural features of late 20th century industrial societies that make life more insecure than it was for earlier generations. Living in conditions of uncertainty is likely to exacerbate anxiety about the world becoming a more hostile and less controllable place. In some instances, the domain of crime and justice may act as a lightning rod for the expression of anxieties generated by concerns about employment security, personal

fulfilment or others. Hough (1995) quotes evidence to the effect that individuals may invoke the vocabulary of fear of crime to articulate their general anxieties[2].

For Beck, risk characterises late industrial societies to such a degree that the label *Risk Society* best describes them. For the Western welfare states:

> ...the struggle for one's 'daily bread' has lost its urgency as a cardinal problem overshadowing everything else. ... Parallel to that, the knowledge is spreading that the sources of wealth are 'polluted' by growing 'hazardous side effects'. (Beck, 1992: 20)

A major consequence of these changes is that, in contrast with earlier industrial society, risk society is concerned more with the distribution of 'bads' than of goods.

> ...in the classical industrial society the 'logic' of wealth production dominates the 'logic' of risk production, [while] in the risk society the relationship is reversed. (Beck, 1992, p 12)

Furthermore, in the risk society a *commonality of anxiety* takes the place of the *commonality of need.* (Beck, 1992: 49). Industrial society is consumed by positive goals such as 'equality of opportunity' and freedom from need. All citizens want their share of the pie. Risk society by contrast is driven by more defensive and negative goals. The focus of concern is 'preventing the worst'. Beck's fear is that a social solidarity based on anxiety may provide a shaky foundation for political action.

At the same time, the distributional aspects of risk and need are different and are summarised by Beck in the formula:

> Poverty is hierarchic, smog is democratic. (Beck, 1992: 36)

This slogan encapsulates the conclusion of Beck's argument that risks display a social boomerang effect in their diffusion. Even though risks are not evenly distributed they affect the rich and powerful in the long term.

A further aspect of Beck's risk society analysis is concerned with certain 'immanent contradictions between modernity and counter-modernity within industrial society'.

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[2] It is arguable, in any case, that the fear of crime vocabulary invoked utilised by standard surveys is insufficiently precise to distinguish between various forms of fear (Ferraro, 1995).

Such contradictions are connected with the declining significance of cultures and traditions based on notions of social class and the declining appeal of 'feudal' sex roles for women and men in the family. There is a surge of individualisation partly connected with 'individual mobility and the mobile individual required by the labour market' which dissolve class consciousness, gender and family roles. Social inequality is no less present in the risk society than it was in industrial society, however the experience of inequality and unemployment becomes more diverse. New combinations of unemployment and full- and part-time employment emerge, giving rise to a less collective consciousness of inequality. At the same time the reliance of the individual on family is eroded and individuals are left to their own devices to face the hazards of risk society, with reducing reliance on family support or the solidarity of their co-workers.

> As a result of shifts in the standard of living, subcultural class identities have dissipated, class distinctions based on status have lost their traditional support, and processes for the diversification and individualisation of lifestyles and ways of life have been set in motion. As a result, the hierarchical model of social classes and stratification has increasingly been subverted.

Beck's contrast between the older industrial society and the emerging risk society should not be allowed to obscure a set of older, well-established comparisons between pre-industrial and industrial societies, where industrial society itself was seen as eroding community and promoting a move from mechanical to organic solidarity (Durkheim, 1984). Johnston (1997) most productively points to the potential redefinition of community itself in terms of 'communities *of* risk'. Risk is, after all, a collective concept and becomes calculable only when it is spread over a population (Ewald, 1996). For example, the prudentialism of the individual subscriber to insurance begins to define a *community of risk-takers* defined through its collective insurance against the pathologies of risk.

It is far from the case that the older industrial society was without risk. For example:

> It is reported that sailors who fell into the Thames in the early 19th century did not drown, but rather choked to death inhaling the foul smelling and poisonous fumes of this London sewer...it is nevertheless striking that hazards in those days assaulted the nose or the eyes and were thus perceptible to the senses, while the risks of civilization today typically escape perception and are localized in the sphere of physical formulas (eg toxins in foodstuffs or the nuclear threat). (Beck, 1992, p21)

However, risk society produces risks that are global rather than personal. Examples (Bhopal, Chernobyl, the problem of acid rain) come readily to mind where risks transcend national borders and also class divisions within societies.

A key element of risk society is its reflexivity. Risk society is inherently self-critical. It becomes conscious of the risks it produces, but this self-consciousness does not allay concern among its citizens. On the contrary, the expansion of and heightening of the intention of control ultimately ends up producing the opposite effect. For example, state welfare departments have devoted increasing shares of their resources to matters of child protection. Yet when children 'are allowed to' slip through the protective net of the system, social concern with protective measures and their failure is amplified over and above the circumstances of any individual case. Risk society undermines the credibility of its own experts. In a real sense risk society produces iatrogenic effects, as illustrated in the child welfare example above.

The public discussion - and illustration - of threats is related to everyday life, drenched in experience and plays with cultural symbols. It is also media-dependent, manipulable, sometimes hysterical, and, in any case dependent on research and argument so that it needs an accompanying science. However this is a science based more on questions than answers.

2. GOVERNMENTALITY

The second major explanatory framework dealing with risk is to be found in the later work of Michel Foucault (1991). In contrast to the literature on risk society, the governmentality literature has been closely identified with analyses of criminology

and criminal justice. Garland (1997), Feeley and Simon (1992, 1994) and Johnston (1996) are some of the writers with such a focus.

Garland (1997) provides a sweeping review of some of the key themes of the governmentality literature. He notes that this literature offers neither a general thesis applicable to the field of crime control, nor a unified account of the present to 'explain' criminal justice developments or policy. Rather, it isolates a series of objects of analysis and directs us towards productive lines of inquiry. Of particular relevance to risk are the themes of 'statistics and bio-power', with their conceptions of the *population* as an entity for independent study and the associated statistical concepts of the normal distribution, deviation from the mean, the law of large numbers and probabilistic forms of reasoning. An associated theme is connected with the growth of technologies of insurance, the social means by which the catastrophic consequences of chance are minimised. Garland applies this form of reasoning to the problem of crime and draws attention to its power in bringing an 'economic rationality' to the language of crime control, its focus on the *criminogenic situation*, which takes its place alongside older objects of attention such as the *legal subject* of punishment and the *criminal delinquent* of correctional attention. Garland is careful to point out that there is no simple or coherent relationship between these different conceptions and practices of crime control.

> The interweaving of these different modes of 'governing crime' produces an intricate web of policies and practices that cannot be reduced to a single formula. ...In any concrete conjuncture the field of crime control will manifest an uneven (and often incoherent) combination of these modes of action, the specific 'mix' depending on the balance of power between the different groups involved, as well as the residues of past practices and institutional arrangements.

Garland's reluctance to underestimate the complexity of this mix of 'modes of action' represents an approach which distinguishes itself from earlier work in the same tradition by Feeley and Simon (1992). These authors argue that a new penological language is emerging which shifts the focus away from the traditional concerns of criminal law and criminology. Such is the power of the new language, they believe, that a 'new penology' is displacing the old.

The old penology is characterised by its focus on the individual offender and is concerned with concepts such as guilt, responsibility and obligation, as well as diagnosis, intervention and treatment. A central pre-occupation is to determine the nature of the responsibility of the accused and to hold the guilty accountable.

The new penology by contrast, redirects criminology to the actuarial consideration of aggregate populations. While Feeley and Simon see the new penology as representing a shift away from punishing individuals to managing dangerous groups, they nevertheless regard it as cementing the role of imprisonment through a merging of concerns for surveillance and custody. The value of prison is tied to incapacitation rather than punishment. Furthermore, while the new penology is a powerful, emergent paradigm, it has not yet become a dominant strategy for criminology and crime policy. It coexists with other paradigms which have their own attractions. For example, there are contrasts between the new penology and the political 'tough on crime' rhetoric. The new penology is more closely tied to a selective rather than a general incapacitative approach and, for justice system administrators presented with limited budgets, the new penology addresses issues of limited resource allocations, whereas the tough on crime rhetoric does not.

While Feeley and Simon accept that the new penology coexists with the old, they nevertheless portray the growth of actuarial justice as inexorable. They see it as emerging within both liberal[3] (President's Commission on Law Enforcement and the Administration a Justice, 1967) and conservative (Greenwood, 1992; Moore et al., 1994) phases. Furthermore, they see actuarial justice as *transforming* older forms of justice and their concepts. For example, recidivism becomes tied to considerations of *risk assessment, incarceration and surveillance* rather than remaining a tool for *correctional program evaluation*. We have already noted the emphasis on the incapacitative function of prison under actuarial justice. Probation and parole also change their emphasis. Once seen as halfway stages for the re-integration of offenders, they are transformed into alternatives to custody for low-risk offenders. Community supervision consists of monitoring levels of risk and using procedures for

[3] For example, the report *The Challenge of Crime in a Free Society*, helped to embed the phrase 'Criminal Justice *System*' in the language of criminology students and practitioners.

revocation of probation and parole that operate at far lower thresholds of proof those do those for obtaining a criminal conviction.[4]

One example of particular interest described by Feeley and Simon is the transformation of the process of drug testing. Actuarial justice does not use drug tests out of a concern for intervention and reduction of individual deviance and self-harm. Rather, the tests represent 'data in a flow of information for assessing risk'. More obvious examples in the Australian setting are laws concerning drink driving. Drivers detected with blood alcohol level over the 0.05 level may be convicted of a criminal offence which derives from a concern with the risk they represent, rather than with any actual harm they may have inflicted.

Garland (1998), while accepting the importance of these insights into the 'new' (actuarial, managerial and control oriented) penology and the 'old' (clinical, individualised and rehabilitation oriented) penology, claims that they have a number of important similarities and are in many respects continuous and mutually supportive rather than in conflict. They both represent 'rational', 'knowledge-based' and 'technical' solutions to crime control of the kind supported by social science professionals. Garland, on the other hand, identifies a more fundamental form of contrast between these instrumental, unemotional traditions and a non-instrumental, morally-charged tradition of expressive punitiveness which is never far from public view. This latter tradition provides an important source of political rhetoric and has a significant influence on criminal justice policy in modern societies. One consequence of accepting Garland's insights is that it is no longer possible to view the 'new penology' as moving inexorably forward and transforming older forms of justice. In any particular jurisdiction there are competing tendencies with 'populist' and 'governmentalist' politics in opposition to each other. It is clear from the analysis of Western Australian legislation presented later in this report that considerations of

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[4] Note that considerations of the population distribution do not imply a focus on the separate distribution components alone. It is not necessary only to address the individuals in the high-risk 'tail' of the distribution, for example. The epidemiologist Rose (1992) focuses on the *mean* of the distribution on the grounds that any distribution will have a high risk tail and that attempts to shift the mean in the desirable direction - for example reducing the mean level of alcohol consumption in a population - will be as effective as attempts to deal with heavy drinking. Rose's focus remains on the population rather than the individual, but he provides evidence for his assertion that the high-risk 'tail' nevertheless belongs to its parent distribution.

actuarial, 'risk-based' justice coexist with punitive principles in an uncomfortable and potentially incoherent way.

3. FROM DANGEROUSNESS TO RISK

Garland points out that there are extra dimensions of influence on criminal justice policy than the struggle between the 'new' and 'old' penologies. Just as important for the present discussion, however, is the work of Castel (1991). In the criminal justice arena it is easy to regard 'dangerousness' and 'risk' as similar concepts. Dangerousness can be regarded, for example, as occupying a particular extreme on a continuum of risk. Yet, Castel reminds us that 'risk' represents a later historical development in psychiatry and, by implication, in criminal justice. According to Castel, dangerousness was historically regarded as a quality inherent in the individual. It was assessed in the context of a face-to-face clinical assessment by an expert and a 'patient'. The assessment involved the divination of a latent quality supposedly dwelling in the individual, regardless of whether that quality has yet manifested itself in the form of violent or unpredictable action[5]. Because the behaviour in focus is extreme in form, the number of individuals involved in these assessments is inevitably small. Castel reminds us that dangerousness is a deeply paradoxical notion.

> ...it implies at once the affirmation of a quality immanent to the subject (he or she is dangerous), and a mere probability, a quantum of uncertainty, given that the proof of the danger can only be provided after the fact, should the threatened action actually occur. Strictly speaking there can only ever be *imputations of dangerousness*, postulating the *hypothesis* of a more or less probable relationship between certain *present* symptoms and a certain act to *come*. (Castel, 1991: 283, italics in original)

The necessary connection of the individual quality with the future probability inevitably invites analysis of how the diagnosis actually relates to the future act. But for the individual psychiatrist there is an inbuilt pressure to be conservative in approach and to intervene rather to leave be. When the diagnosis is 'not dangerous' and a violent act follows, the error of diagnosis is clear to all. However, when the

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[5] Of course, the assessment will most commonly be made after some outbreak of such violent and apparently unpredictable behaviour.

diagnosis is 'dangerous' but is erroneous, the unfounded intervention will not be exposed and the psychiatrist will not be censured.

Castel draws attention to the limitations of the clinical approach to dangerousness when the focus turns to prevention rather than cure. Since one can generally not intervene until some violent behaviour has already occurred there is a 'double limitation' to the clinical approach. On the one hand the diagnoses are fallible and on the other hand they can only be carried out on individual patients, one by one. In the face of these limitations classical psychiatry was left with the very crude strategies of confinement and sterilisation, or with later eugenic approaches now totally discredited after the abuses of Nazi Germany.

Castel argues that a 'new space of risk' was created through the removal of the direct relationship with the 'assisted subject' not only of psychiatry, but also of all the social work and care professions. This involved the separation of the notion of risk from that of danger. Under this approach:

> A risk does nor arise from the presence of a particular precise danger embodied in a concrete individual or group. It is the effect of a combination of abstract *factors* which render more or less probable the occurrence of undesirable modes of behaviour. (Castel, 1991: 287)

Castel's prototypical example of the application of such an approach is a 1976 system for the detection of childhood abnormalities in France. This involved the screening of all mothers and children at a few days, a few months and at two years of age. This screening process made it possible to collate and group together heterogeneous types of physical, psychological and social factors. The presence of certain combinations of factors triggered an automatic alert and a visit of a specialist to the family in question to confirm or disconfirm the real presence of a danger. The screening device was therefore used to deduce the presence of risk on the basis of combinations of abstract risk factors in advance of any actual situation of conflict.

For Castel this shift from dangerousness to risk represents a genuine 'mutation' whose strategy is no longer to confront a concrete situation of danger, but to anticipate all the possible forms of eruption of danger. The new strategy is no longer concerned with

individuals but with populations and the use of statistically based risk factors. It is reliant on a comprehensive surveillance 'technology'. The strategy is one which separates diagnosis from treatment and places the administrator in a privileged position with respect to practioner-professionals. The latter become subordinate technicians in the new schema. Castel's concerns over this strategy are clear.

> The modern ideologies of prevention are overarched by a grandiose technocratic dream of absolute control of the accidental, understood as the irruption of the unpredictable. In the name of this myth of absolute irradication of risk, they construct a mass of new risks which constitute so many new targets of preventive intervention. Not just those dangers that lie hidden away inside the subject, consequences of his or her weakness of will, irrational desires or unpredictable liberty, but also exogenous dangers, the exterior hazards and temptations from which the subject has not learned to defend himself or herself, alcohol, tobacco, bad eating habits, road accidents, various kinds of negligence and pollution, meteorological hazards, etc. Thus a vast hygienist utopia plays on the alternative registers of fear and security, inducing a delirium of rationality, an absolute reign of calculative reason and a no less absolute prerogative of its agents, planners and technocrats, administrators of happiness for a life to which nothing happens. (Castel, 1991: 289)

Castel's pessimistic analysis warns us be aware of the differences between individual and population approaches to risk and dangerousness and to be aware of the different balances of power which may be connected with these alternative approaches.

Rather than leaving the last word with Castel, however, we will consider an alternative discussion which provides further important insights into the respective advantages of population and individual approaches to risk. Through Rose's (1994) analysis we can see that Castel's bleak assessment of the population approach is related to his analysis of a particular *mix* of individual and population strategies. Castel's prototype involves tight central control and surveillance and involves little attempt to engage the individual subject in his or her own preventive activities. Ironically, given the apparently sinister surveillance of the whole population, the French screening process described by Castel may be criticised on the grounds that it does not take the population perspective seriously enough.

4. A PUBLIC HEALTH APPROACH TO RISK

Projects using risk analysis in criminal justice and in other areas typically focus on those particular individuals who are diagnosed to be at high risk. In criminal justice this entails a special concern with offenders who appear highly likely to reoffend. Similarly, in the public health area a common approach is to identify those individuals who appear to be at high risk of developing certain diseases such as cancer, heart disease or alcoholism. Strategies of intervention which focus on high-risk individuals are common, but they do not necessarily provide the most effective means to prevent disease in a population. Rose (1992), whose insights are drawn from the field of preventive medicine, argues convincingly that consideration of risk factors and of their population distribution does not necessarily imply we should focus intervention strategies on individuals who appear to be at high risk of disease.

Rose identifies two extreme strategies of intervention - the *high-risk strategy* and the *population strategy* - and carefully articulates the advantages and disadvantages of each. In the high-risk strategy, for example, intervention is focused on those individuals who, on the basis of some screening test are assessed to be at high risk of developing some disease. For example, individuals with levels of cholesterol above a certain cut-off point may be assessed as having a high risk of developing heart disease. Intervention strategies may be based on developing appropriate screening devices and then attempting to gain the cooperation of those in the high-risk 'tail' of the distribution in taking appropriate measures to reduce their risk of heart attack. A true *population* strategy directed at the same problem would take a different approach. Rather than focusing on high-risk individuals, this strategy would examine the *mean* levels of cholesterol in the whole population and attempt to reduce cholesterol levels in the population as a whole. Rose's book articulates the full ramifications of the alternative intervention approaches and it is impossible to satisfactorily do justice to his thesis in the space available in this report. Nevertheless, he argues convincingly that it is unproductive to express a concern only with those individuals in the high-risk 'tail' of the distribution.

Rose's focus on the *mean* of the distribution draws force from the statistical argument that *any* distribution will have a high risk 'tail'. Furthermore, his argument is that

attempts to shift the mean in the desirable direction are just as likely to be effective as attempts to remove the pathology of the individuals in the high-risk tail. Rose provides several convincing examples to demonstrate that the high-risk population extremes are predicted successfully by population means. For example, in an analysis of over 50 population samples in 32 countries, Rose (1992: 65) found that *heavy* drinking correlated almost perfectly (r=0.97) with mean alcohol consumption. In other words the number of problem drinkers in a population is predicted by the mean consumption of alcohol in the population. Correspondingly, it appears that reducing the mean level of alcohol consumption in a population will reduce the number of 'at risk' individuals in that population. From a prevention point of view, it appears that attempts to reduce mean alcohol consumption are as likely to reduce harm in the high-risk group as are attempts to deal with heavy drinking[6]. It is important to recognise that Rose's focus remains on the population rather than the individual[7], but he provides evidence for his assertion that the high-risk 'tail' nevertheless belongs to its parent distribution. Rose develops certain principles and axioms in the course of his book which contribute force to his argument. Of particular relevance here is a 'fundamental axiom' of preventive medicine which states:

> A large number of people exposed to a small risk may generate many more cases [of disease or illness] than a small number exposed to a high risk (Rose, 1992: 24)

This axiom clearly is connected to the insight about the importance of the population mean developed above. The empirical result for alcohol consumption is logically connected with the simple observation that most distributions involve far more individuals close to the distribution mean. While the high-risk tail of the distribution is by definition at greater risk than the segment around the mean, the same tail is

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[6] This assertion assumes that alcohol consumption in the population as a whole is as easy (or difficult) to influence as the alcohol consumption of the high-risk group and that the costs of each program are comparable. In practice the programs targeted at whole populations will be different in nature from those targeted at high-risk groups. Note also that there will be considerable health side benefits for the lower-risk individuals in the population if they reduce their alcohol consumption.

