PERSONALITY DISORDER, THE CRIMINAL JUSTICE SYSTEM AND THE MENTAL HEALTH SYSTEM

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IN 1987, THE VICTORIAN LAW REFORM COMMISSION WAS GIVEN A reference to examine the law relating to insanity and automatism as criminal defence. The reference was not so much a result of the stringent and well-justified criticisms of the current insanity defence and the associated system of Governor's Pleasure, but the result of controversy surrounding the O'Connor decision in the High Court, a finding that gross intoxication could provide the basis for a successful automatism defence.

As it developed, however, the reference was much more concerned with definition of the insanity defence, an empirical study of the Governor's Pleasure system and examination of the rules about unfitness to stand trial.

The Commission issued a discussion paper entitled *Mental Malfunction and Criminal Responsibility* in August of 1988. The issue of what is to count as insanity for the purposes of the insanity defence arose early in the discussion paper. It quotes the judgment of Mr Justice Dixon of the High Court in *Porter* ([1936] 55 CLR 182 pp. 187–8) saying that 'disease of the mind', the term used in the M'Naghten rules, should be understood as:

> A disease, or disorder, or mental disturbance arising from some infirmity, temporary or of long standing.

He contrasted this with:

> The mere excitability of a normal man, passion, even stupidity, obtuseness, lack of self-control and impulsiveness . . .

In a subsequent paper (Dixon 1957, p. 260) he explained that he drew this distinction to exclude conditions like: drunkenness, conditions of intense passion and other transient states attributable either to the fault or to the nature of man. It is clear from the flavour of this passage and from a general reading of Mr Justice Dixon's view on criminal responsibility that moral blameworthiness was at the heart of his concern and that his formulation of disease of the mind had to do with the undermining of freewill, the basis of his system of criminal responsibility.

By contrast, other judicial approaches to the issue of disease of the mind —most notably the approach taken by Lord Denning in *Bratty v. Attorney-General for Northern Ireland* ([1963] AC 386)—focused much more on the dangerousness of the person's condition and the likelihood that it might be repeated. Lord Denning took the view that:

> Any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate, it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.

Both definitions draw the boundaries of disease of the mind very widely leaving the issue of what sorts of conditions fall within or without the definition of disease of the mind very vague. Some courts have developed a distinction between internal and external stimuli, leading to decisions that violent behaviour caused by arteriosclerosis and diabetes, for example, should be treated as diseases of the mind. The unsatisfactoriness of this criterion is perhaps illustrated in some of the cases involving diabetes where mistaken overdoses of insulin have been characterised as external stimuli and therefore not diseases of the mind leaving a plea for automatism open—and cases of diabetics who have failed to take their insulin being characterised as internal causes and therefore diseases of the mind, subject to the operation of the insanity defence. The recent High Court case of *R v. Falconer* ([1991] 96 ALR 545) gives us little additional guidance, referring to criteria like the reactions of a healthy mind, the duration of the condition and the likelihood of recurrence.

Some of the confusion here stems from the purposes for which these inquiries are being made. In some cases, the concern is to make available an insanity defence in situations where a defendant was facing a capital conviction for murder. In the automatism cases, on the other hand, Lord Denning, for example, was plainly concerned about the complete acquittal by the automatism defence of persons whom he regarded to be dangerous and wanted to keep under some form of control. In either case, the width of these definitions was logically broad enough to cover the condition of personality disorder, the main focus of this article.

Personality Disorder and the Insanity Defence

It is very hard to find explicit references to personality disorder—in the sense defined in the psychiatric manuals—in the decided case law on the insanity defence. In part that is due to the fairly recent coining of the term, personality

disorder. During the 1940s, 1950s and 1960s, it was far more common to see references to the main form of personality disorder with which we are concerned—antisocial personality disorder—referred to as psychopathy or sociopathy. It was these terms which tended to be used in the debate trailing back into the 19th century over the distinction between the mad and the bad. However, reading the cases, it would appear that the issue of whether someone with a very severe antisocial personality disorder could successfully claim the insanity defence did not arise very often. In the first place, it seems likely that, at a time when psychiatrists did not distinguish sharply between mental illness and intellectual disability, very bizarre behaviour would simply be classified as mental illness and the issue of whether such a person could be said to have a disease of the mind for the purposes of the M'Naghten defence did not arise.

In two High Court cases in which antisocial personality disorder did arise—*Willgoss* ([1960] 105 CLR 295) and *Stapleton* ([1952] 86 CLR 358)—the High Court treated antisocial personality as a disorder of the mind but the defendants failed because they could not satisfy the other limb of the M'Naghten defence—they could not prove that they lacked the ability to know that their actions were wrong. In the case of *Jeffrey* ([1980] 7 ACR 55), the Tasmanian Supreme Court ruled that it was up to the jury to decide whether the defendant's severe antisocial personality disorder fell within the *Porter* definition of disease of the mind. The judge indicated his clear view that in the case before him, the defendant did have a disease of the mind. A Western Australian decision—*Hodge* ([1985] 19 ACR 29)—has been interpreted as going the other way. However, in fact the case was decided on an insufficiency of evidence about the defendant's mental condition in that case and the Western Australian court explicitly left the issue open for further consideration.

To summarise, courts considering the insanity defence have not given clear guidance about what constitutes disease of the mind. In some ways this is understandable since the questions the courts were putting were not directed at the essence of mental illness but rather at questions of moral and criminal responsibility in the one line by Mr Justice Dixon and protection of the community from dangerous individuals in the other line by Lord Denning. In some ways this is reasonable given that the insanity defence is plainly not restricted to mental illness and could be invoked by someone who, for example, had an intellectual disability or other disabling condition which deprived them of the ability to reason about right and wrong. Moreover, the courts have made it clear that the concept of disease of the mind was not co-extensive with the characteristics which might be adopted by psychiatrists from time to time. Although psychiatric evidence is obviously central in cases involving an insanity defence, the judges have made it clear that psychiatric opinions about a particular defendant should not be treated as determinative by the jury. The insanity defence is built on legal and moral conceptions about guilt which may be influenced by the medical opinion of psychiatrists but not determined by those opinions.

Personality Disorder and Civil Commitment

The Law Reform Commission of Victoria released its discussion paper on these matters in August of 1988. In the discussion paper, the Commission gave its view that antisocial personality disorder should be regarded as a disease of the mind for the purposes of the insanity defence and the determination of guilt or innocence (Law Reform Commission of Victoria 1988). It distinguished between issues of responsibility and an issue which had been of concern to the mental health authorities, the question of disposition. Under the Commission's recommendations in the discussion paper, people found not guilty by reason of mental impairment would no longer be detained in prisons. However, in deference to the concerns expressed by the Office of Psychiatric Services among others, in the case of someone found not guilty on the ground of mental impairment—where that mental impairment was a severe antisocial personality disorder—the court could order that person to be detained in a prison. Basically, the Commission was prepared to depart from the principle that people found not guilty should not be held in prisons because it was advised that mental hospitals simply did not have the facilities to deal with the people with antisocial personality disorder. That view was criticised in response to the discussion paper by the Office of Corrections and ultimately the Commission decided in its final report that no exception should be made to the principle that people found not guilty should not be held in prison.

In the course of those deliberations, the issue arose on several occasions about release decisions from the criminal justice system especially where those decisions involved people with antisocial personality disorder who had served their full sentence. The Chairman of the Parole Board, Mr Justice Vincent, who was also a member of the Law Reform Commission, had raised this issue on several occasions. He pointed out that the issue was becoming urgent in one case and that there were two or three other cases where the same issue would arise in the near future. These cases involved people who had been denied parole on account of their dangerousness but who would serve their full term and thus be entitled to release in the near future. The people involved had been found guilty and given indeterminate sentences. If they fell within the civil commitment criteria of the *Mental Health Act 1986* (Vic), the dangers posed by their release would not arise.

The Commission decided to issue an interim report on this issue. That report was entitled, *The Concept of Mental Illness in the Mental Health Act 1986* and was published amidst much controversy in April 1990. An early draft of the report, which had been circulated to a limited number of people for comment, was leaked to the press. There were dark mutterings about a conspiracy among the Commission and government ministers, violent attacks on the Commission's report by psychiatrists, and inexcusable and probably defamatory attacks on the then Chief Forensic Psychiatrist, Dr John Grigor. Similar attacks were made on the Commission. The Report of the Social Development Committee (1990, p. 32) described the reasoning as dishonest; and psychiatrist, Dr Neville Parker (1991, p. 372), published an article claiming that the Commission was not averse to misrepresenting the views of psychiatrists.

Possibly unwisely, the Commission decided not to enter the public debate surrounding its report. In the event, the Government did not accept the Commission's recommendation and decided instead to introduce the *Community Protection Act 1990*, an Act to enable the Supreme Court to imprison Garry David if it found him to be dangerous. The opportunity is taken, however, to reject most strongly any suggestion that the Commissioners—who unanimously supported the recommendation—were doing so for any reason other than their sincerely held conclusion that the approach recommended in the Commission's report was the correct approach. This is despite careful consideration of all the criticisms.

With all due respect to those who have reached the opposite conclusion—a respect which has not been reciprocated by some of the Commission's critics—it is easily understandable that sincere people could take opposing views on such a controversial and difficult topic, involving quite fundamental distinctions between madness and badness, an area dogged with controversy for at least 150 years, if not more. It is simply arrogant to do what some of the Commission's critics have done and assert that people who reach a different conclusion must be actuated by political expediency or some such. Were their own arguments overwhelming or those of the Commission so underwhelming, their claims to insight and certainty might be more convincing. But when one interrogates the psychiatric literature for a convincing definition of mental illness, the cupboard is rather bare. Much of the psychiatric literature will tell you that the concept of mental illness is too gross a category to be useful for psychiatric purposes and then goes on to look at smaller categories such as psychoses and neuroses and their various subcategories. The distinguished philosopher, Anthony Quinton, after an extensive review of the psychiatric literature looking for some satisfactory account of mental illness, concluded that the search was largely in vain. Quinton concluded that this was not a great moment, given that many capable practitioners can perform their art or science effectively without being able to give a fully satisfactory philosophical account of what it is that they are doing (Parker 1991, p. 372).

Indeed, the nature of much scientific practice—and this is true of psychiatry—is empirical and has to do with what works in treating psychiatric disorders rather than writing philosophical accounts of it. In a sense, at the risk of gross oversimplification, psychiatrists can claim to know a mentally ill person when they can see one even though they might not be able to give a precise definition of mental illness. Quinton, as a philosopher, is prepared to take on this task. As set out in the Commission's report, Quinton says madness is a fundamental lack of rationality, the fact that the person has lost his or her reason. The Commission (1990) formulated Quinton's idea in this way:

> A person who is systematically unable to function rationally, who is unable to cope with the ordinary pressures of life, who behaves in utterly bizarre ways, and who is grossly destructive of himself and others, is mentally ill.

The author emphasises that this definition does not equate mental illness with violence and that its central idea is about the fundamental and systematic loss of reason. The term bizarre also seems to have upset some of the

Commission's critics. But the very term is used in the Social Development Committee's report in its definition of psychosis.

Although this definition tended to be skated over in many of the criticisms of the Commission's Report on the concept of mental illness, it remains for the author the most plausible account of what is meant by the concept of madness. Indeed, some of the discussions the Commission had with psychiatrists indicated that our positions were not nearly as far apart as some of the debaters would like to suggest. In discussion, these psychiatrists were prepared to concede that someone with a very severe antisocial personality disorder could at times cross into the area of psychosis even though no particular category of psychosis could be allotted to that person. This was understood to mean that they had a sort of residual category for cases which escaped the usual classification system but which they would recognise as mental illness. It may be that the condition which the Commission was describing as at the extreme end of the personality disorder scale is merely the same condition that these psychiatrists were describing as having crossed out of the personality disorder scale and into the psychotic category, even if briefly.

The Concept of Civil Liberty

The discussion has taken a long time to reach the question where many people will feel we should have started. That is, why go into these ruminations about the nature of mental illness? The questions before the conference are not essentially psychiatric questions nor are psychiatrists the only ones with anything to say in relation to them. They are essentially questions about civil liberty and criminal responsibility and they are questions which must be decided ultimately by the body politic. It is not enough to say, as some have been prepared to in the Victorian debate, that if 90 per cent of psychiatrists say that antisocial personality disorder is not mental illness, then it is not a mental illness. Psychiatrists, like other professionals, certainly including lawyers, exercise a great deal of power on behalf of the community and must be able to justify their stewardship to the wider community. Their decisions affect other people's lives and, particularly in these instances, affect their liberties.

While psychiatrists must maintain pre-eminence in diagnosis for the purposes of treatment and cure—though even here pre-eminence must not mean dominance free of any external review—in the areas with which we are concerned at this conference, madness bears on questions of criminal responsibility and the civil liberty to live in the community free of restraint. These are essentially moral and political questions. They are not medical questions, though medical science has a great deal to say about them. After listening to the medical evidence about the state of a person's mental functioning, the jury in the case of the insanity defence and the parliament in the case of preventive detention, must be convinced by clear criteria and rational argument why some conditions are to be counted as mental illness while others are not. That is to say, if psychiatrists are to claim that neuroses and psychoses are to be included within the concept of mental illness but

personality disorder is not, then the criteria upon which this conclusion rests must be clear. The arguments advanced by the Royal Australian and New Zealand College of Psychiatry to the Law Reform Commission and subsequently to the Social Development Committee fail that test.

For example, in its submission to the Social Development Committee (Victoria. Parliament 1990, p. 32), the College of Psychiatrists laid a great deal of stress on *treatability* as the criterion of illness. Quite apart from the questionable positivist assumption that mental illness and physical illness are appropriately analogised, a moment's reflection reveals that many illnesses do not respond to treatment—sickle cell anaemia, haemophilia, motor neurone disease, some forms of cancer and so on. This does not make them any the less illnesses. It is commonplace, for example, that certain forms of cancer do not respond to treatment. Does that make these forms of cancer any the less illnesses?

Similarly, it was claimed by some that personality disorders are *permanent* conditions whereas illnesses are temporary. Again, the concept of long-term illness, even lifelong illness, is easy to understand. Some of the conditions just listed fill that criterion. Not only is this true in physical illness, but in psychiatry too, the notion of illness as a short-term phenomenon belies a great deal of the practice in psychiatric hospitals where a sizeable percentage of the patient population is there on a very long-term basis.

A third set of arguments had to do with questions which were not really germane to personality disorder as a form of mental illness but had a great deal to do with protecting resources. These were arguments which said that psychiatry could do little for people with personality disorder and that it would be a more rational use of resources to devote them to people with other conditions which could be helped. This is not really an argument that people with a personality disorder are not mentally ill; it is really an argument that they are less deserving of psychiatric resources than other people. This argument about resources is reasonable but it becomes much less so when the same people who were putting it were also advocating that people with personality disorders who were dangerous should be kept in prisons. These people do not appear to have considered the obverse of their own civil liberty argument, that it is also discriminatory and just as much a breach of a person's civil liberty to exclude them from psychiatric services when they are entitled to them, and to say that if they are dangerous they should be kept in prisons rather than psychiatric institutions. The resources argument raises yet more difficult policy questions about the services provided to mentally ill people and whether there should be a return to some notion of asylum in the best sense of that word for people whose mental condition makes them unable to function in serious respects in the wider community.

Finally, some said that mental illness—or more accurately, the sort of mental illness for which people could only be committed—was related to people who had hallucinations. Again, it is not clear why hallucinations should count as the distinguishing criterion, and nor is it clear where people with hallucinations, delusions and the like part company from ones who have a radically abnormal perception of their place in the world. Is the classic

caricature of a person who believes himself to be Napoleon Bonaparte so far from a person whose self-conception is that he is an avenging angel of death waging war against a community that wronged him?

The author's conclusion about these criteria offered by the College of Psychiatrists and others is that the criteria offered for mental illness by the psychiatrists are unconvincing. On the other hand, Quinton's concept of a systemic inability to function rationally seems much closer to the kernel of the concept. As perhaps the greatest living philosopher, Sir Isaiah Berlin (Laslett & Runciman 1964, p. 27) put it:

> If I find a man for whom it literally makes no difference whether he kicks a pebble or kills his family, since either would be an antidote to ennui or inactivity, I shall not be disposed . . . to attribute to him merely a different code of morality to my own or that of most men, or declare that we disagree on essentials, but shall begin to speak of insanity . . . ; I shall be inclined to consider him mad, as a man who thinks he is Napoleon is mad.

The author's conclusion is that someone whose severe personality disorder satisfies this definition should be classifiable as mentally ill for the purposes of civil commitment. While the concern of psychiatrists to protect limited resources can be understood—a great deal of the vehemence of the psychiatric criticisms in this area may stem from that concern—people already stigmatised by their violence and involvement with the criminal justice system cannot be excluded from psychiatric services simply because they present resource problems and are consigned to the prison system.