[7] In fact one can mount a strong argument that Rose embraces the population concept fully rather than incompletely. Incomplete population approaches, including the French example provided by Castel, can be identified through their use of *some* information about the population distribution - the high-risk tail - and then their reversion to an individual/clinical approach to deal with those who are located in that segment of the distribution. Such approaches may reflect the essentially clinical interests of those who advocate them.

proportionately small and of little weight compared with the remainder of the distribution.

Summary

The context of sentencing and correctional supervision sits at the intersection of several powerful and competing ideologies. Any discussion of risk in this context should, according to Bottoms (1995) take into account both general developments of thought and social structure and the specific legal frameworks and politics of particular places. In a discussion of sentencing, however, attention should be paid to four specific issues of: deserts/rights; managerialism/technology; community and populist punitiveness. These issues have been addressed in the foregoing discussion of risk through both the sociological analysis of 'risk society' and also the 'governmentality' literature. Each approach draws our attention to important links between the arena of criminal justice and domains of social and medical welfare and science and technology.

There are important contrasts in approach between the two dominant paradigms of risk analysis. For example, Beck is wary of the power of experts to dominate the debate about the reality of risks. He is concerned that citizens voice their concerns about technological risk in the face of experts whose calculus of safety presuppose 'laboratory conditions' for their validity. In contrast, writers in the governmentality tradition tend to emphasise the dominance of administrators and the consequent relegation of practitioner-experts to the subsidiary position of 'mere' technicians.

Furthermore, Beck's emphasis on the global nature of risks in modern industrial socities tends to see risk society as an inevitable companion to increasingly powerful scientific and technological developments. Writers like Garland, by contrast emphasise the uneasy and at times incoherent mix of strategies involved in criminal justice. Risk constitutes only one form of influence amongst a set of powerful others.

Finally, Beck sees the rise of risk society as an issue of concern, something to be debated and responded to democratically. He is concerned about its potential to further marginalise individuals and populations. Other writers, while not complacent

about its technologies (Garland, 1998; Castel, 1991) are more willing to embrace it in certain contexts (Johnston, 1997).

Some governmentality writers regard sociological approaches to risk as too deterministic (Garland, 1998: 204-205). However it may be more productive to read Beck's approach as a cautionary tale pointing out the potential dangers of risk society unless an adequate democratic capacity to take charge of it is developed.

An important point arising from this discussion is that various local and sectorial approaches to risk, the contexts in which it is set, and the particular combination and ranking of other accompanying ideologies in any setting are critically important for any evaluation of its impact. In the context of sentencing for example, there can be a potentially dangerous mix of ideologies of risk and expressive punitiveness, unless issues of rights and desert retain their power. The consideration of these issues in the context of sentencing commences in Part C.

PART C: THE ROLE OF "RISK" IN SENTENCING AND PAROLE DECISION MAKING

CHAPTER ONE: INTRODUCTION

1. 'RISK' AND THE PHILOSOPHY OF SENTENCING

Academic debate in the past 15 years or more has seen increasing emphasis on concepts of 'proportionality' or 'desert' in sentencing.[8] In other words, offenders are to be sentenced primarily for what they have done and not for their 'rehabilitation', for general deterrent purposes, or for fear of what they may do in the future. Different writers suggest different models but, in essence, 'just desert' schemes hold firm to the principle that it is what the offender has done which should determine both the type of sentence which is imposed and the quantum of sentence. Any deterrent effect or rehabilitation is just a welcome by-product of a system based upon desert.

In practice and in public debates, however, there is less 'purity' of aims. Certainly, rehabilitation is given less focus these days but deterrence remains a matter to which both courts and the public have regard.[9] Most striking, however, is the way in which risk has now moved far more to centre stage in the past decade. This seems to reflect two factors. The first is that, as discussed elsewhere, we live in a society in which 'risk' seems to have become an omnipresent concern.[10] Secondly, society appears obsessed by "Law and Order" issues. It is therefore not surprising to find that debates about risk and law and order coalesce. This is particularly true of discussions in the populist media and in politics which are often characterised by the call to do more by way of the 'protection of the community.' In other words, the community must be protected from those offenders who pose a risk. All too often, this is coupled with the simplistic and erroneous assertion that the courts and other relevant agencies such as

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8. See eg the contributions of A Von Hirsch in *Doing Justice*, 1976; *Past or Future Crimes*, 1984 and *Censure and Sanctions*, Oxford University Press, 1993. A Ashworth, *Sentencing and Criminal Justice*, second edition, Butterworths, 1995.

9. The English experience following the introduction of the *Criminal Justice Act* 1991 was that judges continued to refer extensively to questions of general deterrence even though the legislation required primacy to be given to desert based thinking; see A Ashworth, *Sentencing and Criminal Justice*, second edition, Butterworths, 1995.

10. See the earlier section of this report on 'the Risk Society'.

the Parole Board, either ignore or take inadequate account of something called 'the protection of the community.'

2. 'RISKS' AND 'COLLATERAL RISKS'.

We have so far spoken of 'risk' in very general terms. However, it is all too easy for definitions of 'risk' to be imprecise, for meanings to shift and for unwarranted leaps in logic to occur. We shall therefore start with a range of definitions which will be utilised and developed in the rest of this discussion.

(a) "Risk of Reoffending"

Strictly speaking, this phrase refers to an assessment (whether based on actuarial considerations or on an assessment of the individual offender or on a combination of the two) of the likelihood of a person committing further offences. These offences could be minor or serious and of a similar or a different nature.

Expressed in these terms, 'risk assessment' relates simply to **the person's** propensity for reoffending. It does not necessarily follow that there is a risk **to** the wider '**community**' in the sense that the person is likely to violate another's personal or property rights. This is especially true of 'victimless' crimes or 'status' offences. For example, some offenders have long records for driving without a valid motor driver's licence and have been banned for life from holding a licence. In some cases it is almost certain that the person will continue to drive without a licence even at the risk of imprisonment. In that sense, the person is obviously at risk **of** reoffending. However, provided that the person drives in an acceptable manner, he/she does not pose a risk to the community at large or to other road users.

However, as our analysis will show, legislation and official policy statements show great '*slippage*' in the terms of what risk means: whilst 'risk **of** a person **reoffending**' is conceptually different from 'risk **to** the **community**', debates readily slide from one to the other.

(b) "Risk to the Community" and "Protection of the Community"

'Risk to the community' is also a phrase which needs careful analysis and there can be further 'slippage' in use; risk of reoffending becomes '**risk to**' the community; this in turn slides into '**protection of**' the community. Both of these latter phrases raise the obvious questions: "Risk of What?" and "Protection from What".

The example of burglary also shows that there is a difference between risk to the community and issues of 'protection'. A persistent burglar who is assessed as likely to burgle again can be seen as presenting a **risk** 'to' the community in the sense that there is a risk to the property rights of people in the community. However, if we are talking of '**protecting**' members of the public, it can well be argued that the question relates to offences of a violent and/or sexual nature.

(c) "Collateral Risks"

The term 'risk' is often used as if it was a unidimensional matter. In fact, of course, in taking a particular course of action to achieve one aim, there is often a risk that something else will happen. The Australian Rules footballer who takes a kick at goal is trying to score a goal; but there is the risk that he will miss and will either score only a 'behind' or will miss the target altogether.

Similarly, actions which have been designed to reduce or eliminate one form of risk can readily generate other risks. In the criminal justice field, some would justify a strategy of increasing rates of incarceration on the basis of risk reduction (reducing the risk of reoffending or the risk to the community). However, the collateral risks are manifold and should not be underestimated; these include the risk of self harm and deaths in custody; the risk of individuals or groups becoming increasingly marginalised and disempowered; the risk of institutionalisation; and, in the case of some Aboriginal offenders, the risk that until they have received punishment at the hands of their own community, the matter remains unresolved within the community, and their family members may suffer as a result.[11]

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[11]. In the sense that unless the matter is resolved, other members of the offender's family may face sanctions within the community - possibly even customary punishment.

3. THE SCOPE OF THE ANALYSIS

This paper examines the role of risk in sentencing and parole decision making. The detailed legal analysis is based primarily on the situation in Western Australia but comparisons are made as appropriate and the issues are common to all jurisdictions

Chapters two to five examine the role which risk assessment plays when a court is sentencing a person. The first part of chapter two discusses risk in the context of the principles which have traditionally been applied by the courts to the sentencing of adults and juveniles - and especially the relationship between risk and notions of proportionality. The second part traces how, in the case of both adults and juveniles, recent legislation has made inroads on the principles developed by the courts by increasing reference to risk as a primary consideration. It is argued that the legislation is often ill-defined (in that it fails properly to spell out what risk really means) and inconsistent.

Chapters three and four examine the way in which 'risk' arises in the context of indeterminate sentences where issues of 'public protection' arise. Chapter three deals with the various forms of life sentence for murder, including 'natural life' orders, and chapter four considers special 'protective' sentences which are not subject to the normal constraints of proportionality. These chapters again expose a number of inconsistencies. In particular, they highlight the fact that risk assessment involves not only a question of the risk of something happening but also involves temporal questions; in other words to what time frame does the assessment relate?

Chapter five looks at the increasing recognition within legislation of the role of risk in the non-custodial sphere. This is not only the case in terms of the decision to use a custodial rather than a non-custodial option, but also in choosing between the different sentencing options. This important development has gone to some extent unnoticed but is, ultimately, a reflection of the movement in community corrections away from 'treatment' and towards 'monitoring' and 'community control'.

Chapter six examines the central role which risk plays in decisions as to early release from custody on parole or work release. In recent years legislation has become far more explicit that risk is the paramount consideration but there are some difficulties

with this. In particular, this chapter picks up the point that 'risk assessment' can lead to practices which are arguably discriminatory in effect; in that those who are sentenced for certain types of property offences, especially 'white collar crime' may end up being treated far more leniently by the criminal justice system than those who have received similar custodial terms for other types of offences.

Chapter seven provides an overview and an assessment of some of the key issues and problems. These include:

- lack of precision in the use of the term risk by Parliament and the courts
- problems of deciding exactly what 'risk' means in different contexts; risk of what, and risk for how long?
- the fact that reliance on 'risk' can subvert principles of proportionality and justice.
- The danger that although it is not discriminatory on its face, increasing reliance on risk will be discriminatory in effect because of its focus on certain types of offending behaviour.

CHAPTER TWO:RISK AND GENERAL PRINCIPLES OF SENTENCING

The first section of this chapter considers the role of 'risk' in the sentencing of adults under general sentencing principles. The second section considers the sentencing of juveniles. Both sections examine the principles developed by the courts and evaluate the effect of recent legislation. It will be shown that legislation is often poorly defined and is sometimes inconsistent and incoherent. It will also be shown that under general sentencing principles there are limits to the extent to which 'risk' can be taken into account. A later chapter (chapter four) will examine special 'protective' sentences which are not subject to such constraints.

ADULT OFFENDERS

1. PROPORTIONALITY AND RISK: THE COMMON LAW OF SENTENCING.

In a series of cases in the course of the 1980's, the High Court consistently affirmed the principle of proportionality in sentencing.[12] There are three key cases in which the Court, in effect, examined the relationship between proportionality and risk. The first two are the *Veen* cases[13] which involved a young man convicted of serious violent offences. The other case is *Baumer*[14] in which the offender had a long record for driving under the influence of alcohol and appeared likely to carry on in the same manner in the future.

(a) The *Veen* Cases

Bobby Veen was a young homosexual prostitute of Aboriginal descent. After engaging in homosexual activities with a client, Veen requested payment. The client refused and said "You black bastards are all the same - always demanding handouts'.

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12. In *Walden v Hensler* (1987) 61 ALJR 646, for example, the Court held that the fact an offence carried a high maximum penalty did not mean that it was always to be regarded as an offence requiring heavy punishment. What was necessary, they said, was to look at the facts of each case.

13 (1979) 143 CLR 458 and (1988) 164 CLR 465

14 (1988) 63 ALJR 113

Veen stabbed the man over 50 times and was convicted of manslaughter on the grounds of diminished responsibility. Veen had previously been convicted of an offence of unlawful wounding when, at the age of 16, he had stabbed his landlady after he had been drinking. There had also been occasions when he had threatened self harm. The trial judge accepted evidence that Veen suffered from brain damage and was likely, in the future, to act in an uncontrolled and aggressive manner if provoked or intoxicated. He imposed a life sentence (the maximum penalty) on the basis that Veen was likely to kill or seriously injure people and it was necessary to protect the community. All members of the High Court held that this sentence was too severe and the majority substituted a sentence of 12 years imprisonment.[15] This case became known as *Veen No.1.*

Veen was subsequently released on parole. Some nine months after his release he went drinking with a homosexual acquaintance called Hosen, who propositioned him. They went to Hosen's house but Veen did not want to take part in various sado-masochistic activities which Hosen suggested and went to the kitchen to make some coffee. He said that he felt his 'past life' and experiences coming back. When he saw Hosen standing naked in the kitchen doorway, he threw coffee at him before stabbing him to death. Veen was again convicted of manslaughter on grounds of diminished responsibility. The trial judge sentenced him to life imprisonment, commenting that Veen represented a continuing danger to society and was likely to kill again if released.

This sentence also gave rise to an appeal to the High Court, the case of *Veen (No.2).* This time, by a bare majority of 4-3, the Court upheld the life sentence. The majority, consisting of Mason CJ, Brennan, Dawson and Toohey JJ., delivered a joint judgment. They considered that this case differed from *Veen (No 1)* in that it was now clear that Veen had a "propensity to kill when under the influence of alcohol and under stress." There were also differences with respect to mitigating factors; in *Veen No 1* there had been evidence of provocation and his age and less serious record had been of greater mitigating effect. The majority examined *Veen No 1* and agreed with the view

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[15] The majority consisted of Stephen, Jacobs and Murphy JJ. The minority (Mason and Aiken JJ) would have remitted the matter to the Court of Criminal Appeal of New South Wales.

expressed there that proportionality was paramount. However, they said that this did not mean that public protection was irrelevant:

> "The distinction in principle is clear between an extension merely by way of preventive detention which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible"

In essence, then, the majority view was that public protection is a relevant consideration to which courts must have regard in the general exercise of their sentencing discretion. However, it is not a matter which, operating independently, can be permitted to elevate a sentence beyond that which is justified by the current offence or offences. This argument is not without its difficulties. Indeed, the majority conceded that:

> "...it must be acknowledged that the practical observance of a distinction between extending a sentence merely to protect society and properly looking to society's protection in determining the sentence calls for a judgment of experience and discernment."[16]

Some may well feel sceptical of the argument that a position can, in truth, be so clear 'in principle' if its practical observance calls for a 'judgment of experience and discernment'. Nevertheless, it is clear that, as a matter of the common law of sentencing, 'proportionality' is the key principle and sentences which are disproportionate to the gravity of the current offences will not be permitted. However, in cases where the person does pose a risk, less weight may be placed on mitigating factors.

(b) *Baumer*

In *Baumer*[17] the appellant was described by the sentencing judge as having a 'literally appalling' record of driving offences. The High Court held that these comments were not objectionable if they meant simply that 'no leniency could be extended to the

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16 op cit at 474

17 supra n.7

offender'. However, they would have been wrong if the judge was 'increasing the sentence beyond what he considered an appropriate sentence for the instant offence'.

(c) Summary

The general common law principle is, therefore, clear: apart from possible mitigating factors, the gravity of the offence is the determinant of an appropriate, proportional sentence. As the High Court stated in *Veen No 2*, it is possible for Parliament to set up a scheme for 'preventive' sentences which is not so constrained. Western Australia has such a scheme, which is examined in Chapter 4. However, general sentences must be governed by proportionality.

2. STATUTORY SENTENCING PRINCIPLES

Globally, the most striking structural development in sentencing in the past decade has been that legislators have been increasingly interventionist. This intervention has taken many forms but, typically, the Anglo-Australian approach is for Parliament to set out in greater detail the general principles of sentencing and also to provide a more detailed framework for the various sentencing options.

The tension between the principle of proportionality on the one hand and questions of 'risk' or 'public protection' on the other is strikingly apparent in all these statutory systems, especially where proportionality is seen as the central principle. For example, the English *Criminal Justice Act* of 1991 states that sentences are to be 'commensurate with the seriousness of the offence.' However, when a court imposes a custodial sentence on a person aged 21 or more for an offence of a violent or sexual nature, that term is to be for such a length - subject to the statutory maximum - as is 'necessary to protect the public from serious harm from the offender.' The recent West Australian legislation which is examined below is particularly instructive and demonstrates four key features:

(1) Risk, in one form or another, is being afforded much greater prominence;

(2) The inclusion in legislation of 'risk' / 'public protection' is often a political response to media/public pressure;

(3) The legislation fails to define the key terms in a coherent and consistent manner;

(4) Ill-defined legislative notions of 'risk' cut across notions of proportionality, with conceptual confusion being the result.

(a) Section 19A of the Criminal Code: Addressing the 'In-Out Line'.

In 1988, section 19A(1) was introduced into the *Criminal Code* of Western Australia. This section was designed to reinforce the principle, long espoused by the courts,[18] that imprisonment was the option of last resort. Originally the section provided that the sentencing court had to consider the following four matters:-

(a) the seriousness of the offence;

(b) the circumstances of the commission of the offence;

(c) the circumstances personal to the offender; and

(d) any special circumstances of the case.

It will be seen that there was no specific reference to 'risk' or to 'public protection' in the section as it was originally worded. However, in 1992, Parliament inserted, as paragraph (aa), the requirement to consider the 'protection of the community.' Two points deserve emphasis. First, of course, it is significant that this clause was inserted in the first place. It was part of a series of amendments and legislative initiatives which occurred around the time of a 'moral panic' about law and order issues.[19] Secondly, it was inserted as requirement (aa); in other words as the *second* requirement. This apparently reflects the view that 'risk' or 'community protection' was now not merely *a* relevant and significant consideration which fed in to the question of proportionality but was a central consideration *in its own right.*

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[18] See eg *James* (1983) 14 A Crim R 364

[19] The *Crime (Serious and Repeat Offenders) Sentencing Act* 1992 was a terrible knee jerk reaction to the problem of high speed chases involving young people in stolen motor vehicles; see R Harding (ed) *Repeat Juvenile Offenders: The Failure of Selective Incapacitiation in Western Australia*, Crime Research Centre, University of Western Australia, 2nd ed., 1995

For present purposes, two specific criticisms can be leveled against section 19A(1), particularly after the 1992 amendments:

* First, it involved a misch masch of competing objectives without a logical sense of order. In particular, it has always been accepted that the seriousness of an offence (para (a)) is dependent on the circumstances of its commission (para (b)).[20] It was therefore nonsensical for Parliament to have apparently regarded the 'protection of the community' as a factor which could somehow rank between the seriousness of the offence and the circumstances of its commission.

* Secondly, it begged the obvious question; from what was the public to be protected? It was clearly intended to embrace protection from offences against the person but what about protecting people from other offences such as fraud or entrepreneurial crime?