Conclusion

Fundamentally we have here a question about civil liberty. And perhaps it is as well to go back to the modern foundation of liberal thought to assess the issue with which we are confronted. John Stuart Mill's (1975) essay 'On Liberty' gave us a guiding principle about when we are entitled to interfere with the liberty of any individual citizen. His dictum was that we are only entitled to interfere with a person's liberty when that person threatens to do harm to others. The state is not entitled to restrain any of its members simply on the basis that it will be for his own good. Interestingly, Mill made an exception to his principle, for lunatics and children. It is on this basis that we can civilly commit some mentally ill people for their own good. However, today's debate is about the other limb of Mill's principle, locking up people to prevent them from harming others.

Traditionally, we have been jealous of liberty and have not been prepared to detain people on the basis that they might do harm. The one important exception here has been in relation to people who are mentally ill. Where Mill's principle might allow us to engage in preventive detention generally—provided our predictive capacity was reasonable—our practice has been to require two conditions to be met prior to preventive detention; namely that a person lacks the ability to make rational choices by virtue of their mental illness, and that lack of rationality poses a danger to others. While the author accepts much of what is said about the difficulty of predicting dangerousness,

where a judgment is made by proper processes, both that the person lacks the ability to make rational decisions because of mental illness and that that condition makes him or her dangerous to other people, the author is prepared to concede that a restriction on that person's liberty is then justified. These are approximately the criteria which are applied under most of the civil commitment provisions in the Mental Health Acts of the various states.

Ultimately, the argument about whether severe personality disorder can count as a mental illness, may, as the Monash philosopher Chin Liew Ten argues, be sterile or at least so charged as to make it senseless. If a person with a severe personality disorder is so unable to make rational decisions as to be the functional equivalent of a mentally ill person and that inability also makes him or her dangerous to others, then such a person satisfies Mill's principle and is detainable on similar criteria to those upon which we base our civil commitment of the mentally ill.

In Victoria at least, it would now appear that the option of dealing with people who have a severe antisocial personality disorder and who are dangerous through the mental health system is closed. The Community Protection Act has been extended and the government has foreshadowed general legislation to deal with people who have a severe personality disorder and are dangerous. In effect, the current legislation is broadly in line with the argument just put—that the question of whether or not severe antisocial personality disorder can constitute a mental illness is put to one side and the general criteria of lack of rationality and dangerousness form the basis for a different mechanism of civil commitment. It is important to note that this is not a system of general preventive detention and that it does require both the incapacity to make reasoned choices and the threat of danger to others.

For the reasons outlined earlier, such an approach is consistent with Mills' principle about the liberty of the individual, indeed it goes further than Mill did by requiring two criteria rather than one. It is also consistent with the criteria laid down in the Mental Health Act for the commitment of people who are accepted as being mentally ill and dangerous. Indeed, the protections for these people are somewhat greater in that the order to detain must be obtained from the Supreme Court rather than going through the processes of admission to a mental hospital and review by the Mental Health Review Board adopted in the case of mentally ill people. In effect, the Community Protection Act closes a gap opened by the interpretation of the Mental Health Act where people with severe personality disorder would now appear to be excluded from the mental health system which had previously dealt with them in some numbers. Although civil commitment is always a difficult and unpalatable option, if it is conceded that it is justifiable to civilly commit mentally ill people who constitute a danger to others, consistency suggests that people who are in a functionally equivalent position because of a severe personality disorder ought to be treated the same way.

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COPING WITH THE HIGHLY DANGEROUS: ISSUES OF PRINCIPLE RAISED BY PREVENTIVE DETENTION

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THE GARRY DAVID CASE HAS RAISED IN STARK FORM A DILEMMA FOR THE legal system. When, and for how long, may persons representing a danger to the community legitimately be incarcerated beyond the period of the sentence imposed upon them for past crimes?

In the case of Garry David, this question has to a considerable extent been clouded and confused by the issue of mental illness. If Garry David could be regarded as mentally ill then his continued detention would be justified on ordinary principles relating to civil commitment. The balance of psychiatric opinion, however, establishes clearly that the concepts of mental illness and personality disorder or psychopathy are quite distinct, and this view was adopted by the Mental Health Review Board in allowing Garry David's appeal (Case No. 230190:X01:300512). The recommendation of the Law Reform Commission of Victoria (1990) that the *Mental Health Act 1986* (Vic.) should be amended so as to incorporate antisocial personality disorder within the concept of mental illness now appears unlikely to be adopted. Issues raised by the Garry David case touching on the nature of mental illness and psychopathy, the role of the profession of psychiatry and its relationship with the criminal justice system and the criteria and procedures to be adopted in respect of civil commitment to psychiatric hospitals have been dealt with by the present writer elsewhere (Williams 1990, p. 161), and will not be considered in the present paper. It is sufficient to state that the present writer holds to the view that psychopathy and mental illness are distinct concepts, that the Mental Health Act should not be amended as recommended by the

Law Reform Commission of Victoria and that it is a fiction that persons who are deviant and dangerous must necessarily be mentally ill.

The issue of detention of the highly dangerous is not, of course, confined to the case of persons suffering from antisocial or borderline personality disorders (psychopaths). It would, for example, be equally raised in the case of a political terrorist serving a sentence of imprisonment for murder who made it known that he or she intended to kill again for political purposes on release. In some cases the terrorist's threats would themselves amount to crimes justifying further imprisonment, but this would not always or necessarily be the case.

No general mechanism presently exists to enable the incarceration of individuals such as Garry David and the hypothetical terrorist beyond the period of their terms of imprisonment. In the case of Garry David, of course, a special Act of Parliament, the *Community Protection Act 1990* (Vic.), has been passed applying only to him. Such an expedient is, it is submitted, highly unsatisfactory. The argument will be advanced in this paper that, in the interests of community protection, a carefully limited and properly regulated form of general preventive detention is warranted.

The Legal Dilemma

Few would deny the proposition that in the case of a person suffering from a personality disorder of an extreme form and representing a grave threat to the physical safety of members of the public, and in the case of a political terrorist awaiting the opportunity to commit further crimes of violence, society must be able to protect its members if necessary by depriving that person of their liberty. Such a view would be held by the overwhelming majority of members of the community, and a government that failed to respond to it would be widely and properly perceived as failing in its duty to protect its citizens.

Yet an appropriate response runs counter to traditional legal thinking as to the nature of punishment and the principles to be applied in determining the limits to be set to periods of incarceration. Such thinking proceeds from the proposition that deprivation of liberty, involving harm to the individual and the infringement of that person's rights, normally must be viewed as punishment and must be justified in terms of the legal and ethical principles applicable to punishment. Theories of punishment stipulate that a person may only be punished for that which they have done, not for that which they are likely to do. Professor H.L.A. Hart (1968, pp. 4–5), for example, explains the concept of punishment in criminal law theory as follows:

- It must involve pain or other consequences normally considered unpleasant.
- It must be for an offence against legal rules.
- It must be of an actual or supposed offender for his offence.

- It must be intentionally administered by human beings other than the offender.

- It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

Such thinking is retributive in nature, and heavily dependent upon the concepts of individual human responsibility and moral wrongdoing. It requires both that the individual to be punished must have offended against legal rules, and stipulates a proportionate relationship between the offence and the nature and degree of punishment to be administered. The only exception to the principle of proportionality recognised by such thinking is the case of insanity. Those who commit crimes while insane act without moral culpability. They may, because of their insanity, be detained for treatment. Since such cases involve treatment rather than punishment considerations of desert and proportionality are not applicable.

The essentially retributive nature of the common law in respect of sentencing was highlighted with particular clarity by the decisions of the High Court in *R v. Veen (No. 1)* ([1979] 143 CLR 458) and *R v. Veen (No. 2)* ((1988) 62 ALJR 224). The accused suffered from alcohol induced brain damage and experienced uncontrollable urges leading him to commit violent crimes. In 1975 he was charged with murder in New South Wales, but convicted of manslaughter having regard to the defence of diminished responsibility (a defence available in that state but not in Victoria). The trial Judge, having regard to the needs of community protection, sentenced the accused to life imprisonment. The accused appealed successfully to the High Court, where a sentence of twelve years was substituted for the life term. The view taken by the majority was that while the protection of the community was a factor in determining sentence it was not a consideration which would justify what was in substance a sentence of preventive detention.

Veen was released after serving eight years and, tragically, killed again later that year. He was charged with murder, found guilty of manslaughter on the same basis as before, and again sentenced to life imprisonment. He again appealed to the High Court against sentence, but on this occasion his appeal was dismissed. The two cases were different in material respects; the mitigating factor of youth was no longer present, an element of provocation possibly present in the first case was absent in the second and, most notably, the accused's earlier less serious criminal record had on the occasion of the second conviction now been supplemented by the previous conviction for manslaughter. While on this occasion upholding the sentence of life imprisonment, the High Court affirmed its decision in *R v. Veen (No. 1)*. In sentencing an accused the requirement of proportionality must, the court held, be adhered to. It is only within the range of what is proportionate to the personal circumstances of the offender and the offence that regard may be had to considerations of community protection. In a joint judgment Mason CJ, Brennan, Dawson and Toohey JJ (p. 227) expressed the proper role of considerations of community protection at common law in the following terms:

> It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. 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.

The decisions in *R v. Veen (No. 1)* and *R v. Veen (No. 2)* may be regarded as a correct institutional response on the part of the courts to issues of community protection. It is properly the role of the courts to protect rights, and to focus attention upon the individual case before the court. The courts would serve their function less well if they were to allow the essentially individual focus of their attention and the consideration of issues of desert which this involves to be replaced by a primary concern for issues of community protection. It by no means follows as a proposition of logic, however, that it is not equally proper for the legislature to intervene in respect of such cases with a response which places greater emphasis on considerations of protection and less, if indeed any, emphasis on considerations of desert and proportionality. This view was expressly affirmed by Deane J in *R v. Veen (No. 2)*. His Honour (p. 237) stated:

> [T]he protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence. Such a statutory system could, one would hope, avoid the disadvantages of indeterminate prison sentences by being based on periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatric and other experts. The courts will impede rather than assist the introduction of such an acceptable system if, by disregarding the limits of conventional notions of punishment, they assume a power to impose preventive indeterminate gaol sentences in a context which lacks the proper safeguards which an adequate statutory system must provide and in which, where no non-parole period is fixed, the remaining hope of future release ultimately lies not in the judgment of experts but in the exercise of a Ministerial discretion to which political considerations would seem to be relevant.

The *Community Protection Act 1990* (Vic.)

The Community Protection Act is unique in Australian legal history as being the only occasion on which an Act of Parliament has been passed for the expressly stated purpose of enabling the detention of a named individual. The Act empowers the Minister to apply to the Supreme Court for an Order that Garry David be placed in preventive detention (s. 4). Power is granted to the court to make an interim order for detention pending a hearing (s. 6). The

test to be applied by the court in determining whether to order preventive detention for Garry David is set out in s. 8(1) as follows:

> If, on an application under this Act, the Supreme Court is satisfied, on the balance of probabilities, that Garry David:
>
> (a) is a serious risk to the safety of any member of the public; and
>
> (b) is likely to commit any act of personal violence to another person—
>
> the Supreme Court may order that Garry David be placed in preventive detention.

Such Order is required to specify, inter alia, the period of detention which must not exceed six months (s. 8(2)(b)). On application by the Minister, orders for further detention may be made by the court for periods of up to six months at a time (s. 9). Upon the making of an Order, Garry David must be detained in the psychiatric in-patient service, prison or other institution specified in the Order (s. 10). Where an Order is in force, Garry David must not be discharged or released from preventive detention except in accordance with an Order of the Supreme Court (s. 12).

The Community Protection Act was expressly stated to expire twelve months after receiving the Royal Assent, that is 24 April 1991 (s. 16). Its operation was extended for a further three years by the *Community Protection (Amendment) Act 1991* (Vic.).

Section 8(1) of the Act gives rise to significant problems of interpretation. The operation and relationship of the two sub-sections is uncertain. The word 'and' appearing between them clearly means that both need be satisfied. Focusing first on sub-paragraph (b), what is meant by 'likely'? Does it mean 'probable' in the sense of more likely than not, or is a higher degree of probability required? What is meant by an 'act of personal violence'? Presumably 'personal violence' is something less than 'grievous bodily harm', which is bodily harm of a really serious nature: *R v. Smith* ([1961] AC 350, pp. 334–5). Is it then an equivalent of 'actual bodily harm', an expression interpreted as extending to any hurt or injury calculated to interfere with the health or comfort of the victim, provided that it is something more than merely transient and trifling: *R v. Donovan* ([1934] 2 KB 498, p. 509); *R v. Miller* ([1954] 2 QB 282, p. 292). Turning to sub-paragraph (a), what is meant by 'a serious risk to the safety of any member of the public'? The concept of serious risk does not necessarily narrow the operation of sub-paragraph (b), for it would seem that the likelihood of serious risk may be independent of the likelihood of commission of an act of personal violence. Thus, if Garry David were found to be suffering from AIDS he could be said to constitute a serious risk to the safety of the public which, in combination with the likelihood of commission of an assault involving actual bodily harm, could be argued to be sufficient to satisfy the dual test laid down by s. 8.

If the test spelt out in s. 8 is found to be satisfied, it does not necessarily follow that Garry David must be detained. The power to detain remains a discretionary one which 'may' be exercised by the court if it finds the two

criteria to be satisfied. How should the court exercise such discretion? Would the court be entitled to have regard to concerns of a civil liberties nature in exercising the discretion? It may seem surprising that such a discretion should have been conferred. In the context of an Act designed to achieve the detention of a particular individual consistency would seem to suggest that if the twofold test of s. 8 is satisfied then detention should necessarily follow.

The Act is, however, open to more serious criticisms than its lack of clarity and inadequacies of drafting. It is an item of legislation which would appear to offend against both the principle of the rule of law and the doctrine of separation of powers. The rule of law requires that laws be of general application; that all members of the community be equally subject to the law. Yet this Act, penal in its effect, specifically applies only to a named individual. The shadow Attorney-General described the Bill as creating 'a process that must be compared with the historical Bills of Attainder', and characterised it as 'one of the most obnoxious Bills that has ever been introduced into Parliament' (Victoria. Parliament. Legislative Assembly 1990, pp. 10–11). The doctrine of separation of powers provides that it is for the legislature to pass general laws, for the courts to determine particular cases under them, and for the executive to make specific administrative decisions. Thus a more correct approach to the issue would have been to pass an Act giving the minister power to detain Garry David, and for that power to have been exercised on the responsibility of the minister.

In May 1990, following the upholding of Garry David's appeal by the Mental Health Review Board, the Attorney-General of Victoria, the Hon. J.H. Kennan, made application to the Supreme Court for an Order under s. 8 of the Community Protection Act that Garry David be placed in preventive detention for a period of six months at J. Ward, Ararat. The application was heard before Mr Justice Fullagar, who first made an interim Order under s. 6 of the Act which had the effect of detaining Garry David while the application was heard. The case occupied twenty-two sitting days. On 18 September his Honour delivered judgment, making an Order in the terms sought by the Attorney-General.

Mr Justice Fullagar engaged in a careful review of the facts and the medical evidence presented to the court, paying particular regard to the psychiatric evidence and the evidence of those who had been responsible for Garry David's care and supervision during his period at J. Ward. His Honour did not venture to comment on issues of principle raised by the Act, nor to any extent upon the difficulties of interpretation which it gives rise to. After a careful review of the evidence presented, his Honour concluded that the test laid down by s. 8(1) of the Community Protection Act was satisfied to the standard of the balance of probabilities. His Honour stated:

> I have arrived at the clear conclusion that, if Garry David were to be released forthwith into the community, there would be a real and grave risk that within a short time he would by violent acts cause harm to members of the public and especially to members of the police force, and accordingly that he at large would constitute a serious risk to the safety of members of the public. He would be likely to commit acts of violence upon other persons. He would be likely to stage something like the scenario he planned at the outset of the [1980 shooting] incident. I think

> that, despite his intelligence and his substantial rational periods, if he were now to be released he would be full of anger at a community which he would blame, if not for institutionalising him, at least for sending him out into the community in a hopeless state for managing life as a member of it, and without having made a sustained and lengthy effort to put him into a condition where he *could* manage as a member of society. His underlying anger and resentment would be almost certain to rise to an explosive level as soon as he felt thwarted or subjected to stress, and this would be very likely to result mediately if not immediately in causing serious harm by violence to some members or member of the public.
>
> The court having arrived at these conclusions after the fullest consideration, it is inevitable that, in the public interest, there should be an order that the respondent be placed in 'preventive detention'.

The Order granted in *Kennan v. David* has now expired, and Garry David remains incarcerated pending the hearing of an application for a further period of detention. The Community Protection Act is, it is submitted, a highly objectionable piece of legislation and its use and extension as an expedient is to be regretted. If the proposition is accepted that the public is entitled to protection from persons who constitute a major threat of the order posed by Garry David, then the proper method of achieving this is by a carefully limited and controlled system of preventive detention.

Preventive Detention as an Unavoidable Issue

If the fiction that persons suffering from an antisocial personality disorder and constituting a significant danger to the public are necessarily suffering from a mental illness is rejected, what would appear to be a reasonably straightforward choice is presented. Such persons may be released in the ordinary way at the expiration of their sentences in the knowledge that the public is being placed at substantial risk. Alternatively, a mechanism for preventive detention can be introduced for reasons of public protection on the understanding that such action is being taken for reasons unrelated to moral culpability and that such a mechanism may properly be thought to pose a potential danger to civil liberties. In the case of dangerous offenders not suffering from antisocial personality disorder the inevitability of this choice is even more obvious.

Attempts are, however, on occasion made to avoid this choice. In their Interim Report (1990), *Inquiry into Mental Disturbance and Community Safety*, the Social Development Committee of the Victorian Parliament was strongly critical of the recommendations of the Law Reform Commission, concluding that the Mental Health Act should not be amended to include persons with personality disorder. The Committee recognised that 'a case could be made for incapacitation to apply in a small number of cases where the offender has a history of severe acts of violence and is considered to be dangerous' (p. 55). The Committee declined to make such a recommendation, however, on the basis that it 'would be a radical departure from the principles and values under-pinning this state's criminal justice system', and that such a measure 'should not be introduced prior to extensive public debate' (p. 60).

The Report recommended instead that where an offender currently serving a sentence is thought to be dangerous, a range of special programs should be implemented to facilitate their re-entry into society. Further, statutory provisions should be developed to enable the Government and such offenders to establish individually negotiated agreements as to how rehabilitation and release will occur. The idea of special programs and advance planning for release is, of course, sensible and worthwhile. It is doubtful, however, if the overall scheme proposed is adequate to ensure public protection. The idea of individually negotiated agreements with such offenders is highly questionable. Psychopaths are frequently highly manipulative and are anything but consistently rational. Ultimately the point will come at which their existing sentences will have expired, at which time no basis for continued detention or further negotiation will exist. Such a scheme does not, of course, even begin to come to grips with the issue of the political terrorist approaching the end of her or his sentence and intent upon further crimes.

On occasion the attempt is made to seek a medium course between the supporters and the opponents of preventive detention by arguing in support of a system of incarceration that is said not to involve a punitive element (Wood 1988, p. 424; 1989, p. 324). The argument is put that if the system of incarceration can be classified as civil and non-punitive in nature, then the legal and ethical objections to detention based other than on desert are removed. Such an argument seems mistaken. The essence of incarceration from a punitive point of view is the deprivation of liberty, and this is in no way lessened by claiming the incarceration is civil. When a person is sent to prison following conviction for an offence, tremendous variations exist as to the nature of the institution to which he or she will be committed, and the form that incarceration will take. Ideally, the form of imprisonment will be the least harsh that can be imposed having regard to the need to prevent the particular individual from escaping or from doing further harm while incarcerated. In the case of a person said to be detained civilly, precisely similar considerations would apply. Such incarceration is, accordingly, properly classified as a form of preventive detention akin to imprisonment. To make use of less harsh sounding labels is merely to seek to escape from the gravity of the issues inevitably involved in arguing in support of preventive detention.

The Case for Preventive Detention

Faced with the choice between no effective action and a strictly and carefully limited system of preventive detention, the arguments in favour of the latter would appear the stronger. Such a decision is inevitably subjective, and involves a decision in favour of the potential victims of violent psychopaths, political terrorists and similarly dangerous individuals over the claim of persons possibly mistakenly or unnecessarily incarcerated under such a system.

Professor Nigel Walker (1981), an influential proponent of preventive detention, argues that the incapacitation of those clearly known to be dangerous should be regarded as a justification which is quite as sound as retribution, deterrence or the need for treatment (Floud & Young 1981,

p. 276). He seeks to refute the proposition that the concept of desert must always operate as a precondition to, or a limitation upon the extent of, incarceration by posing two hypotheticals, the latter of which closely parallels the Garry David case. In Situation A:

> the offender to be sentenced is certain to commit a crime of serious violence unless detained for longer than the 'just deserts tariff' would allow. Must he be released and re-incarcerated only when he has committed the crime he was certain to commit? Or would certainty justify incarcerating him before he commits it? To be consistent the pure retributivist must insist on the former. He might protest that the case as posed is unreal and artificial; but the answer to that is that an uncompromising philosophical position must be defensible in any conceivable situation (p. 281).

In Situation B:

> the violent offender declares his intention of committing further violence when he is released, and there is no reason to disbelieve him or to doubt his capacity for doing what he says he will do. Would the retributivist allow him to be kept inside any longer than the just deserts tariff permits, in order to stop him doing what he promises to do? Must his answer in this situation also be 'No'? If so, he is in effect saying that his principles do not allow him to take any steps to save a person from becoming a victim of violence if those steps involve the extension of incarceration. If he is completely consistent he would also be unwilling to allow any non-custodial precautionary measure that would involve even inconvenience for the offender (p. 281).

Predicting dangerousness is, of course, notoriously difficult (Steadman & Cocozza 1975; Cocozza & Steadman 1976, p. 1074; Bottoms 1977; Walker 1981). Professor Walker (1981, p. 277), however, has argued that it is possible to isolate a group of offenders of which a majority will commit further violence. A higher probability can, of course, be achieved if the target group is narrowed so that only those regarded as extremely dangerous are subject to the possibility of preventive detention and it is accepted as a corollary that persons of considerable dangerousness should be released at the expiration of their sentence. Preventive detention should, it is submitted, be reserved only for the most extreme cases; the human time bombs waiting for the opportunity of exploding on release.

Systems of preventive detention which have existed in the past have been unsatisfactory, but have usually been misconceived. First, because they have defined the concept of dangerousness too widely and have properly been seen to pose unwarranted threats to civil liberties. Secondly, because they have, as with s. 192 of the *Community Welfare Services Act 1978* (Vic.) (now repealed), normally involved a decision to impose an additional period of detention at the time of original sentence. Thus, they have operated in the context of the normal sentencing process which is essentially retributive in nature, and have required the judge to assess what is warranted in retributive terms and supplement that by an additional period imposed for reasons of community protection. Since the judge is required to impose the additional

term as part of, and therefore at the same time as, the original sentence, the judge is called upon to determine the risk that may be posed to the community by the offender at some considerable point of time in the future. Any such system is bound to fall into disrepute and fail.

A legislative scheme designed to provide for the further detention of highly dangerous persons after the expiration of their regular sentence would not seem impossible to develop incorporating appropriate safeguards. Such a system would come into operation at a point of time approaching the normal release date of the offender rather than at the time of original sentence. It would operate only in respect of persons who had proved their danger to the community by the commission of crimes of the most serious kind. The list should possibly be limited to murder, attempted murder and rape. Decisions made, towards the end of such offenders sentences, that there was a strong probability of further acts of serious violence on their part would, it would seem, be likely to be reliable. While potential for violence is in general extremely difficult to estimate, the issues which would be involved in such a scheme would be far more specific and the evidence available more extensive. In the case of a person convicted of a major crime of violence, who has a lengthy history of criminality, who has behaved violently while in prison and in respect of whom there is a strong body of psychiatric opinion to the effect that their propensity for violence remains undiminished and is likely to be acted upon in the future, a prediction of future violence is likely to be highly accurate.

Decisions as to the requisite degree of dangerousness should be made by a single judge of the Supreme Court, from which there should be an appeal to the Full Court. The court should be empowered to order a not insubstantial period of further detention based upon perceived risk of future violent acts.

Conclusion

The issues posed at the beginning of this paper as being raised by the Garry David case and the hypothetical case of the terrorist whose release date is approaching do not admit of easy resolution. The principle that a person should be punished on the basis of desert and not detained longer than her or his crimes warrant is deeply imbedded in our theories of criminal justice and ethics, and departures from this principle should be made only in exceptional cases. The claims of the community to adequate protection, however, are strong and should prevail in exceptional cases. The attempt should not be made to avoid these difficult issues by a pretence that persons who are deviant and violent are necessarily mentally ill or by ad hoc expedients such as the Community Protection Act. It is preferable to adopt a carefully limited and controlled system of preventive detention.

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PROVISIONS FOR VIOLENT OFFENDERS: PERPETUATING MYTHS OR CONFRONTING CHALLENGES

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THE SOCIAL DEVELOPMENT COMMITTEE, AN ALL PARTY COMMITTEE OF the Victorian Parliament, commenced an Inquiry into Mental Disturbance and Community Safety in June 1989. Concern was apparent during the early stages of the Inquiry about appropriate responses to offenders with severe anti-social personality disorders in regard to sentencing, management, release and review processes throughout the health, corrections and justice systems.

On 5 February 1990, the Minister for Health requested the Social Development Committee (SDC) to produce an interim report which dealt with legislative changes required to respond to persons with severe

personality disorders who may or may not be mentally ill and who present a danger to the community.

The Committee interpreted this as a general brief rather than a brief to focus on any particular person. In practice the distinction was difficult to maintain as current concern appeared focused on one particular offender who was entitled to parole, but was considered by many to pose a substantial risk to the safety of the public.

The public debate came to a head in the months of October, November and December 1989 when considerable media attention was given to this person's pending release. The person's preparation for release came to an abrupt end in November. Debate and controversy ensued which resulted in a polarised set of options: amendments to the *Mental Health Act 1986* (Vic) or the introduction of dangerous offenders legislation.

The Committee's Research and Investigations

The Committee conducted a comprehensive international literature and statute search as part of its general inquiry on the issues of personality disorder, offenders with severe anti-social personality disorders, involuntary detention under mental health legislation and responses to dangerous offenders. Having already taken evidence and received submissions from relevant departments, agencies and community groups in previous months and having identified information gaps the Committee held further hearings in February 1990.

The Committee's Conclusions and Recommendations

The SDC concluded, on the basis of evidence given to it, that personality disorder by itself does not constitute mental illness. Consequently, the Committee concluded that the Mental Health Act involuntary admission criteria should not be amended to include persons with personality disorder alone.

The Committee recommended that amendments to the Mental Health Act should not be considered as an option to responding to the problems posed by the small number of persons or offenders with severe personality disorder who pose a threat to public safety. Of the many offenders, there are only a handful with severe personality disorder who are considered a threat to public safety. The Committee recommended that where offenders currently serving sentences are thought to be dangerous, a range of special programs should be implemented to facilitate their re-entry to the community. Where such offenders have a serious personality disorder the programs may have to be augmented, adapted and intensified in acknowledgment of the additional difficulty in providing effective assistance for persons with severe personality disorder.

The Committee concluded that the development of a range of adequate pre-release programs is the most appropriate way of assisting such offenders to re-enter the community. Given that serious behavioural problems often emerge early in a person's life, the Committee undertook to examine the adequacy of the response of the juvenile justice and child welfare systems to children and young people with severe behavioural disturbances in the state of Victoria. The Committee's Report, *Young People at Risk* (Victoria.

Parliament. Social Development Committee 1991), recommended preventive strategies which may assist to avert the most tragic transition of a severely disturbed child to an offender feared by the community.

Severe Personality Disorder and Threat to Public Safety

The size of the problem

The personality disorder which is considered most likely to feature in incidents involving a threat to public safety is anti-social personality disorder (formerly known as psychopathy). A submission to the SDC by the Office of Psychiatric Services—Health Department Victoria during the Inquiry into Mental Disturbance and Community Safety indicated that overseas research suggests that about 3 per cent of men and 1 per cent of women in the general population may be considered to have an anti-social personality disorder (1990, p. 5). Many witnesses to the inquiry argued that only a small number of persons with serious personality or behavioural disorders would pose a grave risk. The SDC, in its *Interim Report*, concluded that it would be extremely difficult to accurately identify this small number of people and to predict whether or when they would actually commit serious acts of violence (1990, p. 9). The Office of Corrections reported to the SDC that:

> Around 10 per cent of prisoners (i.e. 200–250 prisoners) exhibit a level of behaviour disturbance which could benefit from therapeutic intervention. Within the remand population this proportion may be much higher, around 20–30 per cent. A smaller group, perhaps 1–2 per cent of prisoners (i.e. 20–25 prisoners) are severely disturbed and require special management (1990, pp. 5–6).

The Committee then sought to discover the number of offenders with severe anti-social personality disorders or with severe behavioural disturbances currently under the custodial care of the Office of Corrections, who would pose a grave risk to the community upon their release. The Office of Psychiatric Services and Office of Corrections in evidence before the SDC estimated this to involve between fifteen to thirty offenders (1990, p. 6).

The nature of the problem

In their evidence to the Committee, government departments discussed the nature of the problems presented by this very small number of people. The Committee provided the following summary of problems emerging:

> Their needs would have been evident since early childhood. Inadequate and inappropriate responses by government agencies have compounded the problems and helped to lock this small number of people into a cycle of aggressive behaviour and institutionalisation. In prison they are extremely difficult to manage and their level of dangerousness and destructiveness perhaps increases proportionally to the level of intensity of supervision. Research has shown that in hospital settings, it is almost impossible to balance security needs with therapeutic aims (1990, pp. 6–7).

The impact is thought to be one of serious risk to members of the public. This small number of offenders has been described as 'time bombs waiting to explode'. The SDC pointed out, however, that the bomb may or may not detonate. Evidence before the SDC suggested that as such offenders grow older the risk to the community diminishes (1990, p. 7).

The failure of existing provisions and programs

The SDC analysed the failure of agencies to respond adequately to the needs of persons with severe personality disorders.

Juvenile justice and child welfare systems

The Public Advocate, Mr Ben Bodna, discussed the failure of the juvenile justice and child welfare systems to respond to children and young people with severe behavioural disturbances or personality disorders:

> All of these people have had problems from an early age and they would have been noticed from an early age either by the educational system, or by Community Services Victoria and its predecessors. They have all had contact. The simple fact is not enough has been done for them in their formative years and they have risen through the system to be nuisances or menaces.
>
> The community should recognise those kids and start to work with them so they do not become menaces and this is an important part of ensuring that we do not have the problems we ultimately have (1990, pp. 73–4).

Dr Heather Manning, Psychiatrist Superintendent of the Victorian Children's Court Clinic, provided the Committee with further information about the lack of appropriate services. Dr Manning stated in her submission to the SDC:

> Of concern to us is the shortage of specialist and general counselling and supervision services in the post-court phase in certain regions, especially country Victoria. Because of this fact, many disturbed youngsters rapidly fail or regress, return to court and are institutionalised—'the revolving door' (1990, p. 74).

The Office of Corrections

The Director-General of the Office of Corrections, Mr Peter Harmsworth, in evidence to the SDC, admitted the failure of his Office to respond to the needs of a particular person, Mr X:

> We are looking at a program to help them (violent offenders) cope in the community but it is one of the things we have not done as well as we should have. I give the example of Mr X. That was left too late so his coping skills could have been better. A lot of his manifestations in terms of threats, I have been told, relate to his insecurity about being released. He does not know how he will manage (1990, p. 75).

Mr Harmsworth further said:

> . . . we started too late. That is the simple answer. We should have started two or three years ago with Mr X . . . whilst we had knowledge of him, it was one of those things we put off and with limited resources dedicated to developing those programs that are needed (1990, p. 75).

Aware of the inappropriate responses to Mr X, Mr Harmsworth concluded that:

> What we must examine is the preparation for release and management of the person once back in the community . . .
>
> [currently] we are just opening the gate and letting people go. The proposal is that attendance at such a facility [supervised supported accommodation] would be part of the parole system and a prisoner will reside in such a facility and be supervised . . . (1990, p. 76).

An analysis of the decision-making process by which the offender in question was kept in custody though eligible for parole reveals a parole system which is under resourced. Ms Wynne-Hughes of the Office of Corrections stated:

> The unfortunate situation with Mr X was that the Parole Board came up with this scheme (of intensive supported parole) and they were not satisfied about his management in the community so no parole was given . . .
>
> My understanding is that they had no option but to say they could not let him out on parole because they were of a mind that he would not comply with his parole.
>
> The strong view was they (the Parole Board) had a community responsibility in terms of the way he may respond when released and they were not satisfied there was a support program available to him that could reduce apprehensions about his dangerousness (1990, p. 77).

Limitations of existing health, welfare and support services

Envoy David Eldridge of the Salvation Army assisted the Committee to understand the accommodation needs of persons with severe personality disorders:

> They would be described as a difficult group by mainstream services. In many cases we are forced to look for inappropriate housing options, such as boarding houses, where they might be able to spend a few nights, and then we may have to put them in the Gill Memorial Centre or any sort of temporary situation that we can find. Again, that just exacerbates their anger and sense of not being appropriately cared for (1990, p. 78).

Envoy Eldridge discussed the type of response required of the Government:

> There is a need for a range of flexible options rather than a single track simplistic response . . . so that it could reflect both the diversity of the problems and the diversity of responses needed.

> The provision of such options would in the long term contribute to enhanced public safety (1990, p. 78).

The Committee concluded that the state's inadequate response to the needs of persons with severe personality disorder was a factor in the emergence of the view that provisions for preventative detention were necessary.

Preventive Detention in Operation

The Committee reported that Australian and international provisions for the preventive detention of dangerous offenders:

> take the form of an indeterminate or 'semi-indeterminate' sentence applied at the time of sentencing or a sentence considerably longer than the offence would have normally incurred (selective incapacitation in sentencing). The detention is related directly to an offence of which a person has been convicted. The offender is detained supposedly for the protection of society against actions which the person might have committed if he/she had been released after serving a sentence proportional to the crime. Dangerousness is inferred from the offence itself and from assessment of the person's past and current behaviour. The provisions are usually referred to as provisions for the detention of dangerous offenders (1990, p. 41).