(b) The Sentencing Act 1995

Section 19A(1) was also rather odd in that it purported to deal only with the decision to use a custodial sentence (the 'in/out line') and not with the quantum of any sentence. The section ceased to apply from 15 January 1995 with the introduction of new and more comprehensive statutory principles which address both choice of sentence and quantum.[21] Originally these were inserted as a new section of the Criminal Code (section 17A) but they are now to be found in sections 6-8 of the Sentencing Act 1995.

(i) The Guiding Principle: Proportionality

Section 6(1) of the Sentencing Act enshrines the principle of proportionality. It states, quite simply, that: 'A sentence ... must be commensurate with the seriousness of the offence'. Section 6(2) then states that the 'seriousness' of the offence is to be determined by taking into account the statutory penalty, the circumstances of the offence and any aggravating and mitigating factors. Under s.8(1), mitigating factors are those factors which, in the court's opinion, 'decrease the culpability of the

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20 See *Walden* v *Hensler*, supra n.5.

21 Section 19A was repealed by the Criminal Law Amendment Act 1994.

offender or decrease the extent to which the offender should be punished.' Aggravating factors are defined in s.7(1) as factors which 'increase the culpability of the offender'.

There is no reference in any of these sections to the question of 'risk' or 'public protection' and the section specifically states that fact that a person has a criminal record is not an aggravating factor. Prima facie, therefore, the sections reflect the common law; public protection may well be an element of a proportional sentence, but 'risk' and 'public protection' do not have an independent operation. As seen earlier, this means that a sentence is not to be inflated beyond that which is proportionate for reasons of 'public protection'.

It is important to stress that the inverse should also hold: if the seriousness of the offence calls for a particular penalty, that penalty should not be *reduced* because the person is not perceived to pose a risk to the public. This has particular pertinence in the case of 'white collar criminals' whose conduct is generally not seen as posing a 'risk' to the public but whose general level of criminality - in the sense of planned, calculating and systematic fraud - should be regarded as high on any scale of 'proportionality'.

(ii) Justifying a Custodial Sentence

In the light of the rest of section 6 and of sections 7 and 8, section 6(4) makes curious reading because of its specific reference to public protection as an independent factor. The section purports to deal with the 'in/out line':

> "a court must not impose a sentence of imprisonment on an offender unless it decides that
>
> (a) the seriousness of the offence is such that only imprisonment can be justified; or
>
> (b) the protection of the community requires it."

The conjunction 'or' which links paragraphs (a) and (b) clearly contemplates the use of imprisonment for the 'protection of the community' even if the 'seriousness of the

offence' would not require such a sentence. Put another way, this means that the risk which a person is said to pose may, of itself, justify incarceration.

(iii) Reconciling the Competing Principles

Section 6(4) presents some major problems of interpretation, logic and justice. As a matter of interpretation, it is prima facie inconsistent with the unequivocal language of s.6(1). Section 6(1) requires sentences to be commensurate with the seriousness of the offence (i.e. the language of para (a) of s.6(4) alone) and does not contemplate public protection as an independent factor. One possible explanation would be to argue that ss.6(1) and 6(4) can be explained on the basis that they deal with different questions. In other words, s.6(4) deals with the 'in/out line' and s.6(1) with the *duration* of any sentence. However, such an argument is unconvincing. First, it is illogical; how can the court fix the duration of the sentence by reference to proportionality if the initial decision to use a custodial sentence was based on grounds of public protection rather than the seriousness of the offence? Secondly, it would be unjust; whilst the element of 'public protection' may be incorporated within a proportional sentence, it should not be permitted to 'inflate' a sentence.[22]

Overall, the provisions of the *Sentencing Act* have therefore perpetuated the confusions which were evident in section 19A(1); specifically, the inclusion in s.6(4) of the phrase 'public protection' is illogical and at odds with general principles of justice.

(iv) What does 'Public Protection' Mean?

As with the 1992 amendments to section 19A, the section is also unclear in scope. It fails to expand on what 'public protection' actually means.

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[22] As discussed in the previous chapter, the High Court has consistently held this line; see *Baumer* (1988) 63 ALJR 113; *Veen No 1* (1979) 143 CLR 458;*Veen No 2* (1988) 164 CLR 465 and *Chester* (1988) 63 ALJR 75. It is, of course, possible for specific sentencing provisions to be enacted for protective sentences which are not restricted by the principle of proportionality. Sections 98-101 of the Sentencing Act (discussed in chapter 4) contain the option of 'indefinite imprisonment' for those considered a 'danger to society' but it is acknowledged that the general principles of sentencing are irrelevant to such a determination (s.98(3)(a)). The existence of these provisions is therefore of no assistance in explaining the relationship between ss.6(1) and 6(4).

3. SUMMARY

In the case of adult offenders, risk has come to the fore in terms of general sentencing principles in the past decade, alongside the increasing emphasis on 'proportionality' / 'desert'. However, the legislation is generally content to bandy around the terms 'risk' and 'public protection' without defining what they mean. The provisions of the now repealed section 19A(1) of the *Criminal Code* and of the current section 6 of the *Sentencing Act* are testimony to the lack of understanding of the practices of the courts and even of common sense and logic. Far from clarifying the role of risk in sentencing, the current provisions are confusing and inconsistent.

YOUNG OFFENDERS

1. THE 'TRADITIONAL' APPROACH

For much of the Twentieth Century, and especially in the post-war period, courts have emphasised 'rehabilitation' when sentencing juveniles. From 1947 to 1988 this was a legislative requirement[23] and even when the principle was omitted from the revised legislation governing the Childrens' Court in 1988, the courts saw no significance in its repeal.[24]

However, rehabilitation and the 'welfare of the child' were never the exclusive focus. In 1988 the Court of Criminal Appeal dealt with some extremely serious sexual offences in *Yorkshire*.[25] Wallace and Smith JJ. explained that the objective was to achieve "the balance between the entrenched but competing sentencing principles of retribution and the protection of society on the one hand and the rehabilitation and welfare of juvenile offenders on the other."[26]

2. LEGISLATIVE INTERVENTION

(a) The Crime (Serious and Repeat Offenders) Sentencing Act 1992

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23. *Child Welfare Act* 1947 s.25.
24. *R v T (A Child)* Pidgeon J.
25. Unreported, Court of Criminal Appeal, 2nd May, 20th June 1988.
26. Seaman J. made similar comments.

1992 saw the introduction of the *Crime (Serious and Repeat Offenders) Sentencing Act*. This ill-conceived legislation was introduced against the backdrop of public, media and political concern with respect to high speed chases involving stolen motor vehicles. The feature which attracted most debate was the introduction of a mandatory minimum sentence of eighteen months imprisonment, followed by detention at the Governor's Pleasure, for both adult and juvenile offenders who satisfied the loose statutory definition of being 'serious repeat offenders.' The legislation has been subjected to rigorous critiques elsewhere and these will not be repeated.[27] For present purposes, the interesting feature is the way in which 'public protection' was afforded a more prominent role in general sentencing principles and, once again, the lack of precision and consistency in the use of that term.

Schedule 3 of the *Serious and Repeat Offenders Act* set out guidelines which applied to a number of groups of offenders.[28] During the course of the Parliamentary debates, the then Attorney General explained the guidelines in the following terms:

> "At present the standards developed by the courts when sentencing juveniles emphasise, as the dominant consideration, the rehabilitation and future welfare of the offender. The new sentencing guidelines are intended to direct the courts to modify the emphasis on rehabilitation in the case of serious repeat offenders in order *to give greater weight than that which is now provided to the physical protection of the public....* Increased penalties in appropriate cases can be expected as a result of these guidelines, in particular, as a result of the reference to a change in the current balance as between considerations of rehabilitation and *public safety.*"[29]

However, the Guidelines themselves read rather differently (emphasis added):

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[27] See R Harding (ed.), *Repeat Juvenile Offenders: The Failure of Selective Incapacitiation in Western Australia*, Crime Research Centre, University of Western Australia, 2nd ed., 1995

[28]. First, to repeat offenders convicted of a prescribed violent offence; secondly, to all juveniles convicted of certain scheduled offences and thirdly to 'repeat offenders' who were convicted of any prescribed, but non-violent offence.

[29]. *Hansard*, Legislative Council, 7 February 1992, at 8250-5

"The court sentencing an offender shall have regard to *the need to balance rehabilitation with the protection of the community* ***and property*** and shall also have regard to such of the following matters as are relevant and known to the court -

(a) the personal circumstances of any victim of the offence

(b) the circumstances of the offence, including any death or injury to a member of the public or any loss or damage resulting from the offence.

(c) any disregard by the offender for the interests of public safety

(d) the past record of the offender, including attempted rehabilitation and the number of previous offences committed, whether prescribed offences or not;

(e) the age of the offender;

(f) any remorse or lack of remorse of the offender and to any other matters that the court thinks fit."

This is a striking example of the 'slippage' to which we referred earlier. The Attorney General's comments were in terms of the 'physical' protection of the public and of 'public safety'. However, the legislation itself was quite different and far wider in scope, referring to 'protection of the community' and protection of 'property'.

(b) The Young Offenders Act 1994

(i) General Principles of Juvenile Justice and Sentencing

Overall, the *Young Offenders Act* 1994 is a far more comprehensive, thoughtful and structured piece of legislation than the 1992 Act. Sections 6 and 7 set out the general objectives and guiding principles of the legislation in language which is clearly designed to reflect international conventions on the treatment of juvenile offenders.

Section 6 sets out the general objectives of the legislation in terms which focus on the need to observe the legal rights of young people, the need to involve responsible adults and families in the processes of reducing crime and punishing and rehabilitating offenders, the need to integrate offenders into the community and the recognition of cultural considerations.

Section 7 is a more detailed list of 'general principles' governing the treatment of young offenders. The first three principles focus essentially on the interests of the young person. Paragraph (a) of section 7 states that there should be 'special provision to ensure the fair treatment' of young persons who have committed or who are alleged to have committed offences.

Paragraph (b) states that offenders are to be dealt with in a manner which encourages the person to accept responsibility and paragraph (c) enshrines the principle that a young person is not to be treated any more severely than an equivalent adult offender. Paragraph (d) then states that 'the community must be protected from illegal behaviour'. Paragraph (e) refers to the role of victims and (f) to the role of 'responsible adults'. The remaining paragraphs also reflect accepted principles of juvenile justice.

This approach feeds in to the language of section 46 which specifically addresses questions of sentencing. 'Public protection' is not specifically mentioned in section 46 and section 46(3) enshrines the principle of proportionality: any sentence which is imposed on a juvenile must be 'in proportion to the seriousness of the offence and consistent with the treatment of other young persons who commit offences'.

The general provisions of the Young Offenders Act therefore recognise that public protection is one of many considerations but it is not, under the terms of section 6, an 'objective' as such. Nor, under the terms of section 7, is it ranked towards the top of the various principles. The guiding principle in sentencing juveniles as well as adults is proportionality.

(ii) Dispensing with General Principles: Serious Repeat Offenders

It is striking that the general principles are simply ditched in Division 9 of the Act with respect to young offenders who 'repeatedly commit serious offenders'. Risk is again right at the forefront both in terms of the definition of the 'target group' and in terms of the principles which apply. If the offender does fall in the target group, the court must suspend the normal principles (especially proportionality) and must give 'primary consideration to the protection of the community ahead of all other principles' (s.125). The aim is obvious; to allow the imposition of a sentence which is less constrained by the principle of proportionality.

The court also has a separate discretion (see chapter 4) to impose a 'special order' on those caught by s.124. This is made in addition to a custodial sentence and runs for a set period of 18 months from the date at which the young person would otherwise be released.

The 'target group' of offenders is defined in s.124 - essentially in terms of 'three strikes'. The offender must be convicted on the current occasion of a 'serious offence' as defined; the offender must have previously been released from custody and reoffended on two previous occasions. In addition to the offender demonstrating this 'cycle', the court must be satisfied that there is a high probability that he/she would commit further offences for which *custodial sentences could be imposed.*

We are unaware of such powers yet having utilised though there have been a couple of applications by the DPP. It should be stressed, however, there is no equivalent power to suspend general principles in the case of adults. Unless adults are sentenced to the special protective sentences described in chapter 4, their sentences must be governed by the principle of proportionality.

The 'risk assessment' criteria for such juveniles are interesting and represent new variations on old themes. The question is whether there is a *high probability* of further offences for which a *custodial sentence could* be imposed. It is therefore not a question of further offending in general. It is also, on its face, not limited to further *violent* offending. Strictly speaking it is also a question of whether the future offences are ones for which a custodial sentence **could** (not 'would') be imposed.

ASSESSMENT AND CONCLUSIONS

The common law principles of sentencing which were developed over time and were encapsulated in a series of High Court decisions in the mid-1980's, took the view that the objective of public protection in sentencing could only be pursued within the confines of a proportionate sentence. Consequently, any assessment that a person was at risk of reoffending would not be permitted to extend the sentence beyond what was proportionate.

In recent years, State legislation has increasingly sought to change the emphasis; stressing public protection as a consideration in its own right. There are a number of reasons for this but two intimately related factors would appear to be primarily at play. First, there appears to be increasing cynicism, fed by media focus on apparently lenient sentences, about the sentencing practices of the courts. Secondly, 'public protection' is a convenient political catch cry as politicians seek to capitalise on this cynicism and to appear tough on 'Law and Order'.

However, law and order politics do not make for good law making and it is easier to call for greater 'public protection' than to define what 'public protection' means or what its appropriate limits are. The West Australian legislation is testimony to these problems in that the definitions are inconsistent and beg fundamental questions. Protection of the public is normally raised in the context of offences against the person. However, the *Crime (Serious and Repeat Offenders) Sentencing Act* 1992 had referred to protecting both the person **and property**. Section 6(4) of the *Sentencing Act* 1995 talks simply of the protection of the public without explaining what the public needs protection from. *The Young Offenders Act* talks in equally vague and general terms about protecting the public from what it terms 'illegal behaviour.'

There is also tension within the current system between the different justifications for punishment. The first example of this concerns the relationship between proportionality and risk, exemplified by the old s.19A of the *Criminal Code* and the more recent *Sentencing Act* 1995.

Another example is the tendency to see 'public protection' and 'rehabilitation' / 'treatment' as antithetical. In fact, rehabilitation provides one mechanism for public protection. As Murray J. said in *T (A Child)*:

"It is only in a limited sense that the rehabilitation of the offender and the protection of the community and property are to be regarded as matters to be balanced one against the other. A true appreciation of the effective exercise of sentencing discretion will result in an understanding that the sentence imposed, in whatever form and of whatever severity, should be such as is best calculated to achieve the protection of persons in the community and their property by properly balancing the rehabilitative and punitive aspects of sentence so as to deter, not only the particular offender, but offenders generally, from the commission of such offences as that before the court."[30]

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[30]. Court of Criminal Appeal, WA, 4 May and 10 June 1993.

CHAPTER THREE: MURDER SENTENCES

1. INTRODUCTION

Questions of risk play a pivotal role in the context of sentences for murder and wilful murder in Western Australia. This was highlighted by the recent case of *Mitchell* in which the Court of Criminal Appeal[31] and the High Court[32] were called upon to consider whether a person should be subject to an order never to be released on parole. A central concern was the 'prognosis' of the risk that Mitchell was likely to pose if he was to be released into the community and there were some interesting and significant differences of opinion between the different judges involved in the case. However, *Mitchell* was just the most dramatic illustration of some broader issues. To understand these issues, it is essential to outline the definitions of murder and wilful murder and the sentencing options which are open to a court.

The definitions of murder and wilful murder in Western Australia are unique. Wilful murder is established where the offender killed another person and had the intention to kill. Murder is established if the offender killed but 'only' intended to do grievous bodily harm (GBH).[33] In practical terms, there is often little difference between the two, especially as GBH refers to a narrow range of very serious injuries.[34] However, the sentences which attach to each offence are very different and show that wilful murder is regarded in legislation as a far more serious offence. After a series of changes, the current position is as follows in the case of adult offenders:[35]

* **Murder**

  - The court must impose a sentence of life imprisonment.

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31. (1994) 72 A Crim R 200
32. (1995) 85 A Crim R 304
33 There is also a category of murder called 'dangerous act murder' (*Criminal Code* s.279(2)) for which it is not necessary to prove an intention to do GBH. However, this is little used in practice.
34 Criminal Code, s.1 A strong case can be made for the abolition of wilful murder as a separate category and for the introduction of a single offence of murder based upon an intention to kill or to do GBH; see I Morgan.
35 In the case of juveniles, life is a maximum rather than a mandatory penalty; s.282

- With effect from January 1995, this means that the court must set a minimum period of between 7 and 14 years before the first 'statutory review date' (SRD). The first SRD is the first date at which the Parole Board must first report to the Governor with respect to the possibility of the person being released on parole.

* **Wilful murder**

- The court must impose either 'life imprisonment' or 'strict security life imprisonment'.

- If the court imposes 'life', it must set a period of between 15 and 19 years before the first statutory review date.

- If the court imposes strict security life, it has two choices. The first is to set a period of between 20 and 30 years before the first statutory review date. The second is to make an order that the person is never to be released on parole.

Prior to 1995, the courts did not set the period before the first stautory review date. Instead, this was fixed by legislation as follows:

- Life imprisonment for murder: 7 years before first SRD

- Life imprisonment for wilful murder: 12 years before first SRD

- Strict Security Life for Wilful Murder: 20 years before first SRD

Most of the jurisprudence in this area, including *Mitchell*, concerns the position prior to 1995.

2. WILFUL MURDER: CHOOSING BETWEEN STRICT SECURITY LIFE OR LIFE IMPRISONMENT

The legislation provides no criteria to guide the judge's choice, in the case of wilful murder, between strict security life or life imprisonment. However, the cases reflect two main considerations: the objective seriousness of the offence and risk to the community.

In *Jackson*,[36] the appellant was a retired public servant with no prior record. His gambling habit had left him penniless and he and his defacto partner were unable to sustain the lifestyle to which they had become accustomed. He decided to kill himself but did not wish to leave his partner to face the financial mess and the shame. He decided on murder/suicide but, although he shot his partner, he did not have the courage to shoot himself. He pleaded guilty to wilful murder and was sentenced to strict security life imprisonment. The Court of Appeal agreed with the trial Judge that the offence was premeditated, planned and deliberate but considered that it was "of such a nature, committed under such circumstances and by such a person that it was unlikely that it would be repeated". The Court therefore substituted a term of life imprisonment.

Jackson therefore indicated that risk to the community was a *relevant* consideration in choosing between life and strict security life. In *Monaghan*,[37] defence counsel tried to elevate the status of community risk. It was argued that it should be regarded as a *prerequisite* for the decision to impose the heavier penalty. Monaghan's offence was one of extreme violence. He and his co-offender Napier suspected that the victim had been informing the police about their activities in the Australian Nationalist Movement. They lured him to a park where they beat him about the head with iron bars, cut his throat and threw him in the river. Monaghan did have something of a criminal record which led the Court of Criminal Appeal to express concerns about the risk to the community. However, it also held that strict security life imprisonment should be imposed in bad cases of wilful murder such as this, *irrespective of the degree of risk to the community.*[38] Subsequent unreported cases have confirmed that whilst community risk is relevant, it is neither a prerequisite nor a paramount consideration.[39]

In most of the cases, there is also reference to the rehabilitation of the offender. However, these references are again reflective of changes in penal philosophy to which reference was made in chapters 1 and 2. Rehabilitation does not appear to

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36 [1990] WAR 105.
37 (1990) 3 WAR 466.
38 See especially Kennedy J. at 472.

operate as a primary and independent concern in its own right as it might perhaps have done in the 1960's and 1970's. Rather, the emphasis now seems to be on the question of community risk; with the recognition that, as the courts have also observed in the context of juveniles,[40] risks are reduced by rehabilitation.