Dangerousness in some statutes is inferred from a condition of mind or on the basis of a psychiatric diagnosis of personality disorder.

The Australian experience

Mental Defectives (Convicted Persons) Act 1939 (NSW). This act was introduced to detain indefinitely those who were either intellectually or socially deficient (that is, the latter being those thought to have an antisocial personality disorder). Similar legislation was introduced by most state governments during the first half of this century. Mental defectiveness meant:

> a condition of arrested or incomplete development or of degeneration of mind from whatsoever cause arising (s. 2).

The Act was intended to provide for a person who did not come under mental health legislation, who upon the expiry of sentence would otherwise be released from custody and in whom:

> there exists mental defectiveness so pronounced that he requires supervision and control for his own protection or for the protection of others (s. 2).

The type of offence required by the Act was:

> an offence punishable with death or with a term of imprisonment of two or more years or the offence of wilful and obscene exposure of person (schedule to the Act).

These provisions were used in an inequitable fashion to detain indefinitely persons who in many cases had experienced considerable disadvantage throughout their lives (Davies, *Sun Herald*, 23 May 1954).

Habitual offenders legislation. The consistent features of habitual offenders provisions across Australia, as outlined by the SDC are:

- the commitment of an indictable offence;
- a past offence (in some instances more than one prior offence);
- a declaration by a judge or magistrate that the person is an habitual offender;
- a conviction for the current offence and the imposition of the appropriate sentence;
- the order by the judge or magistrate that the person be detained at the Governor's Pleasure at the completion of that sentence; and
- the right of appeal to a court or a board to be discharged from the status of habitual offender (1990, p. 40).

Most often in the absence of formal mechanisms for regular automatic review and appeals, persons subject to such provisions have languished indefinitely in custody at the Governor's Pleasure despite having completed a sentence proportional to the original crime.

The international experience

Danish provisions. From 1930 provisions in Denmark allowed the indefinite detention of offenders with severe personality disorders who were thought to be dangerous in special high security psychiatric hospitals or 'special prisons'. Following concern as to the efficacy of the treatment provided at these prison hospitals the Danish Parliament introduced new dangerous offenders' legislation in 1973. 'Dangerous offender' is defined as:

> Persons who have committed, or have threatened to commit, severe bodily harm to others and are believed capable of or likely to repeat such acts.

In 1977, Svendsen explained the provisions of this statute:

> . . . it is intended that only a few offenders (up to five a year) should be dealt with in this way, and that at any time a maximum of twenty to thirty offenders should be detained; . . . The stay in the new form of detention, used since 1973, is unlimited in time, the following conditions must be fulfilled:
>
> 1) the offender must have been found guilty of homicide, robbery, rape, kidnapping, arson, or attempting such a crime.

> 2) it must be assumed from the nature of the offence committed and the information obtained about the offender, especially concerning his previous offences, that he represents an obvious risk for the life, body, health or freedom of other people; and
>
> 3) the application of detention in place of imprisonment must be considered necessary to counter this risk . . . (1977, p. 178).

The new legislation also enables courts to make a Dangerous Offender Order for a fixed period (for example, for two to three years). The fixed order is reviewable at the expiry of the given period.

The debate in the United Kingdom. British commentators had expressed concern about the provisions of the British Mental Health Act which resulted in the detention of many offenders under the legal status of 'psychopath' on an indeterminate basis in a special hospital. Many offenders had been declared to be 'psychopaths' on the basis of their offence and their behaviour in prison. Demonstrating that one was no longer a 'psychopath', as defined by the British mental health legislation, then proved a formidable task (Chiswick 1982; Wootton 1978; Ashworth & Gostin 1984).

The Butler Committee on Mentally Abnormal Offenders in England and Wales had recommended that the system of an indeterminate hospital order for dangerous psychopathic offenders should be abolished and replaced with a new and semi-indeterminate 'reviewable sentence' which though applied at the point of sentencing would be 'served' at the end of the original sentence (Great Britain Committee on Mentally Abnormal Offenders 1975).

This proposal was widely opposed. Many commentators considered that it was not morally fair as a person would in effect be punished for crimes not committed but for crimes it was feared might be committed. Debate was rekindled about the inability to accurately assess and predict dangerousness (Radzinowicz & Hood 1981; Bottoms & Brownsword 1982).

Failings of provisions for preventive detention

The Social Development Committee in their Interim Report outlined the following failings of provisions for preventive detention.

Inability to accurately predict dangerousness. Miller, an American criminologist stated:

> Our current ability to predict long-term violent behaviour yields no more than one accurate prediction out of every three . . . (1987, p. 39).

An implication of this pointed to by the SDC would be that for every one offender who is detained because of a prediction of future dangerousness, two non-dangerous offenders would also need to be detained.

Vagueness of criteria for detention under the Acts. Verin (1981), a French criminologist, in discussing Frances's Security and Liberty Law and Ohio's Dangerous Offenders Law referred to criminologists and other commentators

who have expressed concern about the attachment of definitive qualities to the notion of dangerousness. Verin argued against attributing legal validity to a vague popular notion such as dangerousness.

Definitional tautology. The effect of tautological definitions of dangerousness has been discussed by leading forensic psychiatrists in America:

> By appearing to state the obvious, . . . [they have given] . . . the proceeding an air of science, although all that is happening is that the forensic psychiatrist, either intentionally, or unwittingly, is inserting his or her own moral judgement into the process by way of expert testimony (Bloom & Rogers 1987, p. 852).

Indeterminate detention. The arbitrariness of indeterminate detention in many dangerous offenders provisions is a commonly criticised aspect of provisions for preventive detention. For example, Marchal, a Belgian criminologist, discussed the tendency toward inequitable application of indeterminate detention (1980).

Procedural bias. Jakimiec et al. (1986, p. 480) found that within the Canadian legal framework for dangerous offenders, once launched, applications for dangerous offender status are most difficult to defeat—the onus of proof tending to be reversed with the offenders against whom the application are made having to demonstrate why release at the end of their sentences should in fact occur.

Broad application. The provisions of Canadian dangerous sexual offenders legislation were often applied to offenders who were considered by Professor Greenland to not be dangerous. Greenland (1978) argued that the mere existence of any dangerous offenders legislation manufactures a tendency or pressure to 'classify' offenders as dangerous.

Failure to rehabilitate. Because most provisions for the preventive detention of dangerous offenders past the expiry of their sentence do not address the opportunities which should be accessible to the offenders while under detention, the offenders so detained are usually left languishing in custody with little opportunity to prove their readiness for release (Greenland 1978).

False perceptions of community safety. The SDC argued that dangerous offenders provisions can result in the public having a false and unrealistic sense of security. Professor Greenland (1978) for example argued that an effect of the Canadian Dangerous Offender provisions is to:

> often in the mockery of justice, give the public a false sense of security by incarcerating—virtually for life and in conditions of appalling degradation a pathetic group of socially and sexually inadequate misfits (1978, p. 215).

Perpetuating Myths or Confronting Challenges

Provisions for preventive detention are underpinned by assumptions with which the Committee disagrees. The first assumption is that lengthy

separation of a violent offender from the community will enhance community safety. The reality is, however, that prisons are dangerous places, that people learn further violence and maladaptive behaviours in prison. Prison can undermine a person's ability to live independently and peacefully in the community. Prison for many is a disabling and embittering experience. In some cases it significantly brutalises people, reduces the will to live decently with others and inflames their desire for revenge.

The second assumption with which the Committee disagrees is that disturbed violent offenders cannot be assisted to eventually return to the community. This assumes that rehabilitation programs and programs geared toward integration into the community are not worth attempting during the person's term of imprisonment. Community Services Victoria (CSV) advised the SDC (1990, pp. 18–90) in their submission of recent research findings of Wineze which suggests for example that the rate of recidivism by sexual offenders can be reduced from a rate of 80 per cent to 20 per cent through participation in a rehabilitation program (1990, pp. 18–90). Similar results have been reported in America for offenders participating in work release programs. Goldmeier et al. (1980) and Rogers and Cavanaugh (1981) report favourable statistics for violent offenders participating in community based follow up and rehabilitation programs.

Research shows that rehabilitation programs which have the objectives of increasing a person's opportunity in life particularly their economic opportunities and which assist prisoners to develop skills which are directly and immediately relevant to living in the community can reduce the level of recidivism (Halleck & Witte 1977; Benedek 1981; Reid & Solomon 1981; Matthews & Reid 1981; Frederiksen & Rainwater 1981). Matthews and Reid argued that when these programs are extended into the stage of parole and re-entry to the community favourable results can be observed.

As in other fields, rehabilitation programs in prisons are now stressing the importance of subjecting prisoners as early as possible in their sentence to situations resembling, as closely as possible, normal community living. The emphasis is hence on subjecting, prisoners to the stresses of living with others and of assisting the development of relevant interpersonal, living and work skills. Reid (1981, p. 257), outlined the way in which experience based rehabilitation programs were assisting offenders with long histories of anti-social and disturbed behaviour to return to the community. He stressed the importance of programs which are designed to:

> represent a relatively new approach to antisocial individuals. Preliminary data appear consistent with the hypothesis that reality oriented, experiential therapy involving simplistic and basic survival concepts has a substantial impact on the psychological and behavioural characteristics of antisocial offenders, especially combined with an individualised, comprehensive program of psychosocial rehabilitation.

Despite the fact that many violent crimes are now related to drug or alcohol problems, there are few substance abuse programs in prisons.

Confronting Challenges

In the Chairperson's Preface of the Committee's Interim Report (Victoria. Parliament. Social Development Committee 1990, pp. xi–xii) it was argued that:

> In a desire to ensure the protection of the community it is important to not be over zealous in seeking to punish or detain 'dangerous' people. In the end, the only way the safety of the community can be protected is to reduce the dangerousness of the person who threatens it. Detention without rehabilitation will not achieve this.

How can the dangerousness of severely disturbed violent offenders be reduced?

The authors believe the first step is reducing the violent nature of prisons by introducing operational paradigms into prisons which aim to inflict no further harm upon those placed in their care. An enlightened approach to prison management similar to those which have worked effectively in Scandinavian and other Northern European countries is required. The introduction of such approaches has long been urged in Australia by Professor Tony Vinson and the Australian Institute of Criminology. New Victorian prisons are attempting to introduce systems of unit management which are consistent with such approaches.

Lotus Glen Correction Centre at Mareeba in northern Queensland, a new state run purpose built prison which commenced in 1988, attempts to as much as possible provide a situation for prisoners which is similar to daily living. Prisoners are managed in units of twelve to sixteen and are involved in the daily running of the unit. Responsible behaviour is both encouraged and rewarded. The emphasis is upon correctional officers getting to know each prisoner and in assisting them to prepare for release. Prisoners report that they are treated well and that they can actually communicate with the officers. Prisoners who have experienced both Victorian and New South Wales prisons comment on the absence of a regime of interaction characterised by violence among prisoners themselves and between prisoners and correctional officers. It is only in such an atmosphere that a disturbed offender will have any chance of not becoming further alienated from society.

Programs for violent offenders with severe mental/emotional disturbances

Programs already under way in the Victorian Correctional system including the Drug and Alcohol Program, Sex Offenders Program, the Psycho-Social Program and Intensive Parole Program provide models from which responses could be developed. The proposal for the development of a Violent Offenders Program at Pentridge and within the community-based corrections program would appear to have the potential to be applied across the prison population and to be adapted to those thought to have a severe personality disorder. The Committee eagerly awaits further information about the status of this proposal.

The Office of Corrections suggested in evidence before the SDC the introduction of the following:

- Intensive psychotherapy and increased prisoner management support by Office of Corrections psychologists. This option would comprise of intensive, individualised behaviour modification programs conducted by Office of Corrections psychologists, together with more effective day-to-day management of anti-social personality disorder prisoners within the mainstream accommodation. Additional training of custodial staff in behaviour management techniques would be a key component. During acute episodes the anti-social personality disorder prisoners could be transferred to the Psycho-Social Unit which is being established within G Division.

- Establishment of a special accommodation unit. A behavioural program-based unit for severely disturbed prisoners could provide an intensive therapeutic environment which might benefit some prisoners. Due to the problems associated with grouping severely disturbed prisoners together a very high level of resourcing would be required.

The Committee supported the introduction of these programs.

Preparation of prisoners for parole or release

It is clear that a person who has spent many years in custody, who has not had the opportunity to develop skills which will be of assistance upon release, who is released with no income, with no employment, with little prospect of gaining and maintaining lawful employment, with nowhere to live and with no support is highly likely to re-offend. The Committee recommended the introduction of comprehensive pre-release programs which would provide practical assistance and support to prisoners as they prepared for release.

Parole programs

Parole can and should provide a mechanism for the supervision of and integration back into the community of offenders. Parole can be structured in such a way as to balance the community's need for protection with the prisoner's need to develop and test out skills necessary for living in the community.

Supported accommodation programs

The Committee noted that the Epistle Centre had applied for funding from the Office of Psychiatric Services to establish a supported accommodation program for up to six psychiatrically disturbed offenders. If funded this program will:

- provide transitional accommodation and will be staffed twenty-four hours a day;

- be oriented toward assisting the residents to develop living skills and strategies for problem solving; and

- also aim to link the resident to existing health, welfare and employment programs in the local area.

Though geared to mentally ill offenders this supported accommodation could provide a model for assisting violent offenders who are thought to have severe personality disorders or behavioural disorders to re-enter the community.

Conclusion

Developing and building prisons geared to preparing a prisoner for release and to providing support upon release will involve the provision of new resources. Prison reform in the long term will enhance the safety of the community. A further challenge is presented by the task of providing sufficient resources for child welfare and juvenile justice agencies to be able to respond adequately to seriously disturbed children and young people.

The Social Development Committee concluded, on the basis of evidence before it, that only a small number of seriously disturbed children and young people could be considered to pose a threat to community safety. The Committee has considered how the circumstances of a child's life—the responses of family, community and government can exacerbate or diminish mental disturbance. It has identified the need for, and made recommendations in respect of:

- support for families;
- support at school;
- support for young people in crisis;
- accommodation and income support for homeless youth; and
- provision of health services which young people will use.

The Committee is confident that the early provision of assistance to disturbed and distressed children and young people will in the long term enhance community safety. It is also confident that, for those disturbed children and young people who demonstrate a real threat to community safety, appropriate assistance directed to community integration and rehabilitation through alternative and challenging experiences, can diminish future risk.

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'DANGEROUS PERSONS': TO BE GAOLED FOR WHAT THEY ARE, OR WHAT THEY MAY DO, NOT FOR WHAT THEY HAVE DONE

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THIS PAPER RECOGNISES THAT THE GARRY DAVID CASE IS CURRENTLY THE subject of a reserved judgment in the Supreme Court, and while the paper will attempt in many ways to reflect upon the problems Mr Justice Hedigan is confronting in that case it is fairly important, particularly in a conference like this, to confront the issues of dangerousness head-on. There are some very fundamental flaws that need to be addressed in the legislative program that the government has implemented. This state has embarked upon what was necessary in an Act to achieve the desired result. The desired result was achieved by conferring upon a court the ability to order preventative detention.

Let us discuss this in its correct context. The first aspect that requires analysis is the role of the criminal justice system. In the Middle Ages when the King was a little unhappy with some of his enemies, he managed without too much difficulty to get an Act of Attainder which was passed through parliament to detain one of his enemies, a person he may have ceased to trust and eventually the attainder was used to impeach the person, the catch phrase was 'danger to the state'—something that rings some bells in the context of the present debate.

As the judicial system started to evolve and the roles of parliament and the courts took their own separate paths these Bills of Attainder fell in disrepute and

by the eighteenth century had all but been eliminated. Indeed the last usage of the Bills of Attainder were in respect of persons who were being impeached for criminal charges. Since the eighteenth century the role of the courts took over, the parliament made laws and the courts applied those laws. Of course that did not resolve the problem of people who were dangerous to the state, so we in Australia, probably more than most, became aware of the treatment of habitual offenders. People who committed offences more than once were transported to the colonies. During the nineteenth century a legislative pattern of gaoling habitual offenders, under the notion that these people were 'dangerous' to the state evolved. That has been an evolution that has occurred in England, it has been tried in the USA and still exists in some shape or form in many of the states of Australia.

The essence of an habitual offender is that the person was still gaoled for the offence committed and courts used the sentencing principles appropriate at the time. Because there were second or third offences, however, the courts put into effect a 'surcharge' on the penalty of imprisonment. This surcharge had to be imposed at the time of sentence, not at a later point in time. In effect, this fell foul of the sentencing principles as you were able to punish for the nature of the offence or for the offenders past conduct. Its use became more infrequent as there was quite a strong judicial aversion to it as it introduced an indeterminate aspect into sentencing. The courts were well equipped in any event to handle the problem of the repeat offender. Obviously the third time offender secured harsher treatment than the first time offender.

In Victoria such legislation was finally repealed in 1986. It has lingered on in the other states but it is rarely used and certainly not regarded as a vehicle to try and deal with someone who is 'dangerous'. The courts on occasion try in effect to take this problem into their own hands and sometimes hand out a severe sentence which may have gone beyond that which the crime warranted in the circumstances of the case. Occasionally those excesses resulted in what was effectively preventative detention. The High Court in *R v. Veen (No. 2)* firmly put down such an idea by upholding what it called the doctrine of proportionality. In other words people would be given sentences by reference to the crime they had committed, having regard to the prior conduct and the particular circumstances of the offender. But it was not for the courts to protect the public by superimposing on normal sentencing principles, a principle of preventative detention.

The end result of this little foray into the criminal justice system is that the courts are there to gaol people for offences they have committed and it is Parliament's role to stipulate what those offences are. Indeed Parliament has done so under the *Crimes Act 1958* (Vic.). If people threaten to kill or threaten to cause harm then that is a serious offence that can be punished by imprisonment. That is the role of the criminal justice system. It has never been used and should never be used to gaol people for their personality, that is for what they are, rather than for what they have done.

This has led to problems in the mental health area. Over a long period of time under the mental health system, a system of involuntary detention has been accepted as necessary to prevent harm to the individual or to prevent harm to the public. People who are mentally ill may be subjected to

involuntary detention after appropriate certification and examination. These people could be treated so that eventually as with any illness they may be cured or were curable and could be released back into the public domain.

In Victoria, the mental health system fell into disrepute as the certification procedures were able to be abused and the definition of 'mental illness' was possibly a little too flexible. We had a very enlightened approach and after a series of reports our *Mental Health Act 1986* (Vic.) was passed which made it fairly clear that the Mental Health Review Board (constituted by eminently qualified experts) was well placed to handle appeals from certification to prevent involuntary detention which could no longer occur in an arbitrary or subjective manner. This, together with new definitions of mental illness, was regarded as a very enlightened approach to the problem. The problem for present purposes was that an anti-social personality disorder alone, is not to be regarded as mental illness.

The system in effect left no role for what we call the dangerous person. Such a person is not mentally ill but gives rise to the present problem. The Garry Davids of the world would have been certified under the pre–1986 legislation. It was to prevent abuse of that procedure that the 1986 legislation was passed. The expedient of saying such persons were mentally ill in either lay terms or any other terms was no longer available. That gave rise to the problem of what do we do with dangerous persons. They do not fall within the criminal justice system and they do not fall within the mental health system. Where do they fall? And if so why?

Firstly, it is important to understand what they are. It is fairly clear that you cannot draw upon what the offender has done other than as an aid to some form of analysis or diagnosis of the problem. One may draw on what they threaten to do again; however this can only be an aid. If there are genuine threats to kill or to commit massacres then those persons would quite properly be prosecuted under the relevant provisions in the Crimes Act. If the threats are not genuine then their mere existence is not much of a guide to 'dangerousness'.

So what do we do? The problem is where do you start? When the *Community Protection Act 1990* (Vic.) was introduced into Parliament, the second reading speech of the Attorney-General stated:

> as elected representatives of the people of Victoria we have a responsibility to protect the safety of Victorians wherever and whenever possible.

One cannot object to that, as a statement of government policy. He went on:

> If horrendous threats of violence are made by any person, that let us believe that the person making those threats can, and will, carry them out then, we must take all possible steps to protect the public.

Again, one can have no quarrel with this and that is why we have the Crimes Act to deal with that very problem.

> The Hoddle Street and the Queen Street mass murders deeply affected our community, we could never knowingly expose Victorians to another

> Hoddle or Queen Street (Victoria. Parliament. Legislative Assembly 1990, *Community Protection Act 1990*, Second Reading Speech).

The accusation in Garry David's case is that he had threatened to commit a Hoddle Street or Queen Street massacre. The author does not believe that people think those who make such threats and intend to carry them out should be wandering around the streets. There lies the problem—it is an offence to make a threat. If for some esoteric reason the debate is that mass murder is not specific enough to be a crime, then the Crimes Act should be amended. That was not what was done. As a result of the analysis of the alleged 'threats' as he had made, Garry David has his own Act.

The Mental Health Review Board conducted a sixteen-day hearing into Garry David. There were 2,100 pages of transcript, fifty-eight exhibits, and many psychiatrists who looked at this particular offender. In its decision the Board said:

> We believe it unlikely that he would carry out his threats by violence directed towards the community at large or public officials. However there is evidence to suggest that he does pose a threat to members of the police force and to people in his immediate surrounds if he were placed under stress with which he could not cope. We do not believe that Mr David is likely to embark upon a rampage as soon as he is released into the community.

The finding by the experts set up for the purpose was that he was not mentally ill. It was a finding deliberately made, and cautiously made. The point the author wants to make quite strongly is that one of the dangers with a case such as this is that the case is in effect predetermined by trial by media or by the public mood.

Therefore as the author suggested at the beginning of this paper, it depends what question is asked. If we ask:

> Should we allow someone who is going to carry out a Hoddle Street massacre to roam the streets?

The question answers itself—of course not. But when we ask the question somewhat differently and ask:

> What do we do with such a person in respect of whom opinions legitimately differ—who has in the past shown a tendency to be violent in certain circumstances and who may or is likely to exhibit the same tendency in specified circumstances? Do we lock them up for what they are, that is for having a serious anti-social personality disorder?

The answer is more difficult and raises the second real point—we are locking them up for what they are, we are locking them up for their personality. We are not locking them up for threats—we are locking them up entirely for what they might do. This has to be confronted in that way.

Garry David's case is probably the most extreme test of the principle. One would not find many other people who fit quite as neatly into the pocket he

has fitted into. There are few people that one can waive the aura of 'threatened' public massacres around under the umbrella of saying 'this person cannot be allowed onto the streets'. Another thing that is said about him, and indeed about many other people who are said to be dangerous, is as to the violence they will inflict on the community. In fact, when one reads Mr Justice Fullagar's judgment, and the Mental Health Review Board's analysis of Garry David's problem, most of his acts which have been quite horrific have been self-mutilation. Principally he has taken his anger out on himself. He has on occasions been involved in some violent incidents but that is not at the forefront of the case against him. So the problem is obviously a much more complex one than is suggested.

The third warning about people like this, is that in his case he has spent the last ten years in custody. What one sees in the evidence thrown up against him, is in fact a compression of ten years experience into a hearing of sixteen days. These events are taken out of context, and he is put forward as 'man who attacks his own sex organs, a man who attacks his own body' and suddenly one sees a horrific situation. Put in a broader context they may take on a different light. The author is not arguing his case one way or the other, but believes there is a general warning about the dangers of trying to anticipate human behaviour or personality. His case is a good example of how expert views can legitimately differ about his mental state.

This leads to the next point. Can we predict dangerousness? How likely is it that such persons are likely to be violent. It seems clear that the psychiatrists are in agreement that there is no scientific process or basis to form a view about dangerousness. It seems to be highly subjective. The greater the track record, the more meaningful the threat, the more likely the predictability. You have to estimate—is this a threat made to a psychiatrist to express anger, is this a threat made just to produce a fear or a reaction, or to take advantage of a particular situation, or is the threat real? These are real problems.

There is a fundamental flaw in the notion that dangerous persons should be gaoled after they have served their time. Of course whatever they were at the beginning of their prison term, the author does not believe anyone would suggest that a violent person is going to become less violent in a gaol environment at the end of the imprisonment. The treatment or help that they get in the course of their prison term is very modest indeed. The Office of Corrections was reported in the press as stating that after Garry David's ten years of imprisonment they had failed him completely.

Garry David had not been assisted into readjusting into society. Therefore, whatever situation he was in at the beginning, the state has to take responsibility for the transition between what he was when he entered that system and what he had become after he was due to leave it.

This is a burden that the state has to accept. The state cannot take the short-term option and say 'well, whatever the reason is at the end of ten years this is what we are confronted with; let us just lock him up and throw the key away'. This is a pretty important problem. Some argue that this is only for the most serious offenders: the rapist, the murderer, and the person who has been guilty of consistently violent crime. How can we assess whether the tendency, such as the rapist's tendency, has gone within a prison period. It is

almost an impossible task because the prison environment is such a unique one. Until we have more resources and a more enlightened approach, it is hardly likely that the kind of treatment and benefits that must occur within this environment will benefit the prisoner's personality.

The Community Protection Act demonstrates the failings of the whole system. It was brought into being after a great publicity beat up, and in the context of failed certification. It was not preceded by a Law Reform Commission report on the problem of community protection. It came about as a short-term fix to a problem that the government had no solution to. It created a one-person law, unique since the Bill of Attainder in the days of the Middle Ages. The Act dispensed with the rules of evidence, enabled documentary and hearsay evidence to be accepted and acted upon as evidence. The Act dispensed with medical privilege and allowed the case to be determined on the balance of probabilities. This is unique legislation enabling the court to act upon evidence that is not otherwise admissible. The Council of Civil Liberties was very critical at the time. The real point is why did the government have to take these extraordinary steps—setting aside basic protections and rules which our criminal justice, and even our civil justice system give. The answer is because such rules (for example, strict rules of evidence) would not be able to achieve the required result; that is, Garry David's detention. They could not have achieved the desired results if it had to be 'proof beyond reasonable doubt'.

In summary, the problem of dangerous persons is a terrible indictment of our prison system. We cannot blame those administering it, but the author blames those who are responsible for the fact that these institutions are not given the resources they require to fulfil the task of rehabilitation. It is also an indictment of our mental health system, because the mental health system has wiped its hands of the problem, and yet a man who is now in detention and in need of treatment has not been treated for the ten years in which the state had an obligation to treat him. We have a Catch 22, he is not mentally ill therefore he cannot be treated. If he cannot be treated how is he going to change his personality? Is this an indeterminate sentence? At the moment the author does not think that anyone can suggest that the Community Protection Act is anything other than an indeterminate sentence. It is like locking him up and throwing away the key. Where does that leave Garry David? A man living in hopelessness about his future. What does that do to his anti-social personality? It hardly offers a curing, or a beneficial effect.

The answer is obvious. These people must be treated, must be helped and must be assisted from the first day they enter gaol. It is not good enough and it is quite wrong for the government to think it can take up the problem at the end of the prison term and subject these persons to something that our criminal justice and our mental health system has never permitted. If it is wrong for one, we must not fool ourselves that by making it applicable to all in order to satisfy 'the equality of all before the law' principle that we are solving the problem. We are exacerbating it as if it is wrong for one, it becomes wrong for all.

We cannot ignore the risk to society in having people who may be dangerous out there, but sometimes we have to live with such risks. We have gun laws and

they give rise to risks which for some reason we are prepared to accept. We have cars, we have drink—these create risks that can lead to death, but we permit them. We have building construction sites which cause accidents and sometimes death. We have to live with risks because sometimes the cost of doing otherwise is too high. Until we can satisfy ourselves that we can scientifically or objectively establish on proper principles that a person is actually going to cause harm, we have to live with the risks of potentially dangerous people being out there, free in the community. A solution lies for rehabilitation within the prison system from the first day that such persons arrive there and in the parole system, in trying to give incentives to ensure the people who serve their sentence can re-enter society. The solution does not start at the end of imprisonment. This is something that governments need to give a lot of careful consideration to. What had started out as a misconceived exercise in legislation, a one person Dangerous Person Act will become an all persons Dangerous Persons Act. Initial trial by media has resulted in a short-term expedient creating an intractable problem. That is not the way that law reforms should proceed in a modern, western civilised society.

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THE POLITICS OF DANGEROUSNESS[1]

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> Violence is not a politically neutral concept, it is entwined with the most fundamental questions of state moral authority (Ericson 1991, p. 233).
>
> Penal signs and symbols are one part of an authoritative, institutional discourse which seeks to organise our moral and political understanding and to educate our sentiments and sensibilities (Garland 1990, p. 252).
>
> Notions of 'dangerousness' are closely related to particular value systems, as well as philosophical, moral and ideological perspectives. Clearly the major values and sociopolitical process in a society will tend to determine what will be perceived, defined, and officially labeled as dangerous, and how conditions and behaviors so labeled will be handled. However, the term 'dangerousness' is rather vague and often receives surplus meanings and varying interpretations. Indeed it has been suggested that, like beauty, dangerousness lies in the eye of the beholder (Shah 1981, p. 235).

AN ANNOUNCEMENT WAS MADE IN EARLY 1991 WHICH REVEALED THAT the Victorian Government intended to introduce a Companion Animals' Bill to go before Parliament in November 1991. This Bill is concerned with special measures for dangerous dogs; that is, those who have killed or inflicted serious injury on a person without provocation. There would be identification on the basis of this past violent behaviour and a distinctive collar would then be worn; certain restrictions would be imposed on the dog's movements and, if these protective measures

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failed, the dog would be killed. These suggestions were commended in the press as being most reasonable and there was little public comment.

It is perhaps rather more curious that special legislation for dangerous people has not aroused much general interest either. Here, the author is mindful of the warning given by Lord Allen, who when writing in a publication of the Royal College of Psychiatrists, stated that:

> One very important aspect of this question of dangerousness is the reluctance of the general public to try and understand some of the underlying issues (Allen 1982, p. 1).

Certainly, in the case of Garry David, we have witnessed a hiatus in meaningful dialogue between professionals, the government, the public and the media.

The literary allusions to dangerousness are a revealing guide to the use of this term. Lady Caroline Lamb wrote in her diary that her first impressions of Byron were that he was 'mad, bad and dangerous to know'. Walter Bagehot indicated that 'there is a glare in some men's eyes which seems to say, 'Beware, I am dangerous' and he found Lord Brougham to show 'a mischievous excitability [which] is the most obvious expression of it. If he were a horse, nobody would buy him; with that eye no one could answer for his temper'.

Shakespeare was concerned with dangerousness in some of his best known plays, which serve to dramatise the elusiveness of its meaning. For example, Julius Caesar boasted: 'Danger knows full well that Caesar is more dangerous than he' and he referred to portents such as the hooting of birds in the market place and comets as a means of assessing his own personal danger. Personal qualities were added with the comment that 'Yon Cassius has a lean and hungry look, he thinks too much, such men are dangerous'; yet Caesar completely failed to recognise the signs in Brutus, who presented the real danger to him. Hamlet was another Shakespearean character concerned with his own potential violence, when he soliloquised: 'For though I am not splenetive and rash, yet have I in me something dangerous'.

There is a threefold message firmly entrenched in these literary examples. Firstly, there is the perception that dangerousness is expressed overtly; secondly, that it is profoundly linked with masculinity; and thirdly, it is a propensity inherent in those who are otherwise deceptively conformist. Perhaps Shaw most succinctly exposes the tautological nature of dangerousness in an article in *Medicine, Science and Law* when he maintains that it is a dangerous concept (Shaw 1973). This confusion does not abate by utilising it as a solution to some of society's misfits, since neither the government nor the public appears to recognise the minefield of ethical and professional problems which then ensue (Petrunik 1982; Sleffel 1977). It is, therefore, a salutary exercise to explore some of the nuances which surround the use of this term.

Nigel Walker has pointed out that we should avoid the abstract category of dangerousness and personalise it. Too often we assume the existence of some innate and specific characteristics and use these to invoke a special status category, which can then be applied to designated people (Walker 1977). Once this is formally invoked, there are no clear guidelines to reverse

such a judgment and, in their absence, we may be condemning selected people to a life of social irresponsibility.

There is no doubt that connotations of uncontrolled and unpredictable violence arouse diffuse anxiety, which can most readily be relieved by the powerful mechanism of scapegoating (Chapman 1968). To categorise individual people as 'unacceptable risks' or 'socially dangerous' is stereotypical thinking—that is, the syndrome or entity of the dangerous person is believed to exist beyond argument. When we do this, all other human qualities are annulled or pale into irrelevance. The term 'dangerous' becomes a shorthand expression in much the same way as the term 'witch' signalled deviance beyond redemption to societies in the Middle Ages (Cohn 1970). Stereotypical beliefs are useful for their ease of caricature, their ability to be readily portrayed in the media, and for the reality they have in the public's mind. However, there is an element of political expediency if policies depend on this sort of portrayal for their acceptance.

Although the term 'dangerous' is so often used in an abstract, sanitised and professional way, it is redolent of the moral condemnation invoked by the word 'evil'. This has religious overtones but attained a scientific status with the criminal anthropology movement, which arose at the turn of the century. Lombroso gave respectability to the belief in a frankly dangerous individual with his terrifying portrayal of an atavistic being, who was a throwback to a lesser form of humanity and thus inherently evil, irredeemable and irresponsible (Lombroso 1913). This notion filtered into legal and psychiatric discourse, ultimately reinforcing juridical, political and community belief systems.

It was Michel Foucault who was quick to point out that it was the development of these anthropological notions around the turn of the century which led to the introduction of social defence principles and encouraged a transposition of the notion of 'no fault liability' embodied in the civil law, to pertain to the criminal law. The existence of dangerous citizens accorded this status on account of both their actions and their personality could be seen to justify the absolute power of the state in such a way that there was no conflict with the ordinary process of the criminal law (Foucault 1978, pp. 16–17).