3. STRICT SECURITY LIFE : NATURAL LIFE TERMS AND THE *MITCHELL* CASE

(a) Overview of *Mitchell*

As we have seen, if an offender has been sentenced to strict security life imprisonment, the sentencing Judge must decide whether to make a 'natural life' order under s.91(3) of the *Sentencing Act* 1995 (formerly s.40D(2a) of the *Offenders Community Corrections Act*). If such an order is made, the Governor can never order the prisoner's release on parole.[41] The legislation provides no guidance for a court on the exercise of this dramatic power, simply stating that the court '*may*' make such an order if it considers it '*appropriate*':

The section came up for analysis for the first time in the case of *Mitchell*.[42] Mitchell pleaded guilty to four counts of wilful murder, the victims being a 31-year old woman, her 16-year old son and her two daughters aged 7 years and 5 years. He also pleaded guilty to three counts of indecently interfering with a dead body by sexual penetration and one count of sexual penetration of a child under 13. Full details of the circumstances of the offences were not revealed publicly because of their appalling depravity. In the early morning of 22 February 1993, Mitchell had driven to a remote property and killed all four victims by inflicting horrific blows on their heads and necks with a tomahawk. After killing the mother, Mitchell sexually abused her dead body. Before killing the 7-year old girl, he sexually penetrated her with a vibrator, causing appalling internal injuries. He was 24 years of age at the time of the offences and was intoxicated by a combination of amphetamines and cannabis.

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39 *Fry*, unreported CCA SCt of WA, 12 July 1991 and *O'Connor*, unreported CCA SCt of WA, 22 September 1994.

40. See summary at end of chapter 2.

41 Although the royal prerogative does still exist.

42. Supra n24 and n25

The sentencing judge, Owen J., declined to make a natural life order. The Court of Criminal Appeal held by a majority (Kennedy and Ipp JJ., Murray J. dissenting) that an order should be made.

A unanimous High Court set aside the order. The Court held that the use of the word *'may'* in s.40D(2a) did not mean that a sentencing Judge retains a discretion whether or not to make an order once (s)he considers such an order to be *'appropriate'*. Put simply, an order under s.40D(2a) *must* be made if the sentencing Judge considers it appropriate in the circumstances. The Court held that there was no error in the way Owen J. had construed and applied this term.[43] In essence, the High Court was of the view - in line with standard principles governing sentencing appeals - that it was wrong for the Court of Criminal Appeal to have substituted its view for the view of Owen J, without any error having been shown. Since this was the basis of the High Court's decision, it was not necessary for it to consider the arguments of substance in detail.

Mitchell provides a fascinating example of the problems surrounding the use of 'risk' by the courts. Careful study of the case - and especially of the majority opinions in the Court of Criminal Appeal - reveals there were very different views on two absolutely fundamental matters. First, on the importance of risk to the equation and, secondly, on exactly how 'risk' was to be defined. The extent of these differences and their ramifications were arguably not fully recognised.

(b) Balancing the Relevant Considerations: Proportionality, Risk and the Prospects of Rehabilitation.

The High Court held that:

> "the phrase 'considers ... appropriate' indicates the striking of a balance between relevant considerations so as to provide the outcome which is fit and proper".

Owen J. had commented that the relevant considerations were essentially the same as those which he had already addressed in deciding on strict security life rather than life

imprisonment; in other words, the circumstances of the offence and the question of risk.

The members of the Court of Criminal Appeal agreed that these were the considerations but the judgments differed significantly on the relative weight to be placed upon each of them. Kennedy J. considered that whilst:

> "His Honour ... made some references, in general terms, to the circumstances of the offences with which he was concerned, when he came to consider the exercise of his discretion, he does not appear to have given this factor significant weight. In this, I believe that he was in error."[44]

In other words, in Kennedy J.'s opinion, Owen J. had placed insufficient weight on the *seriousness of the offences*. The High Court strongly rejected this, stating that Owen J. had "continually returned ... to the intrinsic seriousness of the offences. His Honour is to be taken as having meant what he said".[45]

The other member of the majority in the Court of Criminal Appeal was Ipp J.. He stated that he agreed with Kennedy J.'s reasoning and that he was simply adding some comments of his own. However, his comments revealed a significantly different approach. To Ipp J., the question was one of *community risk*:

> " ... *the overriding factor* in determining whether the court should exercise its powers under s.40D(2a) *is risk to the community, not matters relating to the punishment of the offender.* The punishment ... was properly imposed when the offender was sentenced to strict security life imprisonment."[46]

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43 Dawson, Toohey, Gaudron, McHugh and Gummow JJ..
44 Supra n24 at 223 (see also 221).
45 Supra n25 at 314
46 Supra n24 at 225, emphasis added.

The High Court firmly rejected Ipp J.'s view and stated that the legislation does not indicate any particular 'overriding factor'.[47] In the High Court's view, there was no appealable error in the way in which Owen J. had balanced the various considerations:

> "In particular, Owen J. considered whether the more general and objective factors relating to punishment outweighed the potential of the applicant to be rehabilitated .... His Honour was entitled to have regard to the unchallenged expert evidence that the appellant would not constitute a danger to the public, drug taking to one side, and that he had a constructive attitude to the future.... Owen J, again correctly to our minds, had regard to the possibility of the later emergence of facts, presently unascertainable, but apparent 20 years or more hence, which might then indicate that the appellant no longer constitutes a danger to the public..."[48]

(c) The Question of Prognosis

Whilst the prognosis of risk is not an overriding consideration, it is clearly very significant. It is therefore important to know precisely what the question is. The case again revealed some fundamental differences of opinion as to how the question of prognosis should be posed. Ipp J. stated (emphasis added) as follows:

> "By the very nature of the decision, it will nearly always be a matter of difficulty to determine at the date of sentencing whether *in twenty years time* a wilful murderer will continue to pose a significant risk to the community. Nevertheless, if required, the court must, by process of prognostication, determine this issue as best as it can."[49]

Ipp J therefore saw the issue in terms of the risk in twenty years time; at the date of the first SRD if an order were not made under s.40D(2a). However, such an order leads to denial of parole *for the offender's lifetime.* The fact that the person is to be considered by the Parole Board at that time does not mean that he will be released;

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47 Supra n25 at 313-314.
48 Ibid 314.
49 Supra n24 at 225.

that is a matter for the Board to consider and to make recommendations to the Governor. The question ought, therefore, to be whether the offender poses a serious risk during the rest of his/her projected lifespan. Owen J. considered the case on this basis and in his dissent Murray J. referred to the difficulty of any prognosis "for the whole of perhaps up to 45 or 50 years of life remaining in him."[50] Kennedy J.'s views are not easy to discern, though His Honour does refer without adverse comment to Owen J.'s sentencing remarks with respect to prognosis.

Although the High Court did not clarify which approach applies, their approval of Owen J.'s approach amounts to an implicit rejection of Ipp J.'s analysis. This, of course, does nothing to resolve the problem of *how* accurate predictions are to be achieved, but at least the question can be more specifically addressed by the relevant experts.

(d) The Relevance of Age

Mitchell was 24 years old at the time the offences were committed. He would hardly therefore qualify for mitigation on the basis of youth. Under traditional sentencing principles, with their emphasis on proportionality, he would not be treated in a significantly different manner from an older person convicted of the same offences.

However, the fact that he was relatively young and had a lengthy projected lifespan clearly made the problem of prognosis particularly difficult. The problem is particularly acute if, as argued above, the proper question should be one of prognosis for the remainder of the person's life and not merely at a point some twenty years from the date of sentence. Put simply, prognostication becomes increasingly difficult the longer the likely lifespan of the offender.

This concern weighed heavily with Murray J. who drew attention to the comments of Dawson, Toohey and Gaudron JJ. in *Bugmy*[51]:

> "The appellant was 27 years of age when the minimum term was fixed. He will be over 45 years before the likelihood that he will re-offend will

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50 Ibid, 233; see also at 230.

51 (1990) 169 CLR 525, 537, emphasis added.

become a matter for assessment. *It is not possible to say now what the likelihood will be then ... simply because of the impossibility of making a forecast of future behaviour so far ahead.*"

Murray J. considered that the power contained in s.40D(2a) was "truly exceptional" and required "clear evidence of the most cogent kind". He was not satisfied that Mitchell's future was so devoid of prospects that he should for ever be denied parole.

Since the question of prognosis should relate to the whole of the offender's remaining lifespan, it is clear that the age of the offender may come to play a very significant role. In principle, it is very hard to argue that a person who is 25 years old should, simply for that reason, be treated differently from one who is 45; but if, the crux of the matter is prognosis, the practical reality is that prognostication becomes increasingly difficult the longer the likely lifespan of the offender.

(e) Summary

The 'natural life order' poses some major conceptual and practical dilemmas. It is conceptually confusing in that it requires the sentencing court to revisit the very same issues which have already been canvassed in deciding to impose strict security life rather than life imprisonment. In practice it will be extremely difficult for a judge at the time of sentence to make a prognosis as to the threat which an offender poses for the rest of his or her life, particularly if that offender is relatively young.

One is then drawn inevitably to the following question; if a natural life order was not 'appropriate' in *Mitchell*, when would it be? None of the judgments provides an answer to this question but it should be acknowledged that Mitchell was not a 'serial killer' in the sense of having committed a number of pre-planned killings over an extended period of time. A court will have much stronger grounds for a prognosis in respect of the calculating 'serial killer' rather than the person who kills in a violent frenzy - even the multiple killer.

4. THE NEW LAWS: FIXING THE PERIOD BEFORE THE FIRST STATUTORY REVIEW DATE

The legislative provisions which govern life sentences for murder and wilful murder now generate an additional complexity beyond that which applied in *Mitchell*. This is the requirement that the court set the period before the first SRD; 20 to 30 years in the case of strict security life imprisonment for wilful murder; 15-19 years in the case of life imprisonment for wilful murder and 7-14 years in the case of murder.

The results of these changes are interesting and, in one sense, paradoxical. The first point to note is that the thorny question of *prognosis* will now arise in all murder and wilful murder cases as judges seek to determine public risk as a factor relevant to the period before first SRD. The paradox is this: in *Mitchell* the choice was a first parole review after 20 years or no such review ever. The choice is now between a review sometime in the next 20-**30** years or no review. As we have seen, the prognosis of risk becomes increasingly difficult as the relevant periods become longer. Since strict security life can now extend to a 30 year review date, orders are less likely to be made under s.40D(2a). This can hardly have been the Government's intention but it is the inevitable result of the legislative structure.

5. SUMMARY

Sentences for wilful murder and murder provide an excellent example of the difficulties which can arise with respect to risk assessment in the context of very serious offences. The courts' decisions have shown a lack of consistency in crucial ways in the way the question of risk is posed; notably, in 'natural life' cases, in terms of the relevant date to which prognosis refers.

Another interesting feature of this is that whilst 'community protection' is usually invoked as a reason for **longer** periods of incarceration, a system based on desert reasoning may be more likely in a case like Mitchell to result in a 'natural life' order than a system based upon prognosis. This is for the simple reason that a court will be more comfortable with the proposition - if clearly supported by legislation - that some

offences are so serious that they merit a natural life order **irrespective of risk**. Indeed, it is likely there will be reforms along such lines.

CHAPTER FOUR: SPECIAL PROTECTIVE SENTENCES

This chapter examines the legislative provisions and the principles developed by the courts with respect to special 'protective' sentences; in other words, those types of sentence which are not circumscribed by the limitations imposed by the proportionality principle. As in chapter two, the position is discussed first by reference to adults and then by reference to young offenders.

At the outset, it is worth noting the experience in Western Australia with the *Crime (Serious and Repeat Offenders) Sentencing Act* 1992. This notorious and thankfully short-lived legislation sought to 'excise the hard core' of young offenders from society. It targeted this group by providing that offenders who were convicted to a 'serious' offence and who had clocked up the specified number of 'conviction

ADULTS

1. INTRODUCTION

In *Veen (No.2)*, as we have seen, the High Court affirmed that although sentences of imprisonment do involve an element of 'public protection', they are governed by the principle of proportionality. This means that a sentence cannot be extended beyond what is proportionate in order to achieve the aim of 'public protection.' In that case Deane J expressed the view that if parliament wanted a system of 'preventive restraint' it should set up such a system specifically by statute and ensure that there are adequate safeguards in such a system.[52]

Various forms of 'preventive restraint' have been utilised in Australia, including some extraordinary examples of *ad hominem* legislation which have attracted adverse criticism from the courts.[53] However, in Western Australia the courts have long had the discretion to impose 'protective sentences'. These powers were originally contained in sections 661 and 662 of the *Criminal Code*.[54] These sections were

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52. (1988) 164 CLR 465 at 495

53. See eg *Kable* (1994) 75 A Crim R 428.

54. For a brief history of these measures, see Neil Morgan, 'Parole and Sentencing in Western Australia' (1992) 22 UWAL Rev 94, 99-101.

repealed in the sentencing reforms of 1995 and replaced by section 98 of the *Sentencing Act.*

These measures, and the cases which have come before the courts, have again raised questions about the role of risk and the way risk is defined. These are best explained by first looking at the experience with sections 661 and 662 of the Criminal Code and then at the 1995 legislation

2. CRIMINAL CODE SECTIONS 661 AND 662

(a) The Terms of the Legislation

Section 661 applied to adult 'habitual criminals'. For the purposes of section 661, a person was a 'habitual criminal' if that person was convicted of an indictable offence and had been convicted of such an offence on at least two prior occasions. Habitual prisoners were subject to a 'dual track' system under which the person first served a sentence of imprisonment imposed by the court (parole, of course, being unavailable) and then served detention at the Governor's pleasure ('GP').

Section 662 permitted the court to impose either a 'single track' order of detention at the Governor's pleasure or a 'dual track' system in which a determinate sentence was to be followed by GP detention. Provided only that the offender had been convicted of an indictable offence, the court was able to make an order under s.662:

> "having regard to the antecedents, character, age, health or mental condition of the person convicted, the nature of the offence or any special circumstances of the case."

Where an offender was sentenced under s.662, the case was first reviewed by the Parole Board one year after the GP detention commenced and at least annually thereafter. Under s.661, the first review was two years after the GP detention commenced and at least annually thereafter.

In practice 'dual track' sentences were almost invariably imposed. These drew, in effect, a clear distinction between the 'punishment' component (the sentence of imprisonment) and the 'public protection' component (GP detention). As we have

seen, public protection is generally taken into account as part of the general exercise of sentencing discretion, though not to such a degree as to lead to a disproportionate sentence. In several cases involving ss.661-662 the courts concluded that because public protection was embraced by the GP element, such a consideration was to be discounted or afforded less weight in fixing the determinate term.[55] As a result, the sentence of imprisonment would be somewhat lower where a GP order was imposed than if no such order had been made.

(b) The Restricted Application of ss.661 and 662

Sections 661 and 662 of the *Criminal Code* were, on the face of it, extremely broad. However, the Court of Criminal Appeal and the High Court adopted a restrictive interpretation which has seen indefinite imprisonment used only in rare cases.

(i) Section 662

In *Chester* a unanimous High Court held that section 662 was designed for the protection of the public from those with a propensity to commit serious crimes. However, they said, this did not mean all serious crimes:

> "The extension of a sentence of imprisonment which would violate the principle of proportionality can scarcely be justified on the ground that it is necessary to protect society from crime which is serious but non-violent....[I]ndeterminate detention of offenders who have a propensity to commit crimes ... involving financial loss and property damage is a disproportionate response to the need for protection.
>
> The exercise of the power should be reserved for those cases ... in which the sentencing judge is satisfied by acceptable evidence that the convicted person is, by reason of his antecedents, character, age, health or mental condition, the nature of the offence or any special

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[55]. In *Gooch* (1989) 43 A Crim R 382 the Court of Criminal Appeal set aside an order under s.662(a) but imposed a longer determinate term to reflect the 'need to protect the community' as part of the exercise of general sentencing discretion. In *Chester* (1988) 63 ALJR 75 the High Court quashed an order under s.662(a) but remitted the case to the Court of Appeal on the basis that this conclusion 'may well require' an increase in the determinate term..

> circumstances, so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community. The stark and extraordinary nature of punishment by way of indeterminate detention, the term of which is terminable by executive, not by judicial, decision, requires that the sentencing judge be clearly satisfied by cogent evidence that the convicted person is a constant danger to the community."[56]

Section 662 therefore refered to the risk of future serious violence. Its rationale was 'protection of the community' in the sense of protection from serious physical violence.

(ii) Section 661

Section 661 attracted less discussion. Originally it seems to have had its roots in rehabilitation; that 'habitual criminals' needed special 'treatment'. According to the recent case of *Clinch*,[57] it came to be based more recently on public protection but the court indicated that it was intended to reach beyond offences of violence. According to Malcolm CJ there had to be 'cogent evidence that the [defendant] would pose a positive danger to the community by reason of the commission of further and continued indictable offences.'[58] This was not limited to offences of violence. Seaman J spelt it out more clearly, stating that s.661 was not concerned with physical harm to the community but with the "more general harm which the resumption of indictable offending will cause."[59]

Although it was very rarely imposed, s.661 appears to have been most common for those repeatedly found guilty of serious 'professional' or 'semi-professional' offences of violence such as armed robbery.[60] Section 662 was more common, being used mainly for sex offenders who were considered dangerous.[61]

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56. (1988) 63 ALJR 75, 78. See also *Tunaj* [1984] WAR 48, *Yates* (1984) 25 A Crim R 361, *Cooper* (1987) 30 A Crim R 19, *Stone* (1989) 42 A Crim R 189, *Gooch* (1989) 43 A Crim R 382.

57 (1984) 25 A Crim R 361

58 Malcolm CJ at 306

59 At 321; see also Pidgeon J at 315-316

60 See eg *Stone* (1989) 42 A Crim R 189.

61 See cases mentioned at n49.

(c) The Prognosis of Risk

The *Chester* case called on the courts to be satisfied that the person posed a 'constant danger' to the community. The question of prognosis was therefore the central question; the question of the 'proportional' sentence for the offence being separately addressed. Prognosis of this sort is something which judges often find not only difficult but also doubtful in principle. It is therefore not surprising that in most reported cases, there has been a split court. Two cases are discussed in some detail here because they summarise the main dilemmas.

(i) The assessment of risk and the consequences of such assessments

The first case, *Yates*[62] provides a vivid illustration of the theoretical and practical difficulties with risk assessment and of the dramatic potential consequences of an order being made on the basis of such a prognosis. Yates had committed a sexual assault on a girl aged seven and a half. He had forced his way into a cubicle in a public toilet and had forced the girl to take his penis in her mouth. He had a record, mainly for 'minor' offences, but including an offence of wilful exposure and one of 'evil designs'. The sentencing judge sentenced him to seven years imprisonment to be followed by detention at the Governor's pleasure. On appeal the majority (Brinsden and Smith JJ.) upheld the order under s.662.

In most of the cases in which section 662 has been used, the offender has a long record of serious sex offending so that any prognosis is founded on both prior record and any specialist reports.[63] Yates' record was far less serious. The majority had some concerns at his previous convictions for offences of a sexual nature - albeit at the lower end of the scale - but placed particular weight on the specialist reports. Yates was described as having an intellectual handicap and a personality disorder. Psychological and psychiatric reports said he was a positive risk of reoffending and one psychiatric report said he was 'beyond treatment'. Brinsden and Smith JJ therefore considered that he posed a danger to the community. However, in a powerful dissent, Burt CJ pointed out that if Yates was, indeed, 'beyond treatment', an

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62 (1984) 25 A Crim R 361

63 eg *Ciciora*, unreported, 3 February 1996

order under s.662 would in effect empower his detention for ever more. In part, of course, he was 'beyond treatment' because of his intellectual handicap.