It is professional understandings of the motivation of criminal and antisocial behaviour which have unwittingly contributed to the political use of dangerousness. For example, there was the firm belief within positivism, which prevailed until the 1960s, that one could draw distinct lines between the dangerous and non-dangerous, just as the criminal and non-criminal could be separated (Petrunik 1982, p. 241). The consequences for the dangerous individual were logical, but severe: either elimination, isolation on an island or in a maximum security institution, or castration in the case of the repetitive sex offender. There is, of course, an historical legacy for such public policy responses to those whose behaviour is perceived to constitute a threat. Foucault refers to the extrusion of lepers in the Middle Ages and the ships laden with the mentally ill and vagabonds floating down the Rhine in a bid to find acceptance elsewhere (Foucault 1965; 1977). We should not dismiss this societal response as the mere ignorance of the times, since in the absence of an immediate cure, we have also seen the enforced isolation of those with syphilis and tuberculosis, and it is worth

noting that we are now reviving this same social defence principle with respect to some AIDS carriers (Sontag 1988).

The significance of professional involvement in defining and accepting the term dangerous cannot be underestimated. One consequence is that the actions of governments in relation to legislation about dangerousness are now affirmed more confidently in the belief that it is a concept with an objective base. Professionals have found themselves unwittingly coopted to use the label formally. In so doing, they have become the experts and have controlled the parameters and consequences of its application. Petrunik suggests that by this mode they have enabled authorities to 'legitimate social control policies and practice' (Petrunik 1982, p. 266). In Foucault's terms, society gains control over the nature and personality of the dangerous individual (Foucault 1978). Dangerousness may, in essence, on this view, be a political and administrative concept and for psychiatrists and lawyers to claim otherwise is a prostitution of their professions.

A further semantic problem arises in the linking of 'dangerousness' with 'psychopathy' or the more fashionable 'antisocial personality disorder' (*see* DSM–III–R 1987, pp. 346ff.), since this is a further way of reinforcing its special quality. The very term 'psychopath' is ambiguous and acts as a 'persuasive device' to alter the observer's view of the object, so that it is pejorative rather than scientific (Gusfield 1963; 1981; 1986). If one considers closely the way in which terms such as 'dangerous' and 'psychopath' are invoked, then there is a great deal of circularity. A person is dangerous when some form of containment is considered desirable and, as has been endlessly pointed out, a psychopath is a psychopath because he commits antisocial acts and the reason he commits antisocial acts is because he is a psychopath (Ellard 1991). Kittrie reports Seymour Halleck's comments that:

> Even within psychiatry, there is widespread disagreement as to whether psychopathy is a form of mental illness, a form of evil or a form of fiction (Kittrie 1972, p. 170).

Nonetheless, from the 1920s onwards legislatures responded to public fears and devised laws specifically referring to 'psychopaths'. In so doing, they invested it with an unwarranted scientific significance and ignored its mythological origins and amorphous nature. One can only conclude that such laws built so freely on such an uncertain legal base had, as their major object, the incapacitation of a wide variety of deviants. The significance of this new sentencing direction cannot be underestimated. Governments were creating a special type of offender with distinctive characteristics, who were considered a priori to be antithetical to the security of society. The performance of a punishable act was not to be dealt with in its own right, but as an indication that more such acts would be committed in the future. The application of this consequent legislation was capricious, draconian in its use of indeterminate confinement and it applied to a broad range of both trivial and serious offences (Sleffel 1977).

Gradually, the self-evident nature of psychopathy began to be questioned as a basis for double jeopardy, which was forbidden by the due process requirements of the American constitution. This was overcome by declaring

such persons to be status offenders and the proceedings to be civil, rather than criminal (Petrunik 1966; Brake & Rock 1971). In resiling from one legal fiction, the courts were clearly creating another, called by Dershowitz the 'labeling game' (Dershowitz 1973, pp. 1277 & 1295). A defendant had no grounds of appeal if the court decided that the intention of the hearing was to treat, rather than punish. This meant that the normal criminal safeguards did not then apply because the hearing fell into the civil category. Thus psychopaths, because of their supposed dangerousness, joined the ranks of other status offenders who needed care and protection—the mentally ill, juveniles, drug addicts and alcoholics. The reason given for the decision varied from the simple assertion that the proceedings were '*clearly*, *demonstrably* or *manifestly* civil' (Dershowitz 1973, p. 1296) to the fact that the psychopath statute was not incorporated in the criminal or penal code. Even worse, some statutes were deemed to be civil, simply because the usual criminal safeguards were not built in and it could then be claimed that proportionality or protection against cruel and unusual punishment, self-incrimination and ex post facto laws were not applicable (Dershowitz 1973, pp. 1299–1300).

Finally, there is also an element in which dangerousness can be viewed in Edelman's terms as a 'condensation symbol', helping to construct and sustain our beliefs (Edelman 1988, p. 22). Once the law attaches the label to a person, it does so with authority and clarity. Competent, respected professionals combine to bring a judgment to bear on someone whose actions or utterances are considered threatening to society. The concept is reified in what is a symbolic exercise of political power, which can then later be invoked in times of fear or uncertainty. Government distances itself by passing the responsibility to a court to persuade us of the rationality and morality of the solution initially devised by Parliament. Once this step has been formally taken, there are a number of consequences which inevitably ensue and these will be sketched in briefly.

At times when such legislation is paramount, it appears that the community has lost its capacity to confront the difficulties some of its antisocial members face and so it engages in a ritualistic process of depersonalisation. This is akin to the status degradation ceremony of which Garfinkel wrote, whereby the 'public identity' of a person 'is transformed into something looked on as lower in the local scheme of social types' (Garfinkel 1956, p. 420). Guilt or innocence is not the issue, but 'total identity', which Garfinkel considers includes motivation or intent, as well as overt behaviour.

> The denounced person must be ritually separated from a place in the legitimate order, i.e., he must be defined as standing at a place opposed to it. He must be placed 'outside', he must be made 'strange' (Garfinkel 1956, p. 423).

It is a ritual segregation of the individual from society in both a physical and symbolic sense and it is considered to be necessary in order to reaffirm society's moral boundaries at a time of anxiety. The *Community Protection Act 1990* (Vic.) could be said to provide the clearest legislative example of such a

symbolic ceremony because it has been applied to a single person, namely Garry David, who does not otherwise come under the umbrella of the mental health or criminal justice systems. This legislation appears to have been born both of despair and expediency.

Gusfield claims that one form of political symbolism is gestures of differentiation (Gusfield 1963). The government acclaims those of high status with public rewards and it denigrates those who appear to repudiate society's values, especially by threats of violence. In Gusfield's words, symbolic acts function 'to organise the perceptions, attitudes, and feelings of observers' (Gusfield 1963, p. 167). When any specific Act of government is limited in its application to one person, it highlights society's power and acts as a persuasive device by using both law and language to express values. The citizen feels secure and is unlikely to argue against such legislation, which has no direct impact on his or her lifestyle.

The Community Protection Act combines three basic political elements. There is, firstly, the symbolism of the stereotyped portrayal of a violent, dangerous individual; secondly, there is the instrumental intention to keep an evil person locked up; and finally, there is expressiveness in the outcome of harnessing our fears (Gusfield 1963, pp. 167–8). One can perhaps view it as an extraordinary rite for the expulsion of evil (Szasz 1970, pp. 260–75). In this sense, it is 'safe' legislation, expressive of the government's concern for the community and, therefore, it is not surprising that there was no public debate about the nature of the Community Protection Act either during its passage through Parliament or later at the time of its legislative extension. This is even more understandable if one heeds the words of the sociologist, Stivers, who has written that:

> The concept of scapegoating combines both symbolic and expressive dimensions of human action. Scapegoating is an expressive act in which others heap their guilt, anxiety, hatred, and sins upon an object or person in order to purify themselves. The scapegoat carries the burden for the rest of the community. However, the scapegoat also stands symbolically for what is evil. Moreover, communities devise regular procedures or ceremonies for the handling of the scapegoat. If scapegoating provides for the expression of emotions, it occurs within a ritualistic framework (Davis & Stivers 1974, p. 8).

The arch polemicist, Thomas Szasz, conveys a similar message when he describes how rules and ritual, which depend on psychiatric and medical evidence, invalidate the person as psychologically unfit in much the same way as primitive and earlier societies might have done for their own purification and survival (Szasz 1970).

> The scapegoat is necessary as a symbol of evil which it is convenient to cast out of the social order and, which through its very being, confirms the remaining members of the community as good (Szasz 1970, p. 266).

Kenneth Burke has also pointed out that there is a 'constant temptation' of societies to pervert the sacrificial principle by scapegoating and segregation in symbolic action, and man is the only species adept at this response, when no

rational solution presents itself (Burke 1968, p. 451). However, what is generally not recognised is that there is a counter response on the part of the person scapegoated. Not unnaturally, one may expect that there will be resentment at the overwhelming exercise of state authority calculated to induce powerlessness, but there is also likely to be a degree of acceptance of society's damning indictment. This participation in the segregatory process became clear in an observation made to Mr Justice Fullagar during the initial hearing of the Community Protection Act by Dr. John Grigor:

> Garry retains such an appalling self-image that he is indeed evil beyond comprehension, that when people respond positively to him he finds this very threatening, becomes so destructive in the relationship that eventually he frightens those who have become revolted by him and let him know this (Hedigan, J., Judgment in case of *Attorney-General of Victoria v. Garry David*, Supreme Court, October 1990, p. 19).

The identification of a person as 'evil' or 'dangerous' is dehumanising and overrides other human qualities. It is a defence mechanism employed as a response to fear (Bernard et al. 1971) and can be more readily invoked in pluralistic settings than in smaller tightly-knit communities, where the subject of debasement is appreciated in a more fully-human sense. Authoritative action does not then need to be so demeaning and overwhelming in its impact.

A further consequence of basing legislation on the notion of dangerousness is that it is extremely difficult to make operational in any rational way. Norval Morris relates this problem to the 'vagueness' and 'plasticity' of the term itself (Morris 1974, p. 62). There is the problem of deciding just what it is about the person's behaviour which will fulfil the legal criteria of dangerousness. Is it sufficient simply to isolate examples of dangerous behaviour, which have occurred and extrapolate these to some unknown future situation? How many such previous incidents are necessary to confirm dangerousness? What we are really seeking to do is to take behaviour out of context and endow it with special significance to achieve this judgment. It is an ex post facto reconstruction assured of success, especially when the legal standard is the civil one of on the balance of probabilities. If we are to build in a safeguard of judicial review in relation to a person who has been deemed to be dangerous, what evidence could be given of behaviour in an institution with other violent offenders substantial enough to change the initial decision? This is the most compelling doubt to cloud the notion that a provision for reviewable sentences is sufficient to ensure due process (*see* Svensson 1992). As Shah points out we are making the assumption that:

> . . . samples of dangerous behaviour are fairly typical of the individual and are likely to be displayed in other situations as well. Hence, through a conceptual short-cut, certain aspects of the individual's *behavior* are defined as dangerous, and then the *individual himself* comes to be viewed and labeled as dangerous. This, of course, can be quite misleading inasmuch as violent and dangerous acts tend to be relatively infrequent, occur in rather specific interpersonal and situational contexts, may be state-dependent (e.g., under the influence of alcohol or other drugs), and may not be very representative of the individual's more typical behavior (Shah 1978, pp. 227).

There is a sense of unreality in creating special rules to deal with one such individual or a class of individuals, and it is somewhat ironic that the law believes it can objectify dangerousness at a time when psychiatry has finally conceded that it cannot. The exercise loses sight of the fact that violence and dangerousness are quite pervasive in society and that many other people have demonstrated that capacity in actions which have harmed others.

There is as yet another unsatisfactory aspect in the way in which the term 'dangerousness' is used and that relates to its elasticity. It is, as Morris points out, a 'dangerously expansive rubric' (Morris 1974, p. 72). Once it has defused the anxieties engendered by a particular problem, the solution lends itself most readily to related ones. The abuse of civil commitment procedures for political dissidents in the former Soviet Union is just one such example and the proliferation of sexual psychopath laws in America is yet another. Linda Sleffel's analysis of the variants of the latter's use indicates that the perception of dangerousness relates as much to the jurisdiction in which it occurs as to the characteristics of particular offenders (Sleffel 1977, pp. 46–55). The selectivity of presenting individuals for this sort of scrutiny is inevitable and a recent Canadian sentencing study noted that it is unclear why offenders designated as 'dangerous' have attracted the label:

> In terms of the extremity of violence displayed in the commission of an offence, there is actually little to set this group apart from many other inmates in the general penitentiary population (Canadian Sentencing Commission 1987).

It would seem from the Canadian data that factors other than the labelled offenders' behaviour appear to be used in the process of designating one offender as more dangerous than another (Webster et al. 1985, p. 143). There was inconsistency in the application of provisions across the country and variability in their use. For example, in 1982, of the thirty-two offenders so designated, eighteen were sentenced in Ottawa, which seems to indicate a local sensitivity to a particular offence or offender, or the inclination of a particular Attorney-General to bring such an action (Webster et al. 1985, p. 144).

Sentencing for future possible dangerousness is unsatisfactory in that one can never be assured of its necessity. For even if we are tempted to extrapolate incidents from the institution and assume that such events would have occurred in a community setting, we can never be certain, nor can we assess those aspects which can act as a counterbalance to violent tendencies. Such legislation has overtones of expediency. It may simply be a pragmatic solution to fill the gap where criminal sanctions appear not to have worked and the mental health option has been closed and, in this sense, can be described as hybrid. There is also a degree of ambivalence about its sense of direction and the options which should be made available. For example, there is a clear distinction between a purpose of treatment and that of management or what may be a warehousing for misfits, and it may well be that such goals become intertwined because of a lack of the necessary facilities (*see* Victoria. Parliament. Social Development Committee 1990).

Legislation focused on the personality of the individual, rather than the offence, confirms its hybrid quality and bypasses the conventional principles. When the likelihood of future offending is at stake, the consequences cannot be considered in terms of proportionality, which is an accepted sentencing constraint (*R v. Veen (No. 1*) [1979] 143 CLR 458). Jurisdictions must err on the side of caution and indulge in indeterminate sentencing or guesswork about the necessary period of confinement. It is difficult enough to balance sentencing principles in ordinary cases, but preventive detention seems to base itself on incapacitation and use rhetoric to deny retributive elements in the belief or hope that there will be a positive benefit for the person concerned. The confusion of goals is endemic by the very nature of the legislation.

There has been a clear tendency that, as legislatures have lost their more draconian powers to impose capital punishment or indeterminate sentencing, the notion of identifying and imprisoning the dangerous offender comes to have greater appeal. With the current emphasis on community-based corrections, there is a bifurcation with prisons becoming associated with the retention of only the most inhumane and violent members of society. In the public's mind, this reinforces an immediate symbolic link between the prison and dangerousness. The paradox here is that, in a law and order environment, a government may be seen to be acting fearlessly in reinforcing this perception through preventive detention and longer sentences for notorious offenders, while actually increasing the 'softer' community-based sentencing options, which are less visible and may otherwise generate alarm. Once again, it would appear that scapegoating has become a mechanism to camouflage a political agenda. One need go no further than an American National Advisory Commission report of 1973 to find evidence for such a possibility. Here it was suggested that 'clear authority to sentence the dangerous offender to a long term of incapacitation may induce the legislature to agree more readily to a significantly shorter sentence for the nondangerous offender' (United States. National Advisory Commission on Criminal Justice Standards and Goals 1973, p. 156). As Norval Morris comments, this is tantamount to the government asking for a mandate 'to deal unjustly with a few so that we can persuade the legislature to deal more effectively with the many!' (Morris 1974, p. 65). One must question whether the effectiveness of an official policy of decarceration is dependent on devising special dispositions for a few who do not readily fit within the existing system.

Shah has rightly pointed to the dual powers of the state to create a framework of preventive detention or enforced treatment (Shah 1981). The basis lies in its *parens patriae* function, which has two deceptively separate arms. It is the attempt to combine these that leads to confusion over what to do with someone who seems to have characteristics of both madness and badness. On the one hand, the state has a duty to act as a guardian to those unable to care for themselves and to provide them with care, protection and treatment, as in the case of children and the aged. On the other, the state must also accept authority for the enforcement of laws and regulations for the protection of public health and safety, which is essentially a coercive police-type power. For the state to assume the welfare function of treating a defective personality on the grounds

that the public requires protection from the danger which that person poses is to combine *both* parens patriae roles in the one operation. As a consequence, those jurisdictions experimenting with specialised legislation have straddled the criminal/civil area, because the court's interest focuses not on the offence, but on the potential for doing further harm as a consequence of personality characteristics (Ancel 1965; Foucault 1978).

In the light of this general overview of dangerousness legislation, it is proposed now to consider some of the features of Victoria's foray into the area of preventive detention with the initial warning that the mere existence of legislation confirms, in the minds of most people, its necessity (Arendt 1951).

The Community Protection Act empowers the Attorney-General of Victoria to apply to the Supreme Court for an order that Garry David be placed in preventive detention (s. 4). Power is granted to the court to make an interim order for detention pending a hearing. The test to be applied by the court in determining whether to order preventive detention for Garry David is set out in s. 8(1) as follows:

> If, on an application under the Act, the Supreme Court is satisfied, on the balance of probabilities, that Garry David —
>
> (a) is a serious danger to the safety of any member of the public; and
>
> (b) is likely to commit any act of personal violence to another person— the Supreme Court may order that Garry David be placed in preventive detention.

The original Act stated that such an order is required to specify the period of detention which must not exceed six months (s. 8(2)(b)). On application by the minister, orders for further detention may be made by the court for periods of up to six months at a time (s 9)— later extended legislatively to twelve months.

When the Act was first introduced into Parliament, many politicians of both persuasions were on record as saying that they were voting for it reluctantly solely because of the sunset clause limiting its operation to twelve months (Victoria. Parliament. Legislative Assembly 1990; Legislative Council 1990). Yet, with little further debate, there was an amendment passed in 1991 to increase the possible term for a further three years, creating a total of four years in all. No doubt, the view was taken that this period could be used to devise a satisfactory management program and prepare Garry David for release, yet it has been the uncertainty of his status and the varied locations within the prison and mental health systems which have militated against such an objective. The ambiguous intent of the legislation is indicated in a further statement of its purpose, which is '[to provide for] the care or treatment and the management of Garry David'. It is a very powerful piece of legislation in that it co-joins the interests of Parliament, the Supreme Court, the Office of Corrections and the Health Department.

The perceived necessity for such legislation must be understood against the background of the random violence of the Hoddle Street and Queen Street massacres which had shaken the community. Garry David's chilling threats, published prior to the completion of his lengthy sentence, invoked fears of

such a repetition, and the fact that he had been involved in unusual and dramatic forms of violence previously strengthened the Government's resolve and led to public statements by ministers that he would not be released. As Petrunik has noted, considered objectively, there may be other 'harmful situations or practices which, although more widespread or greater in impact, are less salient' (Petrunik 1982, p. 242). Wittingly, or unwittingly, Garry David himself by his threats had set the agenda.

The media reinforced the stereotype with an intense flurry of reporting both before Garry David's due date for release and during the 1990 hearing of the Community Protection Act. It certainly paved the way for the 'degradation ritual' with the use of headlines which were dehumanising or distancing. Phrases such as 'Danger Man', 'Psychopath', 'Madman', 'Australia's Most Unwanted Man', 'Gunman', 'Scarred Legacy of the 60s', 'Public Enemy' and 'Monster' titillated the imagination. Other headlines referred to likely future actions as 'Vows He'll go on Killing Spree', 'Torture Target Living in Fear', 'Danger to Police', 'Murder Threats', 'Wanted to Torture Fellow Inmate', 'Sex, Drugs and Abuse', 'Forty-Nine Steps to Bloody Terror', 'Blueprint of Death', and 'Guerilla Warfare'. The message clearly being conveyed by the media throughout was that this man encapsulates evil and must be removed from society.

The press had a field day and, at some stages, their behaviour was quite appalling. Not only was there a concerted campaign by one daily to convince the public of Garry David's dangerousness before he was due for release, but there were attempts to preempt the issue during the hearing of the Community Protection Act. Both sides complained and were in agreement that it was 'outrageous' and tried on numerous occasions to have the style and nature of the reporting restricted. Attempts by the judge to moderate this press activity were hampered by what he perceived as a fundamental lack of power. As there was no jury to be influenced, he was the only person, apart from future witnesses, who might conceivably be affected. Yet, it was a matter of some concern when documents labelled 'Confidential' and 'Privileged' at the Mental Health Review Board hearing, were reprinted in the evening paper for community consumption.

Dialogue between the public and media throughout the case was of a different order to that occurring between psychiatry and the law, where there was a more realistic appreciation of the complexity of the issues at stake. The former was more in the nature of a 'spectacle' for a receptive public, whose helplessness was emphasised by being informed of the negotiations and policy occurring at the most senior levels of government (*see* Edelman 1988; Cohen & Young 1973; 1981; Ericson et al. 1987; 1989). As Edelman has indicated, action may then be instituted on the basis of nebulous phrases which have no specific referent—such as 'in the public interest'—thus instantly creating a framework where there can be no compelling counter-argument. Even the wording of the Act has something of this generalised appeal when its purpose is stated as being 'to provide for the safety of members of the public'. Certainly, during the ensuing court hearings, it proved difficult to give this phrase any precise legal definition.

In view of the fact that the matter is again before the Supreme Court (as at October 1991), the author shall confine comments to the initial hearing which

took place in 1990 and make some general observations about legislation of this sort. Under the Community Protection Act there is no charge and there has been an excessive period of remand—some five months in 1990 and six months in 1991. Clearly, the situation might possibly have arisen whereby the Supreme Court found Garry David not to be dangerous and he would then have been held in custody in the absence of a charge for substantial periods of time. The mode of substantiating dangerousness raised issues when it was recognised that the Community Protection Act allows for unfettered judicial discretion to gather evidence, including hearsay, which is generally not admissible. This raises the jurisprudential issue of whether anyone should be deprived of liberty on the basis of hearsay evidence, and it highlights the lack of guidance given to the court, since the strict rules of evidence pertaining to its usual criminal jurisdiction do not apply.

It is interesting to note that it is the Attorney-General of Victoria who initiates the action in the Supreme Court and, at the same time, becomes a party to the action. In addition, the custodial time limits established by the Act were set by Parliament, thus infringing the separation of powers of the executive and judiciary and also raising the spectre of 'cruel and unusual punishment'. On the surface, it appears that the Victorian Government intended to allow the Supreme Court a discretion, but gave it no guidance as to its exercise, which creates a new power or duty to restrict the liberty of one named person. In its usual jurisdiction, the court is bound by the standard of proof being 'beyond reasonable doubt', but this Act puts the onus of proof at the civil standard of 'on the balance of probabilities'.

In the 1990 hearing, the Judge was concerned with the time that the matter could be expected to take, given Garry David's counsel's wish to argue the constitutional right of the Victorian Parliament to enact such legislation while Garry David himself was being held on an interim order. It is not often that a Supreme Court Judge directs his comments to the government, but in this case it was noted that 'this should be a matter of concern to the Attorney-General and his advisers'.

In the hearing itself, the court was empowered to call extraordinarily wide-ranging evidence but, as has already been argued, any decision as to future possible dangerousness must remain speculative, rather than factual, despite the care taken in the handling of such a case. Relevant material tendered in this instance related to judgments made within a prison environment, where violence is to some extent condoned and, on such a basis, incidents were extrapolated as being relevant to future living arrangements in the community. Given the issues at stake, it was inevitable that an adversarial element crept into the court process and psychiatrists were placed in the awkward position of having to predict dangerousness, no matter how equivocally they phrased their evidence. For some time, Alan Stone has argued that the role of psychiatrists should be restricted in court, so that they are not 'alternately seduced and assaulted by the power of the adversarial system' (Stone 1984, p. 58). There is an argument that predictive evidence should not be provided to the court, especially given its considerable weight in such an unusual hearing and the fact that the solution sought is essentially of a political/administrative nature, rather than treatment-oriented.

There were some drafting faults, which became clear in the early directions' hearings, when the procedure for handling the issue was being identified. Even if the judge were to be satisfied that Garry David, the subject of the Act, posed a serious danger to any member of the public and was likely to commit any act of personal violence to another person, the legislation stated that he 'may' order his detention in a psychiatric in-patient service, a prison or another institution. This can only appear as a further abrogation of responsibility and was the subject of comment from Mr Justice Fullagar that Parliament 'had thrown the buck to this court'. It is legitimate to question whether the legislation was designed to fully allow the court to have a *real* discretion in the matter of outcome, even given a finding of dangerousness. Should its role perhaps have been limited to such a finding and then a special tribunal convened to consider the options, including the real one—that of taking no further action? Nigel Walker makes the suggestion that there would be two advantages with this arrangement: the sentencing functions of the court would not be compromised, and the protection of society would be seen as something apart from other sentencing. A separate authority would then have the opportunity to build up expertise in this very limited area of law (Walker 1978, p. 65).

Another problem which surfaced during the court hearings related to the definition of key phrases—such as 'safety of any member of the public', 'serious danger' and 'likely to commit any act of personal violence'—and these were the subject of extensive argument. How can the precise degree of risk be defined for the purpose of confinement in the absence of a specific charge? Presumably, as Garry David's counsel argued, the risk must be substantial and real, not just a remote chance and 'safety' must infer protection from a serious and life-threatening injury. Counsel for the Attorney-General argued that it was sufficient if *any* member of the public had a justifiable fear of Garry David and if this affected their perception of their own safety or caused them to adjust their life-style in any way. It would, of course, be surprising if no reader of the *Sun-Herald* newspaper remained unfearful considering some ten months of consistently lurid headlines. Do published threats of a frightening nature constitute a real threat 'to the safety of any member of the public'? Is it sufficient if evidence can be given that the public has become convinced that there *is* a possible danger? The term 'personal violence' in s. 8(1)(b) was also subjected to scrutiny. There is no suggestion that general threats are to be included here, but that the violence must be to another person. This violence may be some sort of assault, but not necessarily of a serious nature.

The interpretation of such key phrases was clearly crucial to the evidence called and the outcome of the hearing. For example, at one stage counsel sought to argue that a serious risk existed a priori because it had already been established and accepted by both parties that Garry David had both borderline and antisocial personality disorders. In itself, this becomes an insidious argument, because mere reference to this label from the earlier Mental Health Review Board hearing and the use of that transcript of the evidence, could perhaps have preempted the immediate hearing. Fortunately, this was not a course of action taken by the court.

The written judgment of the initial hearing draws attention to some of these inherent difficulties with the comment that 'it is not surprising that the wording of the Act gives rise to some difficulties of construction, having regard to the controversy which must have surrounded its origin and formulation'. At another point, Mr Justice Fullagar said 'all I can do is complain about the legislation'.

There were further difficulties which became apparent because of the unique nature of the legislation itself. The Act was intrusive and breached confidentiality. This matter was noted at the outset, when the Judge inquired as to the reasons why the confidentiality exercised so carefully by the Mental Health Review Board did not subsequently apply. As already mentioned, there were clearly grave problems regarding the justice of proceedings constituting various opinions about Garry David's dangerousness being reported in the press with the likelihood of influencing future witnesses.

There were also few ground rules in the case. The Judge was empowered in s. 7 of the Act to receive reports relating to Garry David including 'reports made to, or by, the Adult Parole Board'. (The 1990 Act states that the Judge 'may' receive or require reports relating to Garry David, and the 1991 amendment is that he 'must' receive, if tendered, or may order such reports.) This, in itself, raised a problem of a different sort, whereby such Parole Board material would not be divulged to the open court and, hence, would not be available to Garry David himself, although it could provide the Judge with convincing evidence as to his dangerousness. Yet the same section of the Act allows for the 'right of Garry David in proceedings before the court to appear to be represented and to cross-examine witnesses'. Clearly, this was a problem not foreseen in the drafting of the Act and in the haste to have it debated in Parliament. (In reality, the only confidential material admitted to the court was that relating to the security provisions of Ward M6 at Mont Park and not that relating to the health of Garry David.)

But the fact that s. 7 of the Act stipulated that the Supreme Court is to be bound 'by the rules and practice as to evidence' (except as otherwise provided) meant that the material had to be openly available to allow for rebuttal. This entailed several days of reading out aloud detailed nursing, prison and medical notes from the beginning of 1990, in order to highlight and submit as evidence incidents of Garry David's dangerousness when thwarted and his unpredictable violence. Such microscopic examination of daily events in a controlled environment might lead to a similar conclusion about many custodial inmates, if tested in the courts. The chance of effective rebuttal would seem to be slight indeed, and the hypothetical nature of an exercise which extrapolates likely behaviour to some unknown, future setting is clearly evident.

Garry David's counsel indicated, at the outset, that his client objected to the use of such material from the notes because, if he were to be confined later in a particular facility, the chances of a therapeutic relationship could be destroyed—a not unreasonable proposition, given that treating personnel were also forced into the invidious position of offering frank assessments about Garry David's dangerousness in front of him in the courtroom and were cross-examined on their views at some length.

It was heartening that Mr Justice Fullagar, in his findings, referred to 'one unhappy consequence of the Act' as being to require the Judge 'to engage in a kind of character assassination in public' by having to weigh up Garry David's character, propensities, 'intimate details of past conduct' and his mental condition in published reasons. The medical evidence was given in front of him 'without any inquiry before the court as to any possible adverse consequences to him of the adoption of this course'. Thus, it is the very nature of the Community Protection Act per se which contravenes the current emphasis on the protection of confidentiality and provides a source for real conflict between the law and psychiatry.

The purpose of the Community Protection Act is quite clearly expressed as being that of 'preventive detention' (s. 4), but this also was the source of some confusion serving to put Garry David into limbo with no guidelines as to his rights, and it is also antithetical to the ideology of both the *Corrections Act 1986* (Vic.) and the *Mental Health Act 1986* (Vic.)—both of which were proud cornerstones of the Victorian Labor Government's social justice strategy. As an ordinary prisoner, Garry David would be allowed to refuse treatment, but within the mental health system this right could be overborne. What, then, is the right of someone who has an order for preventive detention? Does lack of cooperation entail indefinite incarceration? Such questions are indicative of the lack of clarity even surrounding the espoused purpose of the legislation. Certainly, the responsibilities of Garry David's custodians—whether prison officers or therapists—are not clearly defined. As Dr. John Grigor explained about Garry David's treatment during the 1990 court hearing, 'I am not his treating doctor now, but a guardian under the Community Protection Act. He is not technically a patient'.

Garry David himself is adept at exploiting this confusion and refuses to cooperate with an enforced management plan by referring to other societal values; that is, freedom of choice in the absence of a criminal conviction or civil commitment. In the Weberian sense, he is effectively challenging professional power to control a certain course of action (*see* Cicourel 1986). He is also challenging the power of the state to bring the action when he refers to himself as 'a political prisoner'. This evocative phrase shifts attention from his own behaviour to the motives of those bringing the action against him. It is the framework of the legislation which allows him the recourse to construct his social world as a battleground and thereby avoid responsibility for his own behaviour. If the Community Protection Act is seriously intended to be the vehicle for his rehabilitation, then its very nature constitutes a barrier.

The appropriateness of the Act is also clouded when it is viewed as an explicit status degradation ceremony created to enforce compliance with society's values. Such ceremonies are based on the cultural mechanism of shaming which reinforces the values of the group. However, what has not been recognised by the legislators is that this social and psychological pressure for conformity may be irrelevant to someone who has not passed through the ordinary processes of socialisation. In the case of Garry David, there is every evidence that he has been stunted socially and emotionally at an early childhood level. The very diagnosis of antisocial personality disorder or borderline personality disorder confirms an imperviousness to group

values and processes. In this sense, the Community Protection Act may be based entirely on a false premise.

Although the Act is deceptively simple, it raises a host of issues because of its unusually oppressive nature and the difficulty of balancing the interests of the community with the rights of Garry David. For example, should there be a right to counsel during psychiatric or other interviews, which after all may provide the main basis of evidence? Would Garry David's refusal to cooperate constitute contempt of court? Does he have a right to an independent private psychiatrist? What is really the nature of the medical testimony required by the court—can it go to the ultimate issue which is that of dangerousness? How can the evidence be rebutted satisfactorily? If we are to have some form of dangerous offenders' legislation in the future, as has been signalled by the Attorney-General, should there be a right to jury trial and what appeal processes would be allowed? The questions are endless and raise a myriad of libertarian issues yet, in reality, custodial options are limited, despite all the safeguards which may be put in place. Victoria does not have any specialised facility for those with personality disorders.

There are also a number of moral dilemmas which arise when trying to make the general principle of social defence operational in a sense consistent with legal principles. One might argue, for example, that human beings have the right to *choose* to be bad, in which case they will suffer the punitive consequences; but that the state has no right to impose enforced therapy to correct such a possible future choice. This argument becomes even stronger when the past bad behaviour has already been punished, yet society acts in the belief that it is going to continue and disregards the principle of proportionality. In the High Court hearing of *R v. Veen (No. 2)* ((1988) 62 ALJR 224), Deane J. (at p. 495) did allow for some extension of this principle should a community wish to introduce a separate system of preventive detention for those who might possibly represent a grave threat to society if released, providing that review mechanisms were built in. There is certainly more honesty in having a separate process not linked to moral culpability and retribution, provided that community protection is believed to be necessary. This avoids the uneasy compromise represented by the current Community Protection Act, although some of the more general problems must remain inherent. (Victoria formerly had legislation targeted at habitual offenders, but it fell into disuse because it was simply a harsher form of sentence, without procedural safeguards, and it bore little relationship to the seriousness of the offending pattern.)

Some would take the view that legal theory needs to be flexible enough to accommodate solutions, but must do so openly and not through the ordinary sentencing or mental health processes. As Williams has argued, preventive detention may, therefore, really be an ideological choice between civil liberties and those wishing the reframing of legal options on the ground of community protection (Williams 1990). Proponents of the latter course must at least recognise the difficulties which arise in legislating for dangerous persons. No amount of care for due process can conceal the fact that the state is acting belatedly, although in a politically tenable manner, to restrain rather than improve child welfare services, which may have served to prevent the outcome of prolonged neglect or abuse and sporadic attempts at treatment.