The Chief Justice's fears of the consequences of a s.662 order have proved well-founded. Mr Yates has been in prison for over twelve years. He is unable, because of his intellectual handicap, to access prison based treatment programmes and therefore remains 'beyond treatment'. It is unclear when, if ever, he will be released, even though the 'proportionate' sentence for his offences expired, with remission, some five years after its imposition.

(ii) What is the proper question? Is it one of prognosis of risk at the current date or at the date of possible release?

The second case which is of particular interest is *Clinch*.[64] In the context of the *Mitchell* case we argued that if prognosis of risk is a factor which is relevant to making a natural life order, then that had to be prognosis of the risk which the person poses *for the rest of his or her life* and not merely the risk the person poses either at the date of sentence or at a possible review date twenty years down the track. This is because the order means that the person will *never* be released on parole.

In cases involving special 'protective' sentences, the question again arises as to the date to which any risk assessment refers. In many of the cases, including *Yates*, the sentences for the current offences were certainly long but they were not enormously long. In *Yates*, therefore, the court expressed the issue in fairly general terms; namely, the risk which Yates appeared to pose 'for the foreseeable future.'[65]

However, in *Clinch*[66] the offender faced very long sentences for his very serious current offences. Clinch had gone on a rampage of serious offences, including several offences of aggravated sexual assault and other acts of extreme violence. He was sentenced on a number of separate occasions by three different judges in the District and Supreme Courts. On the last occasion, the court imposed an order under s.661, the habitual offenders provision. However, Clinch also faced very long sentences - a

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64 (1994) 72 A Crim R 301
65 Brinsden J at 369
66 (1994) 72 A Crim R 301

total of 26 years - for his offences under ordinary sentencing principles. On appeal, the Court of Criminal Appeal set aside the order under s.661 and also reduced the other sentences to a total of 19 years imprisonment to reflect the totality principle.

A central plank in the Court's reasoning was the question of prognosis. On this, the court concluded that there was no cogent evidence that *at the time when he would become eligible for parole* he would present a 'positive danger to the community.' In other words, the issue was not whether the evidence indicated that he *now* posed a risk but whether he would at a date a long way in the future.

(d) Paradoxes and Dilemmas

In *Clinch*, therefore, as in *Mitchell*, the court was faced with the dilemma that the relevant date in terms of prognosis was a long way off. It is hard to see how there could have been cogent evidence at the date of sentence that in some 14 years or so he would pose a serious risk. It was therefore entirely predictable that an order would not be made under s.661.

The paradox is striking and the comparison with *Yates* is glaring. Clinch had committed far more serious offences than Yates and, as a result, faced longer sentences for his current offences. It was therefore difficult to make a prognosis as to his risk at a date way into the future. However, given that Clinch's record was far worse than that of Yates and, given the nature of his current offences, it was Clinch who appeared to be the higher risk *at the date of sentence.* As a result of the reduction of Clinch's sentences and the operation of the remission rules he will serve at most just over 12 years in prison; somewhat less than Yates has already served.

3. SENTENCING ACT 1995

(a) The Basic Principles

Part 14 of the *Sentencing Act* revamps the powers of the courts with respect to special protective sentences. Sections 661 and 662 of the *Criminal Code* have been replaced by the single power to impose 'indefinite imprisonment'. Section 98(3) of the *Sentencing Act* recognises that if a court imposes a sentence of 'indefinite

imprisonment', it is suspending the normal principle of proportionality. The system is a dual track one where the court must impose a sentence for the current offence (the 'nominal sentence') and the period of 'indefinite' imprisonment comes into effect on the expiry of that sentence.

Release from an order under s.98 is dealt with by the *Sentence Administration Act* 1995 (see esp. ss.20 and 25). Release is by order of the Governor, on advice from the Parole Board. The Parole Board is required to consider the case within a year of the commencement of the indefinite term and thereafter at least once every three years.

As was the case with sections 661 and 662 of the Criminal Code, one can expect the nominal term to be somewhat less than the court would have imposed in the absence of an order under s.98 on the grounds that the public protection element of the sentence is contained in the indefinite imprisonment.

Section 98 reads as follows:

> **98**. (1)If a superior court --
>
> (a) sentences an offender for an indictable offence to a term of imprisonment;
>
> (b) does not suspend that imprisonment; and
>
> (c) does not make a parole eligibility order under Part 13 in respect of that term,
>
> it may in addition to imposing the term of imprisonment for the offence (the "nominal sentence"), order the offender to be imprisoned indefinitely.
>
> (2) Indefinite imprisonment must not be ordered unless the court is satisfied on the balance of probabilities that when the offender would otherwise be released from custody in respect of the nominal sentence

or any other term, he or she would be a danger to society, or a part of it, because of one or more of these factors:

(a) the exceptional seriousness of the offence;

(b) the risk that the offender will commit other indictable offences;

(c) the character of the offender and in particular --

(i) any psychological, psychiatric or medical condition affecting the offender;

(ii) the number and seriousness of other offences of which the offender has been convicted;

(d) any other exceptional circumstances.

(3)In deciding whether an offender is a danger to society, or a part of it, the court --

(a) is not bound by section 6 but is bound by any guidelines on the

imposition of indefinite imprisonment in a guideline judgment given under section 143; and

(b) may have regard to such evidence as it thinks fit.

(b) The Question of Prognosis

Risk assessment remains the key question. Specifically, whether the person would be a 'danger to society' at the time he or she would otherwise be eligible for release. Two main points deserve emphasis. Neither will come as a surprise. First, there are some problems in working out what 'danger to society' means; in other words, from what are we seeking to protect the public. Secondly, there are problems concerning the date to which 'prognosis' refers.

(i) Danger to Society: Protection from What?

To describe a person as a 'danger to society' suggests that the focus should be on crimes of serious violence, as it was in section 662 following *Chester*. However, section 98 shows signs of 'slippage' in that the specific criteria to which the court will have regard include (s.98(2)(b)) the "risk that the offender will commit other *indictable offences*.' This looks more like the language of *Clinch* in which the Court of Criminal Appeal indicated that s.661 was not limited to serious violent and sexual offences but to indictable offences in a more general sense. It is, of course, most likely that in practice s.98 will generally be raised inthe context of violent and sexual offences. However, we would also suggest that the section, when read as a whole, should in fact be restricted to predictions of serious violence or sexual offending; if the offending is not of this character, it may be that there is a 'risk' of the person committing further indictable offences but it cannot truly be said that the person is a 'danger' to the society or any part of it.

(ii) Prognostication: The Relevant Date

Under s.98, as in *Clinch*, the question is the risk which the offender would pose *at the date of possible release from the nominal term.* The question is *not*, therefore, whether the court thinks the person poses a danger at the date of sentence. The paradox therefore remains that the more serious the current offence, the less likely it is that a person will be subject to the order. This will restrict the application of s.98.

The legislation is clear that the relevant date is the date at which the person would be released. However, this seems wrong in principle. It can be argued that in the case of an indefinite sentence, the question ought to be whether, at the *time of sentence* the person is seen as such a risk that there should be the *option* of detention beyond the expiry of the nominal sentence. Under s.98, unlike the 'natural life order', one is not 'throwing the key away' for ever. The Parole Board must consider the case within a year of the expiration of the nominal term. Furthermore, following the clear precedents established by the cases under sections 661 and 662, the nominal sentence should have been reduced to take account of the indefinite sentence being imposed.

THE YOUNG OFFENDERS ACT 1994

1. IMPOSING A 'SPECIAL ORDER'

In chapter two we mentioned that the *Young Offenders Act* 1994 permits the court, in the case of offenders who show a certain pattern of offending, to suspend the normal principles of sentencing (especially proportionality) and to give 'primary consideration to the protection of the community ahead of all other principles' (s.125).

In addition to suspending normal principles and to giving primacy to the protection of the community in exercising general sentencing discretion, the courts have also been given a discretion to impose a 'special order' on those offenders who fall within the target group. We have already commented upon the 'qualification' criteria for such sentences.[67] The terms of the 'special order' now require analysis. The 'special order' is an order which is made in addition to a custodial sentence. Such an order can only be made on application by the Director of Public Prosecutions. The legislation gives little guidance to the courts as to how this discretion is to be exercised but simply states that the court must 'have regard to the periods that have elapsed before the offender has re-offended after being released from previous custodial sentences.'[68] This rather cryptic provisions suggests that another factor is regarded as a key indicator of risk: namely, a proven pattern of decreasing periods between an offender's release and subsequent re-offending. The genesis of this principle is far from clear and it has no specific counterpart elsewhere in the law. Nor is it clear why it is given special prominence in the legislation which is otherwise silent.

2. THE DURATION OF THE ORDER

The 'special order' is a rather unusual creature which differs significantly from both its predecessor under the *Serious and Repeat Offenders Act* and from the provisions pertaining to adults. Adults who are subject to special protective sentences are detained indefinitely. Under the *Serious and Repeat Offenders Act* offenders who satisfied the criteria were to be detained for a minimum of 18 months in custody, followed by detention at the Governor's Pleasure; in other words, they were also subject to detention an indeterminate period.

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67. See chapter two
68. Section 126(2)

The 'Special Order' is not indeterminate but runs, instead, for a set period of 18 months from the date at which the young person would otherwise be released from custody.[69] The Act provides that the offender may be released to the community after twelve of the eighteen month period under a supervised release order. Such a release would be a matter for the Supervised Release Board.

The purported basis of the 'special order' is 'protection of the community' but it is unclear why, as a matter of principle, it should be thought that a fixed period of 18 months should be imposed. There is no criminological evidence to suggest that '18 months' has any magical effect as opposed to one year or two years, and no evidence was ever produced to support this figure. There is no power for the courts to 'adjust' the period to take account of the circumstances of the case itself. Again, politics rather than logic provides the key; the eighteen month period seems to have been chosen so as to avoid the potential criticism that the Coalition sponsored *Young Offenders Act* was unduly soft compared with the Labour Party's *Serious and Repeat Offenders Act.*

ASSESSMENT AND CONCLUSIONS

The notions of risk and risk assessment within the law pertaining to special protective sentences in Western Australia do not stand up well to careful scrutiny. In the case of juveniles, it is unclear how the basic parameters of the special order were arrived at. In the case of adults, the legislation and the cases both slide uneasily between 'protection of the community from violent and sexual offences' and 'protection of the community from indictable offences generally'. There are also serious problems in terms of the date to which prognosis of risk refers. Under the current law, prognosis relates to the date of possible release. This has the bizarre consequence that the more serious the current offences, and the longer the term of imprisonment which is imposed for those offences, the less likely it is that an indefinite sentence will be imposed.

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[69]. Part 8 of the Act

CHAPTER FIVE: NON-CUSTODIAL SENTENCES

1. INTRODUCTION

Recent changes have seen 'risk' emerge as an explicit legislative criterion with respect to non-custodial options as well as custodial sentences. Before considering the specifics of this with respect to the various non-custodial options, it is important to locate this development within the wider context of changes in the philosophy underpinning community based sanctions.

Probation was introduced in Western Australia in 1963 and was modeled on similar systems in other jurisdictions. It was a measure which was imposed on an offender 'instead of sentencing' that person.[70] Originally, probation was based on the philosophy to "advise assist and befriend" the offender and in a fairly recent WA cases it was conceptualised as a measure which aimed at 'rehabilitation through supervision'.[71] The measures which now apply under the *Sentencing Act* 1995 represent a significant shift in thinking. Subject to what is said below, the community based measures are all now characterised as 'sentences' and are therefore subject to the general principles of sentencing to which reference was made earlier. Reflecting shifts which have been evident in practice for some time, monitoring and control in the community have also become far more explicit aims. The phrase 'advise assist and befriend' now has an archaic ring to it; 'offender management' and 'managerialism' generally is the order of the day. The focus on 'monitoring' has inevitably meant an increased focus on 'risk reduction' and therefore 'risk assessment'.

Section 39 of the *Sentencing Act* 1995 sets out a 'hierarchy' of sanctions. In rank order, they may be summarised as follows:-

(a) Impose no sentence and order the release of the offender.

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70 Offenders Probation and Parole Act 1963, later renamed the Offenders Community Corrections Act, section 9.

71 Generally see N Morgan, 'Imprisonment as a Last Resort: section 19A of the Criminal Code and non-pecuniary alternatives to Imprisonment' (1993) 23 UWAL Rev 299.

(b) Impose a Conditional Release Order (CRO).

(c) Impose a fine and order the release of the offender unless an order is made for imprisonment until the fine is paid.

(d) Impose a Community Based Order (CBO).

(e) Impose an Intensive Supervision Order (ISO).

(f) Impose a Suspended Sentence of imprisonment.

(g) In the case of a 'Young Adult' impose a term of imprisonment and order the person's detention at a 'Detention Centre'

(h) Impose a term of immediate imprisonment.

In the case of options (a) to (d), the court may also make a 'Spent Conviction Order', the purpose of which is to relieve the person of the adverse effects of a conviction.

Section 39 provides that a court must not use any one of these options unless satisfied that the previous options are not appropriate having regard to the general principles of sentencing contained in sections 6-8. The key principle in s.6(1) is proportionality but 'risk' plays a role in two ways. First, as charted in chapter two, it comes into play in terms of the 'in-out line'. This is because the curious provisions of s.6(4) state that a custodial sentence may be imposed because of the seriousness of the offence *or* for public protection. Secondly, and this is the main focus of this chapter, it plays a role with respect to the choice between the various non-custodial options. This chapter focuses on the 'community based measures' where risk assessment seems to play a particular role.

2. 'RISK' AND COMMUNITY BASED MEASURES

(a) Making a Spent Conviction Order

Spent conviction orders are covered by s.45, which presents a number of hurdles to a court. First and foremost, the presumption is *against* making such an order; the court

report is required for an ISO[74] and, in practice, is very likely in the case of a CBO. Pre sentence reports almost invariably contain some kind of risk assessment - often in terms of general risk of reoffending. Secondly, the curfew order[75] is designed to allow for "the movements of an offender to be restricted during periods when there is a high risk of the person offending..."

3. SUMMARY

Non-custodial as well as custodial sentences are increasingly subject to 'risk assessment' in various forms. We have shown that this can be directly related to the shift in community corrections towards 'monitoring' and 'control' and away from reform and rehabilitation. Again there are problems with the manner in which risk is incorporated. First, there are different tests ('risk of offending in a like manner again'; 'risk of offending during the order' and identifying periods when a person is 'at high risk of offending'). Secondly, the fact we have different tests seems to assume that we have risk assessment instruments which can answer the different questions. Finally the requirement to consider 'risk' sits uneasily with concepts of proportionality.

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74. *Sentencing Act* s.68
75. Ibid s.75

CHAPTER SIX: PAROLE AND WORK RELEASE

Previous chapters have traced the increasing role of risk at the point at which the courts determine sentence. However, the length of time a person is held in custody is affected not only by the sentence imposed by the court but by policies relating to early release from prison by virtue of parole and related policies. Risk plays a pivotal role in such early release mechanisms. This chapter examines the processes of parole and work release orders in Western Australia.

1. PAROLE

(a) Making a Person Eligible for Parole

In Western Australia it is for the courts to determine whether a person should be eligible for release on parole. The court's job, when sentencing a person to a term of twelve months or more, is to set the 'head sentence' and then to decide whether the person should be eligible for release on parole. The date at which the person can first be released is then determined by means of a statutory formula.[76] On the question of making an offender eligible for parole, section 89 of the *Sentencing Act* 1995 re-enacted the law as it had previously stood under s.37A of the *Offenders Community Corrections Act*. Under the terms of these provisions, as interpreted by the Court of Criminal Appeal, it is extremely rare for a person not to be made eligible for parole. At the risk of oversimplification, courts will only refuse parole in rare cases and where the person has committed a serious offence and has a long history of offending and of poor prior performance when under community supervision. [77] In other words, a combination of 'desert' and 'risk' seem to be at play at this stage.

(b) Releasing a Person on Parole

(i) Categories of offender

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[76]. The non parole period in one third of the sentence in the case of sentences of up to six years; it is two years less that two thirds of the sentence in the case of sentences over six years.

[77] See *Archibald* (1989) 40 A Crim R 228, *Shaw* (1989) 39 A Crim R, *Swain* (1989) 41 A Crim R 214, *Eades* (1990) 47 A Crim R 385, *Thompson* (1992) 8 WAR 387.

The legislation distinguishes between two categories of offenders who are coming up for parole for the first time on their current sentences:

'*Special Term*' prisoners are those who are serving a sentence of three years or more, imposed for an offence of a violent or sexual nature, as listed in the Act. These prisoners must be considered by the Parole Board itself before they can be released on parole.[78]

'*Others*'. Other prisoners can be released 'automatically', that is by order of the Secretary to the Board, without being referred to the Parole Board itself. However, there is provision for such 'auto-release' cases to be referred to the Board for special reasons.[79] In practice, such referrals are usually made for one of three reasons. First, on the basis of risk to the safety of the community at large or of individuals (for whom protective conditions may be imposed). Secondly, where there are concerns about proposed accommodation and third, where there is a need for special conditions relating to counseling/treatment or drug testing. The third situation is often seen in terms of monitoring and 'risk reduction' rather than treatment; in other words, as a strategy for reducing the risk of a person re-offending.

(ii) Criteria for Release

"Risk" is a matter which weighs most heavily in the Parole Board's consideration of cases. There is again some 'slippage' in the language but this time the legislation is ultimately more specific than it is in the context of the sentencing stage. Under s.18 of the *Sentence Administration Act* 1995, the Board's paramount consideration is 'the protection and interest of the community.'

The meaning of the 'protection of the community' question crystallizes and narrows with the more specific provisions of s.26. The effect of s.26 is that there is a presumption in favour of parole being granted at a person's earliest eligibility date (EED). The Board may postpone, defer or refuse parole but (s.26(3)), must **not** do so unless there are 'special circumstances' which justify this course of action, having regard to the nature and circumstances of the offence, the degree of risk the offender

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78 *Sentence Administration Act* 1995 s.19(2) and (4

poses to the personal safety of people in the community or any individual in the community and any other relevant matters.

Under s.26, the Board should therefore not be governed primarily by risk of reoffending in a general sense but by the risk of the person reoffending in a manner which poses a risk to the personal security of the community or individuals within the community. This is important because the Parole Board sometimes receives different risk assessments from different groups who are charged with providing advice to the Board. For example, the risk assessment instrument used by community corrections officers may well indicate that a person is at 'high risk' of reoffending in a general sense; however, the 'specialist' reports from groups such as the Sex Offender Treatment Unit may put the person at 'low risk' of reoffending in a sexual manner.

(iii) Parole Conditions

In chapter five we traced the trend in community based corrections towards 'monitoring' and 'risk reduction' rather than 'treatment'. This is reflected in many of the conditions placed in parole orders. The Parole Board has a broad discretion as to the conditions it will impose in a parole order.[80] In addition to the standard conditions regarding reporting, notifying of change of address etc., the Board commonly imposes protective conditions to reduce the risk to the victim (eg a 'no contact' condition so that contacting the victim would amount to a breach of parole). and conditions with respect to substance abuse counseling, urinalysis testing, sex offender programmes etc.. The Board now has specific statutory authority to impose electronic monitoring[81] but such conditions are comparatively rare. Put simply, the reason for this is that if an offender requires such a high level of monitoring, that person arguably poses such a risk that he or she should not be released on parole.

(v) Release on Parole to Reduce Community Risk

Although 'risk to the community' is obviously a matter which militates against a person being released on parole, there are some situations in which the Parole Board

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79 Ibid s.19(1)

80 *Sentence Administration Act* 1995 ss.31-32

81 Ibid s.32

faces the difficult question of whether the long term risk to the community can be reduced by the release on parole of a person who is at risk of offending again. I a sense this is an issue of 'collateral risk' . For example, a prisoner who has served a long sentence for serious crimes of violence may have had parole deferred at his first eligibility date due to the perceived risk of reoffending. The Board may, at that time, be of the view that the person is unlikely to survive a long parole period. At a subsequent review, the person may still appear to pose a risk but all determinate sentences come to an end, at which point the person must be released into the community and will be free of any constraints and conditions.

Consequently, the Board will sometimes release a person to a short period on parole on the basis that a period under supervision, subject to conditions and subject to being returned to prison may operate as both a carrot and a stick to the released person. it is not possible to generalise as to when this will happen as each case is approached on its merits.

2. WORK RELEASE ORDERS

(a) Nature of Work Release Orders

Work Release Orders are of more recent origin than parole. Work release orders may be made with respect to both parole term prisoners and 'finite term' prisoners (ie those who are not eligible for parole). Under s.46 of the *Sentence Administration Act* a prisoner may be released to 'Work Release' for a maximum of six months prior to the date at which he/she would otherwise be eligible for release, provided he/she has served at least twelve months in prison. If released on Work Release, offenders are required to complete gratuitous community work and personal development programmes as well as complying with any other commitments.

Work Release is not something over which the courts have any control even though it is, in a sense, even more of a privilege than parole. If an offender meets the statutory criteria and applies for work release, it is up to the Parole Board to consider the case.

(b) Releasing a Person on Work Release

The statutory criteria with respect to work release make explicit reference to notions of risk. Specifically, the Board must not release an offender unless satisfied that the person 'would pose a *minimum risk* to the *personal safety* of people in the community or of any individual in the community'.[82]

The language is again quite specific. The question is not whether the person is a minimum risk of reoffending in general, but whether the person poses a risk to the *personal safety* of people in the community. This means that, in practice, the Board is very unlikely to make a work release order in the case of an offender who has a history of violent offending or with respect to whom there is a specialist report (for example, from the Sex Offender Treatment Unit) to the effect that the person poses a risk of violent or sexual reoffending. It is far more likely to make such an order in the case of offenders whose records relate to non-violent activities such as fraud, stealing and drug offences.

3. SUMMARY

'Risk' is a crucial consideration in decisions as to parole and work release orders. In the case of parole, risk is one of the matters which is taken into account by the courts in determining whether a person is to be eligible for parole. When it comes to the question of release on parole, the Board's primary responsibility is 'protection of the community' which, in this context, has been refined to mean risk to 'personal safety'. While risk to person safety is an important consideration for parole, it is even more crucial in the context of work release; the Parole Board must not release a person to work release unless they pose 'no more than a minimum risk' to personal safety.

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82 *Sentence Administration Act* s.48.

CHAPTER SEVEN:SUMMARY AND CONCLUSIONS

This chapter draws together the key trends which were revealed by the preceding analysis and highlights the key issues and problems with the increasing use of risk in sentencing and parole decision making.

1. RISK MOVING TO CENTRE STAGE.

Most of the focus in recent academic literature has been on developing notions of 'desert'. An initial reading of many legislative schemes confirms that 'proportionality' is usually afforded pride of place. However, it is clear that 'risk' has started to occupy a far more central role and, over the past decade, has shifted from the background to the foreground of many statutory schemes. In both penological and practical terms, this is a very important shift. In some respects, at least in the Australian context, it may in fact be more important than the recognition of 'proportionality' as the guiding principle. This is because, as we saw in chapter two, proportionality always was the key principle and to enshrine that in legislation is not dramatically new. It is risk which is the 'new kid on the block'.

In Western Australia the increasing focus on 'risk' can be traced to the early 1990's, especially in the context of juveniles. The focus on risk / community protection has also tended to be the result of political point scoring rather than the product of carefully considered policy changes.

2. RISK OF WHAT? MAKING RISK ASSESSMENT INSTRUMENTS ANSWER THE QUESTION.

If risk is to play a more central role, it should be clearly defined in relevant legislation and/or policy documents. Risk assessment instruments should then address the precise question of what sort of conduct we are talking about. It may well be that the tests will be different at different stages of the criminal process (eg the sentencing and parole stages) but if this is so, the reasons for different tests should be explained.

One of the more glaring features of recent legislation is its signal failure to define its terms. The preceding discussion came up with the following variants on 'public protection' and 'risk assessment'.

* "Risk of reoffending" in a general sense[83]

* "The protection of the community"[84]

* "Protection of the community and property"[85]

* "Protecting the community from illegal behaviour"[86]

* "The physical protection of the public"[87]

* "Whether in 20 years' time the person will be a significant risk to the community" / whether "for the whole of perhaps 45 or 50 years of life remaining in him he will pose such a risk"[88]

* "So likely to commit further crimes of violence (including sexual offences) that the person constitutes a constant danger to the community"[89]

* "A positive danger to the community by reason of the commission of further and continued indictable offences"[90]

* "High probability of committing offences for which a custodial sentence could be imposed"[91]

* "A danger to society because of the risk of committing further indictable offences"[92]

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83. Conditional Release Orders; see chapter 5.
84. Section 19A of the *Criminal Code* and s.6(4) of the *Sentencing Act* (see chapter two) and Division 9 of the *Young Offenders Act* (chapter 4).
85. Guidelines on sentencing juveniles in *Crime (Serious and Repeat Offenders) Sentencing Act* 1992 (chapter 2)
86. Section 7(d) of the *Young Offenders Act* 1994 (chapter 2)
87. Parliamnetary debates on *Crime (Serious and Repeat Offenders) Sentencing Act* 1992 (chapter 2)
88. Discussion in *Mitchell* on 'natural life' sentences (chapter 3)
89. The case of *Chester*, discussing s.662 of the *Criminal Code* (chapter 4)
90. The case of *Clinch*, discussing s.661 of the *Criminal Code* (chapter 4)
91. *Young Offenedrs Act* (chapters 2 and 4)

* "Likelihood of the person committing such an offence again"[93]

* "Risk to the personal safety of the community or any individual in the community"[94]

Some of these formulations are very different. Others appear fairly close but are phrased in different ways. They are therefore unclear, inconsistent and imprecise. What is clear is that it is far easier to talk in general terms about 'risk' and 'public protection' than it is to define those terms with the degree of precision which ought to be required as a matter of law and which is needed in order to produce proper risk assessment models.

This latter point is of crucial importance; a risk assessment instrument which is designed for one purpose (eg level of supervision in a community order) will be quite inappropriate for other tasks (eg parole decisions and decisions as to sentence type). However, the danger is that risk assessment instruments which have been developed for one purpose will in fact be used for other purposes. A good example of how this can happen is provided by the case of *Klavins*. As a matter of practice the Ministry of Justice used to 'filter' applications for work release orders and would only put cases of 'minimum security' prisoners to the Parole Board. Klavins had for a time been rated a minimum security prisoner but his security rating was upgraded. His work release application was therefore not put to the Parole Board. Klavins challenged the Ministry's practice and in the Supreme Court Rowland J ruled - quite properly - that risk *to the community* is quite different from *prison security risk.*[95] As a result, all applications for work release were subsequently put to the Board.

3. RISK AND TEMPORAL QUESTIONS

The preceding analysis revealed two particular issues relating to the time to which risk assessments relate. The first and most obvious is that 'risk assessments' should specify the periods 'at risk'. In the context of non-custodial sentences, we saw that there may be differences; spent conviction orders involve a prognosis as to whether

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92. *Sentencing Act* 1995 s.98 (chapter 4)
93. Spent conviction orders (chapter 5)
94. Parole and Work Release (chapter 6)

the person will *ever* commit a similar offence, whereas conditional release orders involve an assessment with respect to the duration of the order. The Parole Board operates with rather general assessments of risk and the various forms of assessment - especially from groups such as the Sex Offender Treatment Unit, often do not specify the period. In principle it could be argued that the main concern ought to be risk of the person reoffending *during the parole period* but even this proposition requires careful evaluation; for example, a persistent paedophilic sex offender may be assessed to be at high risk of reoffending in a like manner but such offences are often the result of long term 'grooming' of the victim. It might appear somewhat bizarre for the Parole Board, in those circumstances, to release a person to a parole period of say 6 months or a year because the risk of reoffending *during that time* is not high.

The second is the question of prognosis as to the risk which a person will pose at a date some way into the future. The case of *Mitchell* provided a dramatic illustration of different judges putting different views without even clearly recognising that this was the case. In the case of special protective sentences, we exposed a paradox. Obviously, the further away the date to which prognosis refers, the harder it is to prognosticate as to risk. In the context of protective sentences, courts are required to consider the risk the person would pose at the point of possible release into the community. This has the result that the more serious a person's current offences - and the longer the determinate sentence imposed for those offences - then the less likely it is that a prognosis can be made that the person poses a serious risk at the point of possible release into the community. It is undesirable that judges are forced to make judgments about risk a long way in advance and legislation ought to be revised to remove this requirement. In the case of natural life orders, the focus should be primarily on the gravity of the offences rather than risk. In the case of special protective sentences the question ought to be whether at the date of sentence the offender poses such a risk that there should be the possibility of that person being further detained on the expiry of the sentence imposed for the current offences.

4. RISK AND THE SUBVERSION OF PROPORTIONALITY.

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[95]. Unreported, Supreme Court, 1995

The analysis revealed that 'risk' has been grafted on to legislation which affords primacy to 'proportionality' but that risk and proportionality are uncomfortable bedfellows. At root, the problem is that proportionality is essentially 'backward looking' - examining the nature and circumstances of the offence, whereas risk is essentially forward looking. A case can be made for special protective sentences in some circumstances. Although such sentences are obviously controversial, at least the role of risk as the justification for detention is quite explicit.

However, a matter of particular concern is the increasing role of risk in the context of ordinary sentences. The preceding chapters each looked at risk at specific stages in the process. If we draw these separate segments together, we see that although risk is not usually put as a primary factor, it comes in at so many stages that it has a clear incremental impact. It has a role to play in the choice of custodial as opposed to non-custodial measures; in the case of custodial sentences, under the principles developed by the courts, it has some - though limited - impact on sentence length.[96] But the 'head sentence' is only the start. Risk then feeds in to the question of whether the court should order that the person be made eligible for parole. If the person is eligible for parole, risk then becomes central to the Parole Board's decisions.

In a sense, proportionality therefore comes in to play primarily at one stage of the process; setting the 'head sentence'. It has less of a role to play at other stages. By contrast, 'risk' in various forms feeds into several stages. It is obviously possible to defend such a policy but it has to be recognised that it does subvert proportionality - and the extent to which it does so must not be underestimated.

Two examples serve to illustrate the problem. Take, first, the case of Alan Bond who, after appeal by the prosecution, was sentenced to a total of seven years' imprisonment for sustained and systematic fraud involving an estimated billion dollars; money which was improperly shifted from public to private companies.[97] Mr Bond received credit for his 'good works' and lack of much record and for his 'loss of status'. In the

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[96]. See especially chapter 2 - discussion of *Veen* and *Baumer* and chapter 4 where it was shown that in the case of special protective sentences involving governor's pleasure detention on the expiry of the sentence for the current offences, the determinate term will be reduced as risk is built in to the GP term.

[97]. The Court of Criminal Appeal's decision in Bond was handed down on 22 August 1997

sense in which 'risk' is normally used, Mr Bond did not pose a 'risk' to the community. He was made eligible for parole and, under the parole formulae, will be eligible for release on parole after 2 years and 8 months of this sentence. However, he will be eligible for release to the community under a work release order six months earlier; ie after 2 years and 2 months. It is likely that he will put up a very strong work release plan and, given that he is not a risk to the 'personal safety' of people in the community, it is likely that that work release will be granted. His likely custody time on a seven year sentence is therefore 2 years and 2 months.

By contrast, consider the case of a 23 year old man facing three burglary charges (not involving violence). He has a history of burglary offences and a number of public order offences, including relatively minor assaults on public officers. He also has a history of breaching community based sanctions, usually through public order offences, and has little community support upon release. The court may decide that he should be sentenced to a total of three years' imprisonment for his current offences of burglary (not involving violence). Given his record and prior response to community supervision, the court may decide that he is not eligible for parole. It is more likely that he will be made eligible for parole but it is quite possible that the Board will determine that he poses a risk of reoffending and appears unlikely to survive a long period on parole. The Board may therefore deny parole completely or may decide to release only to a short period of parole - say six months. It is almost inconceivable that such a person would be granted work release as he would be assessed as 'more than a minimum risk'. If, on the three year sentence, he is denied parole, he will serve 2 years in prison. If he is released to a six month parole term he will serve 18 months in prison.

The net result is that the proportionality of the sentences imposed by the court has been completely subverted; there may end up being only two months difference in terms of actual custody time between a sentence of three years and a sentence of seven years. Clearly this absurd and unjust situation reflects more than just 'risk'; in particular, it is the result of the formulae for remission, parole and work release. However, risk is a crucial factor in calculating what a sentence is likely to mean. If legislation continues to highlight 'risk', the inroads on proportionality will become greater.

5. THE DISCRIMINATORY IMPACT OF RISK

Risk assessment appears, on the face of things, to be a neutral matter. However, the examples in the previous discussion have highlighted the 'collateral risk' that 'risk assessment' can be discriminatory in impact or effect.[98] In other words, it can adversely impact on lower socio-economic groups and be to the advantage of 'better off' criminals. In Australia generally, and in Western Australia in particular, it is well established that Aboriginal people are far more 'at risk' of arrest, conviction and sentence than non-Aboriginals. In any form of risk assessment, many Aboriginal offenders will rank as 'high risk'. An increasing emphasis on risk assessment therefore has potentially huge ramifications in terms of Aboriginal imprisonment rates.

One particular aspect of this is raised by the selection of offences which are perceived as 'high risk'. Media and political debates about 'public protection' invariably focus around certain types of behaviour - for example, high speed chases and home burglaries. There is no reference to the need to protect the community from the 'serial fraudster'. This has fed into legislation in which certain offences are 'scheduled' as being offences in respect of which 'public protection' is paramount.[99] It is also possible to identify specific practices which are arguably discriminatory. Work Release Orders are a classic example; as seen by our earlier examples, the offenders who most readily 'fit the bill' in the sense of having work to go to and good community support are white collar criminals. It is much harder for other offenders - particularly those who have had no significant work experience and have little community support - to satisfy the criterion of being 'no more than a minimum risk to personal safety.'

6. CONCLUSION

Risk and risk assessment are coming to play a greater role, and their role is likely to continue to increase as politicians seek to capitalise on law and order issues and the catchcry of 'public protection' for short term gain. Current legislation does not clearly

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[98]. For a discussion of this problem inthe USA, see M Tonry, *Malign Neglect*, Oxford University Press, 1995

or consistently define the term risk and we do not have risk assessment instruments which actually address the specific questions which the legislation poses. It is essential that people working in the field are alert to these problems and that the legal system enforces and monitors the questions. Our increasing use of 'risk' also raises profound and difficult issues of principle; in particular, it can be subversive of just and proportional sentences and has a potentially discriminatory impact.

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[99]. See chapter two, especially on young offenders

PART D: RISK ASSESSMENT IN CORRECTIONAL SUPERVISION AND PRE-SENTENCE REPORTS

1. THE NATURE OF THE WESTERN AUSTRALIAN RISK ASSESSMENT MODEL

The principal aim of the Western Australian risk assessment project is to develop a reliable, valid, self-correcting prediction model to inform the correctional supervision process and for use in pre-sentence reports.

Research and development of the Risk Assessment model is being carried out by the Crime Research Centre, University of Western Australia and has been commissioned by the Western Australian Ministry of Justice. It is about to enter the final year of its four-year development. The principal aim of the Western Australian risk assessment project is to develop a reliable, valid, self-correcting prediction model to inform the correctional supervision process and for use in pre-sentence reports.

The model is based on data accumulated in a comprehensive and regularly updated database of offender charges linked to other criminal justice events such as correctional supervision, imprisonment, police lock-ups, and, in future, to court outcomes. Separate arrest and imprisonment components of this database have provided the foundation for a program of criminal career research at the Crime Research Centre since its inception in 1988 (Broadhurst and Loh, 1995; Broadhurst, Maller, Maller and Duffecy, 1988; Broadhurst and Maller, 1990; 1991, 1991a 1992)

Because of the comprehensive nature of the database underpinning the research, it has been possible to develop the model not simply on samples of offenders, but on all incidents where offenders have been charged with an offence in Western Australia since 1984. This means that it is constructed on a data-set containing over 600,000 'arrest events', representing the criminal justice contact history of over 155,000 individuals, together with any associated periods of imprisonment or community correctional supervision. The statistical model is therefore being built on a base of events reflecting Western Australian criminal justice experience over a period of more than 13 years.

The availability of this information furnishes a unique opportunity for the development of an actuarial risk assessment instrument.

Research, principally conducted in North America, indicates that there are potentially great advantages in having access to a reliable risk assessment instrument. Sherman et al. (1998), in a critical and thorough review of 'what works' in crime prevention, consider that rehabilitation programs for adult and juvenile offenders reduce rates of repeat offending if they use treatments appropriate to their risk factors. This endorsement of risk-based approaches places them in a relatively small pool of 'what works' measures, whose members are easily outnumbered by those in the 'what doesn't' and 'what's promising' categories.

At one level a risk-based approach to correctional supervision is common sense. Limited human resources make it imperative that attention is given to those offenders most likely to reoffend. Furthermore, the identification of high-risk offenders requires a systematic and scientific approach. At another level, there is a stronger version of the 'risk principle' (Andrews et al., 1990), which asserts that correctional treatment is most likely to reduce offending when applied to high-risk offenders and is likely to backfire when applied to low-risk offenders. This stronger version of the risk principle is subject to academic debate and one of the aims of the research accompanying the model development is to test the validity of the 'risk principle' in the Australian context.

Apart from the general advantages expected to flow from an effective risk assessment instrument, there are some specific advantages expected of the WA model.

SELF CORRECTING

The database upon which the model is based is updated regularly. This means that it is a relatively simple procedure to update the estimates of re-offending, and hence the parameters of the model, on a regular basis. It will be possible to select a range of years over which to base the model's parameters. In the course of time it will be possible to 'drop off' the contribution of older years to the model, or assign them lower weight, and hence base the model parameters on the most recent experience of

offenders with the criminal justice system. This aspect of the model will be addressed in Stage 4 of its development.

A MODEL ALLOWING INTERACTIONS BETWEEN VARIABLES

Typically, statistical approaches to prediction modelling use standard or logistic regression models with first order terms only. In other words, the impact of a predictor such as offender age is assumed to be uniform across all offenders. Its influence is not assumed to depend on other variables, such as prior offending history. Furthermore, given that offender samples are usually small, the joint influence of prediction variables can be tested only in a limited way, since small samples will provide insufficient data to thoroughly evaluate the impact of particular combinations of predictors.

However, it does appear that re-offending is influenced by specific combinations of factors, rather than by factors acting independently. For example, criminal careers research (Block and van der Werff, 1991; Blumstein, Cohen and Farrington, 1988) suggests that, for some categories of 'career criminals', age is a less important factor in predicting frequency of offending and desistance from crime than it is for other offenders. The Western Australian model uses a technique of hierarchical grouping on the 'primary variables'[100] to provide estimates of re-offending risk for 'like' offenders. In some instances the number of 'like offenders' is considered too small to produce a reliable group prediction. When this situation arises an iterative process is invoked which relaxes the strict conditions on grouping but still produces a 'best' risk estimate. For example, the case in point may be for offenders of a given age; offence and position in a criminal career such that none or few like cases can be immediately found. A 'comparison group' is formed based primarily on the perceived importance of each variable, until a sufficiently large group of like cases is assembled to provide a valid risk estimate.

The model also uses regression techniques to 'fine-tune' the estimates from the interactive model. For example, even if the primary grouping of variables provides a

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[100] The primary variables used for grouping in the Western Australian model are prior arrests, age, sex, race and current offence.

reoffending estimate for offenders of a given age (say 19), the model will use regression techniques to fine-tune the estimate depending on the exact ages of offenders. The estimate for a group offenders who have just turned 19 will differ from that for a 'like' group of offenders who are almost 20. Consequently, regression techniques play an important but subordinate role in the model and this approach differs from standard techniques where the primary foundation of the model is a regression equation without interaction terms[101].

USE OF INSTITUTIONAL DATA TO INPUT TO THE MODEL

The model is being developed to produce risk estimates while avoiding as much as possible the double entry of data by correctional staff. Default data entries are to be provided from information already held in Ministry of Justice computer systems.

OUTPUT

Estimates of the long-term probability of rearrest for a future offence are the initial outputs from the model. These estimates are being supplemented with estimated probabilities of rearrest for shorter periods of time, from one year to five years. Confidence interval estimates of the reliability of these probabilities are also available.

ALTERNATIVE USES OF THE MODEL

There is an expectation that the model will also be useful in areas other than those of its primary design. For example, the knowledge of re-offending patterns compressed into the model is expected to be of value in the evaluation of community correction supervision. Actual, as opposed to expected, behaviour of groups of supervised offenders can be measured, allowing any change in reoffending behaviour to be assessed. Furthermore, reliable knowledge of re-offending base-rates is essential for the assessment of program proposals, resource requirements, and a variety of other decisions within a correctional agency.

2. GENERAL CONSIDERATIONS IN THE DEVELOPMENT AND EVALUATION OF RISK ASSESSMENT MODELS

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[101] This approach generally leads to the development of a 'pencil and paper' risk assessment model with

Gabor (1986) identifies three basic purposes for criminological prediction. These are

- assessing the potential danger an individual poses to society
- ascertaining the level of custody or surveillance required in the management of an offender in the care of a correctional institution or agency, and
- assessing the therapeutic needs of an offender

In the case of the current model it is clear that the second and third aims predominate. The 'risk' that is currently predicted by the model is the risk of *any* further criminal charge following the commencement of a period of community supervision. Thus, the criterion of 'failure' built into the model at present does not limit itself simply to those serious offences generally regarded as the hallmarks of 'danger to the community'. It is clear from section C of this report that 'risk' has been defined in various and incompatible ways and that the legislation is in some instances vague and ambiguous. Very careful attention needs to be paid to the specific context for which a risk assessment is to be made.

The advantage of formal prediction instruments is that they can replace current arbitrary and subjective judgements with a more structured approach. However, there is a danger that these structured approaches may foster self-fulfilling prophecies by presenting individuals or groups in stereotypical roles they find difficult to discard. In this way they may reinforce rather than rectify social inequalities. One essential element in minimising this tendency is to clearly explain to users of the instrument the basis of its development.

Copas and Marshall (1998) identify three difficulties in the development of a risk assessment instrument which they believe to be 'essentially insurmountable'.

These are:

1. The limitation that reoffending is necessarily identified with reconviction (or rearrest in the case of the WA model). We know that rearrest rates represent some

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particular values of the relevant variables adding a fixed contribution to a total risk score.

unknown fraction of true reoffending rates and that the same variables (such as age, sex and race) which prove to be such successful predictors of rearrest may be correlated with the fraction of reoffending discovered.

2. The problem that an unconditional or objective estimate of risk is required prior to sentence despite the fact that future treatment or sentence type may itself affect the risk prognosis.

3. The inadequacy of criminal justice data to always reflect the true sequence of offending. The authors refer here to 'pseudoreconvictions', which occur when an offence committed prior to the criterion offence is dealt with afterwards. The court data indicate that reconviction has occurred when in fact the offender has not offended *subsequent* to the criterion offence.

Note, however, that we do not need to posit a perfectly efficient criminal justice process for prediction to have value. This was pointed out in the 19th century by the Belgian social scientist Adolphe Quetelet (1996) who understood that detected crime represented some fraction of crime, a large part of which goes undetected or unpunished. Nevertheless, Quetelet understood that criminal justice data (in his case they were court statistics) could still be value if the ratio of undetected to detected crime remained in a fairly constant ratio over time, across offences, and among different types of offender.

We are aware then, how important it is to legitimate such a ratio, and we may be astonished that this has not been done before now. (Quetelet, 1996:14)[102].

One of the few Australasian studies to test differential ratios of detected to undetected crime was conducted in New Zealand (Fergusson, Horwood and Lynskey, 1993). Using self-report methodology to benchmark official arrests, the study, while confirming high Maori rates of offending, nevertheless indicated that Maori offenders were more likely to appear in official records than would be expected on the basis of self-reports. Furthermore, this New Zealand study found that the higher risk of

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[102] Quetelet's main method of legitimating the ratio of unknown or unprocessed offences was to examine the pattern of reduction from prosecution to conviction. A consistency of this ratio over time

offending found for their sample of Maori youth was explained by a range of family, social, economic and home environment factors. When these factors were taken into account, ethnicity proved not to be a strong predictor of offending behaviour.

Copas and Marshall (1998) provide thoughtful comments on the *interpretation* of a risk assessment instrument. Most significantly, they point out that:

1. Their own instrument (and by implication most risk assessment models) should be interpreted as providing a description of the correlates of risk, rather than a causal explanation of risk;

2. Statistically based instruments, such as their own (or the WA instrument), do not provide predictions about individuals. Rather, they estimate what the reconviction or rearrest rate will be for *groups* of offenders who match the individual on the set of variables used by the instrument;

3. The instrument acts as a benchmark against which supervising officers can test the subjective assessment they make in a particular case.

Gabor (1986) makes a point relevant to 2 above to the effect that statistical methods of prediction, when applied to individuals, entail an inevitable degree of built-in error, since these methods define groups with varying rates of success. Thus, not everyone fails (or is even expected to fail). By contrast, clinical prediction does attempt to predict for the individual offender and *in theory* can be 100% successful, even though there is a strong body of evidence indicating that clinical prediction is not in practice as reliable as statistical methodology.

3. RISK AND NEEDS IN CORRECTIONAL SETTINGS

Section 2 introduced the notion of the 'risk principle' and discussed briefly some of the promising research evidence supporting the practices of correctional agencies whose provision of offender programs is risk-based. This section will discuss that research in more detail and examine some preliminary evidence regarding the 'risk principle' in Western Australia. However, before introducing this discussion, the

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and across other variables such as sex and age of offender - the visible end of the 'spectrum' - provided

report will review basic concepts relating risk and need, which contribute to an understanding of the research about the risk principle.

RISK FACTORS

In general terms, risk factors are all of those factors which have been demonstrated to be associated with re-offending, as measured by re-conviction, re-arrest, breaches of supervision conditions, self-reported re-offending and so on. A common starting point is to make a distinction between *static* and *dynamic* risk factors. Other categorisations of risk factors are possible. For example, Monahan et al. (1994) group their predictor variables into four *domains*:

- dispositional (including both demographic and personality factors)
- historical (covering family, work, educationa, mental health and crime and violence)
- contextual (including perceived stress, social support and means for violence), and
- clinical (covering mental illness symptoms, social functioning and substance abuse)

Additionally, Gabor's (1986) schema is a more complex grid covering several dimensions. However, the static/dynamic categorisation has acquired a certain currency in the correctional literature and will be adopted here.

Static risk factors are those which are (relatively) fixed in nature and not amenable to intervention. Examples include various measures of offending history, as well as the age, sex or race of the offender.

Dynamic risk factors are those risk factors which are amenable to change. Bonta's (1996) examples include alcohol and drug abuse, the presence of antisocial friends, quality of marital or family relationships, attitude to offending and financial management skills.

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evidence that the ratio of unknown offences to known offences was also a constant.

NEEDS

The concept of need is deceptively simple. It relates to perceived deficiencies in offenders that may or may not relate to the risk of future re-offending. Lab and Whitehead (1990) note that offenders have many needs. These may be interpreted broadly and identified differently depending on the approach of the individual making the assessment of needs. For example, the needs of offenders will be assessed in different ways by correctional officers, social workers, religious chaplains, education officers, spouses or, most importantly, offenders themselves. Several Canadian researchers (Andrews, Bonta and Hoge, 1990, Andrews and Bonta, 1994) have introduced the concept of *criminogenic needs* in order to make the discussion of needs more precise. Criminogenic needs are defined by these researchers to be those needs which are related to offending behaviour, either future or past. Accordingly, the claim is made that certain offender needs are criminogenic whereas others are not. For example, Andrews (1996) argues that poor self-esteem and feelings of personal inadequacy are not criminogenic needs, whereas antisocial attitudes, styles of thinking and behaviour, peer associations, chemical dependency and self-control issues are related to future offending. The conclusion is sometimes drawn that non-criminogenic needs are not appropriate targets for correctional intervention. However, this conclusion assumes that the reduction of future offending is the *sole* aim of correctional intervention.

RISK AND NEEDS

In general we may regard needs and risks as a set of overlapping factors, consisting of static risk factors, dynamic risk factors, criminogenic needs and non-criminogenic needs. The Canadian research (Bonta, 1996) has been concerned to emphasise those factors in the overlap between these two categories. This approach equates dynamic risk factors with criminogenic needs[103].

[103] Note that equating risk factors with criminogenic needs places an exclusive emphasis on *individual* risk factors since needs are defined only in relation to individuals. Risks operating at the social or situational level, for example unemployment levels or community drug use, are regarded as something the individual must learn to manage, rather than something to be targeted in themselves.

In certain instruments, for example the Level of Supervision Inventory, risk and needs assessments are combined, whereas in others such as the Wisconsin classification system (Baird, 1981) they are kept separate. In the current stage of the Western Australian project, logistic regression analysis demonstrated that certain dynamic risk factors such as work habits and drug and alcohol use were able to contribute to the predictive power of the actuarial model. These risk factors had not been collected for a long enough period of time to be candidates for immediate inclusion in the model, but the possibility remains for them to be included at some later date when sufficient data are available. In the interim period the actuarial model is based on static risk factors.

With this basic schema we can begin to discuss various principles of intervention proposed by Andrews et al. (1990).

THE RISK, NEEDS AND RESPONSIVITY PRINCIPLES

Andrews et al. (1990) define three key principles of effective program delivery which they call the risk, need and responsivity principles.

The risk principle states that higher levels of service are best reserved for higher risk cases and that low-risk cases are best assigned to minimal service. (Andrews et al., 1990: 374)

The need principle is connected with the selection of appropriate intermediate treatment targets.

> ...psychology is particularly interested in those dynamic risk factors that, when changed, are associated with subsequent variation in the chances of criminal conduct. Clinically, dynamic risk factors are called criminogenic needs. ... The most promising intermediate targets include changing antisocial attitudes, feelings and peer associations; promoting familial affection in combination with enhanced parental monitoring and supervision; promoting identification with anticriminal role models; increasing self-control and self-management skills; replacing the skills of lying, stealing and aggression with other, more prosocial skills; reducing chemical dependencies; and generally shifting the density of rewards and costs for criminal and noncriminal activities in familial, academic, vocational and other behavioural settings. (Andrews et al., 1990: 374)

The third principle is succinctly stated by Losel (1993):

> The responsivity principle refers to an adequate matching of kinds and styles of service to the abilities and learning styles of the offender.

While there are important sources of support for these principles of intervention they are not uniformly supported in the literature. Losel, for example, finds support for the effectiveness of programs that satisfy all three principles. However, other meta-analyses reviewed by Losel did not find support for the risk principle. Furthermore, in his review of the interaction between offender characteristics and programs, Losel concludes that meta-analyses do not find a consistent effect of offender characteristics on program results. Losel sounds a warning to those who would attempt to classify any type of offender as 'untreatable' on the basis of meta-analytic research and by implication this reasoning applies to offenders at any rated level of risk, need or responsivity.

REFLECTIONS ON THE RISK PRINCIPLE

It is apparent that one reason for the failure of some researchers to find support for the risk principle is that the principle itself is stated in an ambiguous manner. The principle is stated in terms of *relative* rather than *absolute* levels of risk. A precise and literal interpretation of this version of the risk principle could be stated as follows:

> Imagine three groups of offenders at positions A, B and C on a descending scale of risk. The prospects of successful intervention with the group at point B are better than they are for the group of offenders at point C and worse than they are for the group at point A. Furthermore, it makes no difference where B sits on an absolute scale of risk. All that matters is that A is greater than B, which in turn is above C.

A result which contradicts this version of the risk principle, but which sets up the possibility of an alternative statement of it, is provided by Robinson (1995). The offenders targeted in his research were Canadian federal offenders released from prison. Robinson found that a cognitive skills training program was far more effective in reducing the recidivism rates of low-risk offenders than it was for high-risk offenders. Noting that this outcome did not support the results of previous research, he drew attention to the fact that 'low-risk' prisoners in his sample of federal

offenders were comparable in terms of absolute risk with 'high-risk' offenders in samples of offenders drawn from probation caseloads and provincial prisons. While this conclusion makes sense in the Canadian context, it nevertheless radically undermines the generality of the risk principle as it could be applied to groups of offenders in other countries and other settings[104]. Robinson was not concerned with establishing a new interpretation of the risk principle even though he implicitly established the importance of absolute levels of risk, rather than relative levels. Nevertheless, if his research can be generalised, it suggests that there is some limit on the level of reoffending risk beyond which programs and services will have a more limited effect. It would imply that the second part of the hypothesis stated above would need to be modified, by, for example, limiting the 'bandwidth of risk' over which one could be confident that the principle operates effectively. Specifically, Robinson's finding indicates that above a certain point on some absolute scale of risk the principle would not operate. Moreover, it would be very difficult to specify an absolute level of risk which would in practical terms set the upper bound of its operation. This task would require a standardisation of measures of recidivism, follow-up time, criterion for failure and so on. Such a standardisation process across different jurisdictions would be well nigh impossible, given that different criminal justice procedures and efficiencies apply in different places. At the very least, this finding indicates the necessity of checking the operation of the risk principle in specific places and settings.

Our own research project is certainly not the first to find an ambiguity in the definition of the risk principle. For example, Lab and Whitehead (1990) object to what they regard as the arbitrary nature of the definition of high and low risk used in meta-analyses such as the one by Andrews et al (1990).

More subtle and meaningful subversions of the risk principle arise out of research reported by other writers. Brown (1996), for example, while finding partial support for the risk principle among New Zealand parolees, draws on the decision making

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[104] For example, the group of offenders of primary interest to the current project are Western Australian offenders who have not been sentenced to prison but receive some immediate supervised non-custodial sentence. It is not clear how this group of offenders would be ranked relative to Canadian federal

processes of district prison boards to provide a fuller explanation for the relative success of paroled, as compared with released, high-risk offenders in avoiding reconvictions for serious offences. For low-risk offenders there was no significant difference in outcome between parolees and those released unconditionally. For Brown, however, a most important factor was the attitude of the district boards to high-risk offenders who were motivated to succeed. These prisoners were likely to be released on parole but were also given access to comprehensive programs. On the other hand, unmotivated high-risk offenders were unlikely to be released on parole. Brown is cautious about the nature of the challenge his research findings present for the risk principle, however he does claim with apparent justification that:

> ...what it does do, however, is raise important questions about how this principle ought to be applied in practice. In particular, it questions the assumption that risk is an appropriate primary screen within which all other considerations are nested. If, as has been suggested here, motivation is closely tied to *timing* of release, similar programs may have very different effects if delivered at different points in an offender's sentence.

In a parallel finding, Burnet (1994) finds evidence that prisoners' *expectations* about their behaviour during their forthcoming release into the community are important predictors of future reoffending. The finding is a valuable reminder that individuals have intentions, plans and expectations concerning their future behaviour. They are not simply driven by a set of 'variables' pertaining to their past experience. However, it is difficult to see how these intentions and expectations can be built into an 'objective' risk assessment instrument when offenders know that certain responses will be to their advantage and others will not. For program involvement, however, there are obvious advantages in harnessing offenders' motivation regardless of externally assessed risk.

Cumberland and Boyle (1997) also undermine a strict reliance on the risk principle through their evidence-based advocacy of the necessity for 'professional override' of risk classifications derived from their Risk-Needs Inventory instrument. It is

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prisoners. For example, would there be a significant overlap in the risks of reoffending of these groups over any well-defined period of time?

important to note that the Western Australian instrument is being developed as an aid to professional decision making rather than as a replacement for it.

SOME WESTERN AUSTRALIAN EVIDENCE CONCERNING THE RISK PRINCIPLE

Given the development of the actuarial risk assessment model to its present stage, it is possible to gain some preliminary evidence concerning the validity of the risk principle as it applies to supervised offenders. Table 1 indicates the relationship between supervision type and the predicted and observed rates of re-arrest of these supervised offenders[105]. Supervised offenders are grouped into five bands of probability, based on their predicted rate of long-term rearrest. The average predicted rearrest probability is then measured against the observed rate of rearrest for all offenders in each group.

[105] Note that the 'observed' rate of rearrest in this case is actually an estimate of the long-term rearrest rate using the Kaplan-Meier estimate.

Table 1: Predicted and actual rates of rearrest by grouped probability bands and form of supervision

Supervision type	Band of probability	0.0-<0.2	0.2-<0.4	0.4-<0.6	0.6-<0.8	0.8-1.0
	Expected P	0.16	0.32	0.51	0.71	0.91
CSO & probation	**Observed P**	0.34	0.45	0.54	0.65	0.90
	N	52	500	743	1203	2318
	Expected P	0.16	0.31	0.50	0.70	0.91
CSO alone	**Observed P**	0.32	0.40	0.57	0.67	0.89
	N	89	751	734	715	974
	Expected P	0.16	0.31	0.50	0.70	0.92
Probation alone	**Observed P**	0.24	0.37	0.50	0.68	0.91
	N	261	1260	1371	1233	1996

In labelling the different risk bands, it seems reasonable to regard the first three (with long-term rearrest probabilities from zero to 0.6) as being 'low-risk' groups of offenders. This conclusion is suggested by the results of the logistic regression analysis conducted on a separate sample of offenders who commenced supervision in 1990. This analysis showed that individuals with a long-term probability of rearrest of less than 0.6 were at low risk of rearrest within a follow-up period of 2 years[106]. The offenders falling in probability bands between 0.6 and 0.8 and then 0.8 to 1.0 could be regarded respectively as being at 'medium-risk' and 'low-risk' of future arrest.

[106] For example, even for supervised offenders in the long-term probability band, 0.4 to 0.6, less than 30% were rearrested within 2 years, and this dropped to 17% for a 1-year follow-up.

The results of Table 1 require careful interpretation, but a number of preliminary conclusions seem justified. First, it seems that community supervision is associated with small improvements over expected rates of rearrest for offenders of medium and high risk, but worse than expected results for offenders in the three low-risk probability bands. In fact, the performance of supervised offenders becomes progressively worse with each lower band in the low-risk groups.

Second, the 'probation alone' group performs better than the other two supervision groups over almost all risk groups. High- and medium-risk offenders under this form of supervision show similar small improvements in rearrest rates as those under the 'CSO alone' (Community Service Order alone) and 'CSO and probation' groups. Furthermore, low-risk offenders in this group show less deterioration in performance than low-risk offenders under the other forms of supervision.

The results furnish some mixed support for the operation of the 'risk principle' in Western Australia. For offenders at low levels of risk, all forms of supervision result in more offending than expected. For medium and higher risk offenders, supervision results in better than expected results. However, the changes in offending rates are small and they are greater for medium-risk than high-risk offenders. The more positive overall results for the 'probation alone' group may reflect the greater flexibility of supervising officers to adjust supervision levels to an appropriate level, whereas when there is a CSO obligation on offenders, the court, rather than the supervising officer, has set the intensity of future contact with the offender.

The results of this analysis are certainly open to a number of alternative explanations. The most important of these concern the performance of the risk assessment instrument itself. Copas (1995) discusses the concept of 'shrinkage' in the development of risk assessment models and it is possible that the pattern of rearrest evident in Table 1 is partly a result of a shrinkage or 'regression to the mean' effect connected with the model itself. However, the differential performance of the 'probation only' group cannot be explained in this way. Other explanations of the

rearrest patterns are possible[107] and the above analysis presents some tentative conclusions.

SUMMARY

This analysis of the risk principle indicates that it may still be useful in guiding thae allocation of supervisory resources. However, it needs to be assessed for validity across the full range of risks presented by any population of supervised offenders. In Western Australia the principle seems to break down, for offenders in the highest band of risk determined by the risk assessment instrument.

Furthermore, the application of the risk principle needs to take place within a broader decision-making structure which allows other principles to come into consideration.

Above all, we should take very seriously Losel's warning against categorising any offender or group of offenders as 'untreatable'. We should also list another warning besides Losel's. 'Untreatable' offenders should not be equated with offenders whose reoffending is inevitable. To construct this equation is to conflate the failure of offenders with the failure of correctional treatment professionals.

4. THE APPLICABILITY OF THE CURRENT INSTRUMENT TO SENTENCING

Part C of this report (chapter 7.2) enumerated 12 variations of meaning in which the terms 'public protection' or 'risk assessment' have been used in Western Australian sentencing legislation. These separate formulations were applied in different sentencing contexts, such as sentencing for wilful murder offences, or determining if a spent conviction should be made. Of particular interest in relation to the Western Australian Risk Assessment instrument is the context in which non-custodial sentences are prescribed and this is set out in chapter 5 of part C. Recall that the risk assessment instrument is currently able to produce estimates of the long-term

[107] It is possible, for example, that group influences connected with CSO programs are not helpful for low-risk offenders. Furthermore, the sentences with which community supervision are compared are not tightly controlled in the above analysis. Prison sentences are likely to be more common with high-risk offenders, whereas fines and other unsupervised court outcomes are more common with low-risk offenders.

probability of being charged with any offence, apart from those most minor offences involving parking and speeding. The instrument is also capable of predicting rearrest probabilities over shorter periods of time, most notably for follow-up periods of two years from the commencement of supervision. The instrument is also being developed to predict the probability of rearrest for violent and sexual offences, but has not reached this point of progress as yet. In the remainder of this section we examine how useful such an instrument would be in connection with sentencing, particularly in the context of handing down non-custodial sentences.

SPENT CONVICTION ORDERS

The first context of use is in connection with the making of a spent conviction order. From part C of this research we recall that there is a presumption against making a spent conviction order. However, any court considering such an order must be satisfied that the offender's prognosis must be such that he or she is unlikely to *ever* commit *a similar kind of offence*. The current instrument is able to provide a long-term prognosis for reoffending, however it is not designed to predict offending of a similar kind to the original offence. It would be possible to develop the instrument in to predict offending of the same kind, given some definition of *similar offences*, but this is not envisaged at present and therefore the instrument is not a suitable candidate for use in the determination of spent conviction orders.

It is clear, in any case, that the task of providing a prognosis of risk of the kind required for the making of a spent conviction order is exceedingly difficult. This is so regardless of whether the prognosis is made through some intuitive analysis of the offender's record, or by utilising some formal risk assessment instrument. It would be difficult to imagine how any soundly-based positive prognosis could be made for anyone apart from offenders with a single recorded offence. Furthermore, an examination of Table 1 shows that less than 3% of the population of offenders receiving their first supervision order are located in the lowest band of risk[108]. Because of this pattern, the population of offenders under some form of community supervision will contain few individuals eligible for a spent conviction order on the

[108] These offenders have an assessed risk of less than 20% of ever being rearrested.

basis of any empirical assessment of risk. Nevertheless, it is possible under the current Western Australian sentencing legislation for an offender under a Community Based Order (but not an Intensive Supervision Order) to be eligible for a spent conviction order.

IMPOSING NO SENTENCE

By definition, this sentencing option does not apply to offenders under some form of supervision order. However, the option could conceivably arise in the context of a pre-sentence report. Part C makes it clear that this sentencing option relies does not rely on an assessment of risk. It involves court consideration of certain specified factors including the triviality or technicality of the offence. A risk assessment is not appropriate in this context.

CONDITIONAL RELEASE ORDER (CRO)

Some form of risk assessment is involved in the making of these orders, which are unsupervised. The type of risk to be considered is general risk of reoffending and the period of risk is the duration of the CRO - a maximum of two years. In this context the risk assessment instrument is, or will soon be, in a position to predict the kind of risk involved for this sentencing option. However, it is important to recognise that some of the variables used by the instrument for prediction may be unsuitable for risk assessment in this context. Specifically, these variables are the race, sex and age of the offender. This issue is discussed in more detail below.

COMMUNITY BASED ORDERS AND INTENSIVE SUPERVISION ORDERS (CBO AND ISO)

As identified in Part C, these options are designed for 'tougher' community based measures and there is no specific legislative guidance about risk assessment. Nevertheless, two considerations are relevant here. First, a pre-sentence report is legislatively required before an ISO can be imposed and would be highly likely in practice to be prepared when a CBO is being considered. Second, the CRO, CBO and ISO are ranked in increasing order of severity in the hierarchy of sanctions set out in the *Sentencing Act* 1995. Given that risk is a general consideration in sentencing,

among others, it seems reasonable to assume that the considerations applying for a CRO will provide some guidance for the assessment for a CBO or ISO. Thus, considering risk alone, it would be too severe to require that the prognosis for CBO or ISO candidates should be an offence-free period of up to 2 years without supervision. In other words, less positive prognoses should not exclude offenders from eligibility for the CBO or the ISO. If this is the case, then there is potential application for an instrument which provides an assessment of the risk of general reoffending for a period of supervision of 2 years or less.

It is arguable that an ideal form of risk assessment for such a situation is a *conditional* estimate of the probability of rearrest given the imposition of a non-custodial sentence. For example, it may be that an offender belongs to a group of individuals whose probability of rearrest within two years for any offence lies between 0.4 and 0.6, absent any supervision. On the other hand, given some form of supervision, that risk may be reduced by (say) 10%. This is the kind of information which can be derived from Table 1 above and which is discussed by Copas and Marshall (1998) as being most useful. The utility of the advice would be enhanced if the risk assessment were also able to provide information on the *relative* effectiveness of a CBO or an ISO. The ISO can contain more onerous conditions, such as longer hours of community service and the imposition of a curfew which can be administered by electronic monitoring. Table 1 summarises our only present source of information about these conditions. This indicates that orders involving any CSO hours, either by themselves or in combination with general supervision seem to be less effective than general supervision itself. The risk assessment instrument has been constructed without any empirical information available to it on the performance of offenders on these new forms of community supervision. It is therefore unable, by itself, to be precise about the change in risk to be expected through the use of an ISO rather than a CBO.

The Western Australian research does, however, provide a concrete empirical example of conflict between considerations of risk and considerations of proportionality. For example, 'tougher' community sentences involving longer CSO hours seem slightly less likely to reduce reoffending risk than 'softer' community sentences involving no CSO hours. Put differently, 'tougher' sentences may be 'soft' on risk. Note that this

conflict is different in nature from the conflict discussed in Part C between the principles of desert and the principles of risk. These principles were shown to be in fundamental conflict in the context of sentencing. 'Desert' looks to the past while 'risk' scans the future. Here, there is evidence that they are in conflict on empirical grounds as well. In other words, there is evidence that the hierarchy of sentences embedded in the Sentencing Act 1995 may well interfere with the sentencing principles, particularly those concerning risk, embedded in the same act. The sentencing hierarchy is established on punitive principles, which are more compatible with the notion of desert than the notion of risk. At the empirical level only the truth of the strong version of the risk principle, would abolish these conflicts between desert and risk. However, the validity of the risk principle in its strong form is somewhat questionable, as discussed above.

THE 'IN-OUT' LINE

Part C (section 1) of this research argued that the key sentencing principle in determining the 'in-out' line was proportionality. However, s 6(4) of the *Sentencing Act* 1995 provided for the provision of a custodial sentence on the grounds of the seriousness of the offence *or* for public protection. Part C of this report includes an extended discussion of the offences connected with the notion of public protection. Generally, these have been limited to more serious offences against the person, but have been defined more broadly in some Western Australian legislation[109]. It seems safe to conclude that not all of the offences included in the rearrest prognosis provided by the risk assessment instrument will be relevant to issues of public protection. Consequently the instrument is not helpful for the determination of the 'in-out' decision in its present form. The model would need to be redeveloped to predict risk of rearrest for a smaller set of specified offences if it were to be used for this purpose.

PAROLE RELEASE

Risk considerations relevant to parole release are similar to those for the 'in-out' decision, discussed above. However, special factors related to parole release are

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[109] An example given in part C of this report is the repealed *Crime (Serious and Repeat Offenders) Sentencing Act* 1992. This referred to the protection of *both* person and property.

discussed in Part C (chapter 6). For 'special term' prisoners the Parole Board is required to consider the 'protection and interest of the community', but must not postpone, defer or refuse parole unless there are special circumstances which justify such a decision. It is clear in this context that the risk to be considered is *risk to the personal safety of people in the community or of particular individuals in the community*. A risk assessment instrument which addresses the risk of *any* rearrest will not be useful for parole decision making. More specialised assessments are required for parole release decisions.

VARIABLES USED FOR PREDICTION

One of the key insights provided by Monahan (1981: 35) is that the uses and consequences of a risk assessment are highly relevant to considerations of the method by which the risk assessment is conducted. In the context of offenders currently under correctional supervision, for example, an offender has already been sentenced and the general framework of punishment has been set. Offenders who are assessed to be at high risk of reoffending may be subject to more frequent reporting requirements, or may be referred to programs intended to reduce their future risk of offending. In the context of sentencing, however, high-risk offenders face a set of sentencing alternatives which are graded in a hierarchy based on punishment. For some offenders the consequences of a high-risk assessment may well be a prison sentence as opposed to a non-custodial sentence. Furthermore, even the hierarchy of *non-custodial* sentences is based to a large degree on punitive considerations, such as the number of CSO hours accompanying the order[110]. There is no doubt that, in setting a sentence, the consequences for an offender placed into a high-risk category may be severe[111].

Given that the 'stakes' are higher at the stage of sentencing, there is a need to take a close look at the prediction methodology used in any risk assessment instrument. It seems that questions could be raised about the variables in use on the grounds of fairness (or justice), accuracy of measurement and other considerations. While a full

[110] Other components of an ISO, such as a curfew condition, are more specifically based on risk reduction considerations, however, they would no doubt be considered by offenders to involve an extra dimension of punishment as well.

[111] This assumes that considerations of proportionality have left open the possibility of either a custodial or non-custodial sentence.

discussion of these issues has yet to be developed, the following paragraphs sketch an outline of the issues.

For example with regard to *fairness*, arguments could be raised about almost all of the variables used in the current risk assessment instrument. The most salient variable of interest is race, but the analysis could be applied with equal force to other variables. In the case of an Aboriginal offender, the risk assessment instrument will register a higher risk of rearrest than for a non-Aboriginal offender with a similar profile on all other predictors. This pattern occurs even for offenders assessed at their first recorded arrest. The basis for this result is simply the past recorded experience of Aboriginal and non-Aboriginal offenders in Western Australia. However, this recorded historical pattern has less to do with any 'internal' quality of Aboriginal people than it has to do with the nature of Australian society with its history of intolerance to Aboriginal people and denial of access to economic and social power. Furthermore, it seems obvious that Aboriginal people are more likely than non-Aboriginals to be arrested for antisocial behaviour. While there is no definitive quantitative Australian research to support this assertion, New Zealand research provides strong evidence to this effect.

With respect to the identification of race the following thoughts are offered. Suppose an offender objected to the validity of a risk assessment on the grounds that his or her Aboriginality had been incorrectly assessed. An offender with 'mixed blood' in full possession of the way in which the assessment had been compiled might to a categorisation of Aboriginality given some adverse sentencing consequence. Such an objection would be difficult to dispute given certain developments in the way that Aboriginal status is planned to be collected infuture. The National Centre for Crime and Justice Statistics, with the endorsement of Commissioners of Police, has commenced a project to determine the feasibility of recording Aboriginality based on self identification rather than racial appearance as is now the case. The views of the affected individual come inevitably top centre stage.

It is important to realise that issues of race and risk do not simply vanish if race is removed as a predictor variable. The argument is as follows:

> The current instrument predicts risk of rearrest successfully and Aboriginality is an important predictor.

Any other instrument which predicts risk more or less successfully must necessarily generate a high correlation of risk with race.

Therefore the new instrument is more insidious than the first since it hides this correlation from view.

A final comment with respect to race and sentencing is based on some strong research results from other jurisdictions. This research finds that racial disparity in sentencing is most likely to occur for offences of a less serious nature (Spohn and Cederblom, 1991; Crawford, Chiricos and Kleck, 1998). If the offence is serious, desert considerations appear to dominate judicial decision making. However, if the offence is less serious, extralegal considerations, including racial ones, may intrude. If risk becomes a more important sentencing factor and race is correlated with risk, there appears to be a strong possibility that sentencing of Aboriginal offenders will become harsher for less serious offences.

Similar arguments to those surrounding the use of race as a predictor of risk could be applied to other variables as well. For example youthfulness predicts risk, but it is a prima facie consideration for leniency when the sentencing focus is on desert.

5. SUMMARY

The key conclusions to be drawn from the analysis of Part D are summarised below..

1. The actuarial instrument, as it currently exists, furnishes a reliable predictive device which discriminates between unsupervised and supervised offenders on the basis of their long-term probability of being arrested for any further offence. Even when a very conservative 'jacknifing' approach is taken[112] the instrument is able to successfully rank offenders into groups with significantly different risk of subsequent arrest.

2. The use of the criterion of long-term rearrest takes a conservative approach to risk by the standards of community supervision. Further research in Stage 3 indicated

[112] This severe approach eliminates all community correction cases from the predictive instrument. It therefore predicts the success of the supervised cases on the basis of offenders given other types of

that supervised offenders with 'ultimate' probabilities of rearrest under 0.5 were at very low risk of offending within a follow-up period of 2 years. This time-period has been adopted in national indicators of correctional effectiveness and *in relation to this shorter period of time* the model may be regarded as over-predicting risk. Accordingly, further Stage 3 research has developed a means of predicting rearrest within varying periods of time from one to five years. This is one way in which the model may be calibrated to produce estimates of risk for varying time periods. Regardless of this re-calibration for different time periods, the model is still successful in *ranking* supervised offenders into risk groups for any follow-up period. (Refer to the report *Assessing the predictive value of selected dynamic variables*)[113].

3. The model appears to have considerable promise as an aid for allocating levels of supervision and for assisting in the evaluation of correctional programs. Further analysis of its use in these ways and for its potential use as an aid in the provision of pre-sentence reports is required. One issue arising here is the potential impact of the model on the sex and race distribution of offenders if used in PSRs. For example, the distribution of offenders into the highest probability band of rearrest is as follows: Male Aboriginal: 91%, Female Aboriginal 67%, Male non-Aboriginal: 40%, Female non-Aboriginal: 8%. If a strict risk-based analysis were included in pre-sentence reports, there is clearly a potential for the relative number of male and Aboriginal offenders under supervision to drop significantly. The use of the model in any significant way in PSRs therefore raises significant issues. A decision framework needs to be developed in which risk is made subservient to other principles before this should occur.

4. The preceding analysis and the research literature do not fully support the 'risk principle' in its strongest form. One issue for careful assessment is whether to incorporate the needs assessment variables in the new instrument being developed

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disposition. The 'validation' sample for the instrument is therefore completely independent of the 'construction' sample and this is a stringent test of the instrument.

[113] A further item of interest regarding calibration concerns the evaluation of the model over all arrests, rather than at each arrest point separately. One of the tests of the model selecting only one 'random arrest' for each individual arrested indicated that some other source of over-prediction may be present

by the Ministry of Justice into the longer-term development of the actuarial risk instrument. Logistic regression analysis indicates that certain dynamic risk factors, or criminogenic needs, have the potential to add to the predictive power of the model, but the advantages and disadvantages of such an approach have yet to be fully analysed.

in the model. The extent of this seems to be limited, but needs to be investigated in the Stage 4 research along with other calibration issues.

Part E: Conclusion

Each component of this report returns to the recurring theme that 'risk' exists alongside a set of other powerful and conflicting principles both within and beyond the criminal justice arena. It is clear that risk has assumed a growing importance in criminal justice, particularly but not uniquely in the contexts of sentencing and correctional supervision. It is equally clear that risk does not exist in any comfortable or coherent way with other principles. Part C makes it clear that the notion of risk is ambiguously and inconsistently defined in sentencing legislation. Furthermore, the way in which risk is supposed to be considered in the context of other principles such as proportionality or rehabilitation is just as poorly defined. Parts B, C and D of this report draw attention to the growing power of risk in criminal justice and other social arenas. At the same time they draw our attention to the strength of competing principles. Of particular significance is the power of a populist 'expressive punitiveness' with its associated political ramifications. It may be that risk is at its most dangerous when coupled with this other powerful principle.

Further evidence of competing principles to the 'risk principle' came from the field of correctional treatment and supervision, discussed in Part D. There was empirical evidence that a strong version of the risk principle was not operative in the context of correctional supervision in Western Australia. Furthermore, other 'treatment' principles were arguably in conflict with the risk principle, to the extent that this could be adequately defined.

Another important theme to emerge from this research is that risk is a notion that feeds itself. Beck's 'risk society' has iatrogenic overtones. A preoccupation with risks of one kind produces risks of a different kind. This idea links closely with the discussion of 'collateral risks' in Part C. Reducing 'risk to the community' through imprisonment creates risks of deaths in custody. It is tempting to assert that risk as a principle that should be governed or dominated by others, rather than being allowed to exist as a dominant principle to which others are subservient.

Perhaps the most important outcome of this research is its demonstration that risk is a concept requiring careful specification in a specific context. Risk is all to easily

discussed in a singular way - as if its application is self-explanatory. Yet anyone who wants to use the concept productively needs ultimately to ask the questions concerning risk:

- Of what nature?
- To whom?, and
- Over what period of time?

Unless these simple clarifications are made it is likely that confusion about the meaning and context of risk will continue to arise.

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