In the case of Garry David, there are lessons to be learned. Not only has he been the victim of institutional neglect over a prolonged period of time, but he has also tested the system in a most dramatic way which, in turn, has provoked a unique counter reaction in the form of a personal Act of Parliament. In relation to his dangerousness, we can only really be certain that he is a danger to himself and that he perceives the outside community to be dangerous to him. In this sense, the Community Protection Act may be something of a misnomer and, paradoxically, it may serve to prolong Garry David's need for care and a custodial environment. The belated attempts to overcome the gross social and emotional deprivations which he has suffered have led us into a legal and psychiatric morass. There is now an obligation to design rational preventive and remedial measures within the limits of our knowledge to forestall an uncritical acceptance that a more broadly-based system of preventive detention is a necessary component in society's armoury.

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CAN THE VICTORIAN PARLIAMENT ABOLISH FUNDAMENTAL RIGHTS?

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THE *COMMUNITY PROTECTION ACT 1990* (VIC.), AS AMENDED IN 1991, RAISES acutely a range of issues across several disciplines. The sole object of that Act—Garry David—likewise may be seen as testing to the limit many institutions in our community, including the ethics of the tabloid press, the proper role and responsibilities of Parliament as against the judiciary, and the laws and procedures designed to punish and rehabilitate criminals, on the one hand, and care for and treat the mentally ill on the other. None of the combatants on this difficult arena appear to have achieved much success. The Act, as amended, blithely removes rights and protections central to our criminal justice system (onus of proof beyond reasonable doubt, entitlement to liberty save upon conviction for a crime) and, in the author's view, abandons commonsense (for example, the view that providing rehabilitation and thus hope for the future is preferable to endless expensive incarceration).

The unresolved question which this Act addresses is a hard practical one: what is to be done with a prisoner facing release given the assessment he or she is likely to commit further acts of violence? One obvious answer—provide the prisoner, during his or her sentence, with a properly resourced, professionally conducted and determined rehabilitation program such that the prisoner, and the community, may face liberty with reasonable prospects for the future—has not been seriously provided by the Government, at least not to Garry David. Bearing in mind that many difficult, long-serving prisoners suffering various types of personality disorders have been institutionalised since a very young age, and that such prisoners must thus be considered, in large part at least, a product of Victoria's correctional

and mental health systems over the past decades, it hardly seems fair, at the end of a lengthy sentence, to in effect punish the prisoner further for, inter alia, manifesting the failures of those systems.

However difficult a prisoner or patient might be, a civilised society surely bears a responsibility, even in its own self-interest, to incarcerate humanely and to appropriate real resources towards rehabilitation programs, parole services, half-way house type institutions, and the like. Detaining a prisoner determined by experts not to be mentally ill in a psychiatric institution (J Ward Ararat) is not only not humane, it probably amounts to cruel and unusual punishment contrary to the Bill of Rights of 1688 and the International Covenant on Civil and Political Rights. Preventive detention because of a prediction of further violence does nothing for the prisoner, costs money (which might be better spent on rehabilitation or supervision services upon release) disrupts the prison and mental health communities, and does violence to our principles of justice.

In 1990, both sides of the Parliament concurred in this offensive measure. The current (1993) Victorian Government has introduced into the Parliament, as part of a sentencing reform package, further statewide preventive detention legislation focusing on sexual and violent offences (*see* Sentencing (Amendment) Bill 1993; Crimes (Amendment) Bill 1993; Crimes (HIV) Bill 1993; Crimes (Criminal Trials) Bill 1993). The Sentencing (Amendment) Bill includes provisions which allow judges to impose indefinite sentences for the most serious sexual and violent offences, when the judge is satisfied that the offender, as a high degree of probability, is a serious risk to the community. The numbers of prisoners to be caught by this foreshadowed legislation remains unclear.

Having said the above, the author's purpose in this paper is to immediately vacate these difficult fields of penology, criminology, psychiatry, sentencing and dangerousness. It is necessary to go back to equally difficult basics—the constitutionality of such legislation—by reference firstly to certain fundamental civil rights established in the common law; and secondly to the much maligned doctrine of separation of powers. This involves the murky and difficult question of whether the powers of the Victorian Parliament under Victoria's *Constitution Act 1985* are limitless, or relevantly restrained. My purpose is to suggest that the Community Protection Act is unconstitutional and void.

Deep Rights and Powerful Parliaments

Imprisoning a man or woman who has not been charged with any crime, let alone been found guilty of a crime, offends fundamental rights and liberties centuries old, and requires extraordinary circumstances to justify such conduct—if it can be justified at all. The legal and moral sources of these rights and liberties are found first in English common law and second, and increasingly, in various international treaties and conventions to which Australia is a party. None of these are problematical in themselves. Nor can it be denied that current (though strangely untested) constitutional theory and practice states that Dicey's dogma of Parliamentary supremacy prevails; that the Victorian parliament has wide powers 'to make laws in and for Victoria in all cases whatsoever' (*Constitution Act 1985*, s. 16) and that such powers

include the power to abrogate or curtail, should Parliament so choose, these same ancient rights and freedoms. However, before further horrors are imposed upon Victorians (such as a statewide Community Protection Act or the said 1993 sentencing amendments) it is worth noting some, albeit faint, contrary arguments; that is, that Parliaments such as the Victorian do not enjoy unlimited legislative powers in regard to overriding fundamental rights and freedoms, that some rights 'run so deep' that even Parliament cannot curtail them.

The Rights Stated

The rights in question are variously stated in several well-known documents and deal essentially with the liberty of the subject, that is:

- a right not to be the subject of arbitrary arrest or detention without judicial intervention (that is, a trial);
- a right not to be subject to cruel or unusual treatment or punishment;
- a right to a fair hearing (due process); and
- a right to equality before the law, and to equal protection of the law.

These principles which underline the entire fabric of our criminal justice system have been stated again and again, at least since Prince John signed the Magna Carta with his unruly Barons at Runnymede in 1215. Further statements in England are seen in numerous revisions of Magna Carta and numerous other parliamentary instruments—the best known being the Bill of Rights 1688 and the Act of Settlement 1701. The Bill of Rights is 'An act for declaring the rights and liberties of the subject, and settling the succession of the Crown' and states, inter alia:

> That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

Internationally, we may refer to the old world—the French Declaration of the Rights of Man 1791—or to the new—the US Bill of Rights 1792, being amendments to the fledgling US Constitution. In the modern world, we look to numerous international treaties and instruments; for example, the United Nations Universal Declaration of Human Rights 1948, Art. 9; the International Covenant on Civil and Political Rights 1966, Art. 9(1), 10(1). It should also be recalled that, although international law is not enforceable as domestic law, and although (Commonwealth) Constitutional guarantees are at best haphazard or non-existent (for example, s. 116), yet the Bill of Rights 1688 is operating as statute law in Victoria (*see Imperial Acts Application Act 1980*, no. 9426). It is also, unquestionably, good law throughout Australia (*see R v. Murphy* [1986] 64 ALR 498, p. 504) for such propositions by Hunt J. A list of various documents containing statements of these rights are set out at Appendix 1 (British Parliamentary Instruments) and Appendix 2 (International Treaties and so on).

These lists are not intended to be exhaustive. One could, for example, refer to parliamentary Bills of Rights and constitutional guarantees introduced by comparable democracies in recent times; for example, the New Zealand Bill of Rights Act 1990 and the Canadian Charter of Rights and Freedoms (*see* Canadian Constitution Act 1982).

Cruel and Unusual Punishment

In Victoria, what amounts to 'cruel and unusual punishment' has not, to the author's knowledge, ever been decided by the Supreme Court. Preventive detention of an innocent, sane person in a sub-standard psychiatric institution (J Ward Ararat) amongst seriously disturbed patients might just qualify. In an English case, *R v. Home Secretary, ex.p. Herbage (No. 2)* ([1987] 2 WLR 226), the Court of Appeal discussed the precise point. A sane prisoner was detained in a hospital wing of a prison in close proximity to mentally-disturbed inmates. He complained that by his detention he was subjected to 'cruel and unusual punishment' contrary to the Bill of Rights of 1688 and sought judicial protection; that is, a writ of mandamus directing that he be detained according to law. The case turned on an interlocutory dispute about discovery but a majority stated, as dicta, (p. 242):

> Do these conditions amount to 'cruel and unusual punishment'? . . . it is generally held to be unacceptable that persons, supposedly of normal mentality, should be detained in psychiatric institutions as is said to occur in certain parts of the world . . . if it were established that the (prisoner) as a sane person, was, for purely administrative proposes, being subjected in the psychiatric wing to the stress of being exposed to the disturbance caused by the behaviour of the mentally ill and disturbed prisoners, this might well be considered as a 'cruel and unusual punishment' and one which was not deserved.

The Attitude of the Courts

This is not to say that the courts (including Victorian judges) are not sensitive to fundamental rights and freedoms. Quite the reverse is true. Thus, the District Court of New South Wales has held that a delay in bringing an accused man to trial may constitute an infringement of his 'constitutional' right to a prompt hearing, thus nullifying proceedings when ultimately brought on (*see R v. McConnel* [1995] 2 NSWR 269; *see* especially Moore DCJ, pp. 272–3) where three 'constitutional enactments' preserved as law in New South Wales are referred to being Magna Carta 1297; 42 Edward III C.3 (1368); and the Bill of Rights (1688). Moore DCJ states (p. 273):

> It is the duty of the Courts to promote constitutional rights . . . A constitution, and in particular, that part of it which protects and entrenches fundamental rights and freedoms, is to be given a generous and purposive constitution [citations omitted].

The High Court has repeatedly asserted the importance of fundamental rights and freedoms in recent times, be they constitutionally based or otherwise. However, this is not to say that the courts have sought aggressively to limit the powers of state Parliaments in order to strike down unjust legislation. Perhaps of most interest—in that the High Court leaves the critical question open—is a statement by the Full Court of the High Court in *Union Steamship Co. v. King* ([1988] 82 ALR 43). There, questions of limitations, if any, upon the New South Wales' Parliament to pass laws 'for the peace order and good government of the State' were in issue. The High Court (p. 48) stated:

> Within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words 'for the peace, order and good government' are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom, on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law (NZ cases cited above) . . . is another question which we need not explore.

Thus the High Court left the door slightly ajar.

The New Zealand authorities' cases cited by the High Court refer to statements by Sir Robin Cook in a series of cases heard in the New Zealand Court of Appeal where he suggested there may be 'common law' rights which an Act of Parliament could not override (*see L v. M* [1979] 2 NZLR 519; *Brader v. Ministry of Transport* [1981] 1 NZLR 73; *NZ Drivers Association v. NZ Road Carriers* [1982] 1 NZLR 374; *Fraser v. State Services Commission* [1984] 1 NZLR 116, and *Taylor v. NZ Poultry Board* [1984] 1 NZLR 395). The last-mentioned case concerned whether the New Zealand Poultry Board Act 1980 could authorise regulations taking away the common law 'right' to silence. Cooke J stated (p. 398):

> I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.

There is authority for and against this proposition. In 1974, Lord Reid, for example, buried notions of natural or moral law overriding the principle of absolute Parliamentary sovereignty when he said in *British Railways Board v. Pickin* ([1974] AC 76, p. 768):

> In earlier times many learned lawyers seem to have believed that an act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of

> Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.

However, preventively detained citizens can rely on earlier judicial support for the alternative view. The most renowned dictum is that of Coke CJ in *Dr Bonham's Case* (1610 8 Co. Rep. 114, p. 118), where he stated:

> And it appears in our books, that in many cases the common law will control Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.

This remarkable passage attracted some judicial support (*see* Holt CJ in *City of London v. Wood* [1701] 12 Mod. 669, p. 687) but in the view of one author, 'Coke CJ's doctrine did not survive the fundamental political and constitutional changes of the Bill of Rights (1688) and the Act of Settlement (1700)' (Caldwell 1984, pp. 357–8).

The idea, however, is far from judicially dead, at least when English judges consider the laws of another country of which they disapprove. In *Oppenheimer v. Cattermole* ([1976] AC 249), the House of Lords was called upon to consider a Nazi decree of 1941 by which German Jews (in this case, a British taxpayer disputing his assessment by reference to his nationality) who resided abroad lost their nationality, and by which all Jews lost their property without compensation. The taxpayer, a German Jew, emigrated to England in 1939 as a result of Nazi persecution and became a British subject in 1948. The question was whether the taxpayer was subject to the Nazi law; that is, had ceased to be a German national under the law, leading the House of Lords to consider whether it was obliged to recognise the Nazi law, however obnoxious it might be. Lord Cross ([1976] AC, p. 278) stated:

> What we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out of racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country, ought to refuse to recognise it as a law at all.

Again, Lord Salmon (pp. 281–2) registered his outrage, but rested his refusal to recognise the Nazi decree upon the 'unruly horse' of public policy. He said:

> The Crown did not question the shocking nature of the 1941 decree, but argued quite rightly that there was no direct authority compelling our courts to refuse to recognise it. It was further argued that the authorities relating to penal or confiscatory legislation, although not directly in point, supported the view that our courts are bound by established legal principles to recognise the 1941 decree in spite of its nature. The lack of direct authority is hardly surprising. Whilst there are many examples in the books of penal or confiscatory legislation which according to our views is unjust, the barbarity of much of the Nazi legislation of which

> this decree is but an example, is happily unique. I do not consider that any of the principles laid down in any of the existing authorities require our courts to recognise such a decree and I have no doubt that on the grounds of public policy they should refuse to do so.

One might ask is the Community Protection Act 'barbaric or merely 'unjust'. The Nazi decree stated:

> (2) A Jew loses German citizenship —
>
> (a) if at the date of entry into force of this regulation he has his usual place of abode abroad . . .
>
> (b) If at some future date his usual place of abode is abroad . . .
>
> (3) (a) Property of Jews deprived of German nationality by this decree to fall to the State;
>
> (b) Such confiscated property to be used to further aims connected with the solution of the Jewish problem.

Clause 3(b) surely underscores the barbaric nature of the decree: utilising confiscated Jewish property to, inter alia, build and maintain concentration camps, whose sole purpose was to destroy those same Jews, says it all. It is also a sickening reminder of the depths to which the Victorian (non-Nazi) Government and Parliament have sunk that we are driven to consider such laws when assessing judicial responses to the constitutionality of the Community Protection Act.

Conclusion

An argument

On the above analysis, an argument that the Act is unconstitutional by reason of fundamental 'civil' rights might proceed as follows:

- The Constitution of Victoria is found in the following sources:
  - the *Constitution Act 1975* and its predecessors; and
  - the Common Law inherited from England, by reason that:
    - (i) Parliament, in passing the Constitution Act, is deemed to know the law. That common law included relevant ancient principles concerning fundamental rights and freedoms which were since 1788 to today part of the common law of England and, at least since 1828, became part of the law of Australia;
    - (ii) these principles gave rise to, and were secured and emphasised by, various historical instruments setting out fundamental rights and freedoms; for example, Magna Carta 1215, Bill of Rights 1688 and similar documents;

(iii) these common law principles were always, or have now become, of a fundamental or constitutional character compared to normal laws or statutes;

(iv) unless specifically abrogated, such 'constitutional' common law principles continued in force upon the enactment of the first (1855) and all subsequent Victorian constitutions. The various Victorian Constitution Acts, including 1975, do not abrogate these principles;

(v) these principles are thus built into Victoria's current constitutional structure and may be seen as supplementary to the written 'constitution' document; alternatively, they impact upon the meaning of the written document as a matter of statutory construction;

(vi) these principles are emphasised and perhaps complemented by similar principles of customary international law reflected in the laws and practices of civilised nations, and in international treaties, conventions, declarations, protocols and the like, to which Australia is a party.

- The 'common law' constitutional and international principles of relevance include the following:
  - a right to be free from arbitrary arrest and detention without trial;
  - a right to a fair hearing without unreasonable delay;
  - a right to equal treatment before the law, and to equal protection of the law;
  - a right not to be subjected to cruel and unusual punishment.

- The apparently limitless legislative powers of the Victorian Parliament, set forth in the Constitution Act 1975 s. 16 are expressly or impliedly limited by the above-mentioned fundamental principles, that is the Parliament is not empowered to make laws infringing these ancient rights and freedoms.

- Remembering that the Constitution Act 1975 is itself merely an Act of Parliament, by reason of the above common law restraints, the Parliament lacks power to pass s. 16 of the Constitution Act 1975 save in a 'read down' form; and in particular lacks power to pass ss. 4 and 5 of the Community Protection Act.

- Alternatively, Dicey's dogma is dubious, the Victorian Parliament is not 'supreme' in the sense that Parliament has untrammelled power to make any law upon any topic. Authority for the alleged 'supremacy' or 'sovereignty' of Parliament does not sustain such ambitious claims. Some common law rights 'go so deep' that the Courts will now allow Parliament to destroy them.

- The Community Protection Act ss. 4 and 5 violate several of these principles, and thus are beyond the powers of the Victorian Parliament.

Gaoling by executive discretion

A second argument for invalidity is that the Act, in so far as it usurps judicial powers, is beyond the powers of the Victorian Parliament. This involves the somewhat bold assertion that the doctrine of separation of powers is built into Victoria's constitutional structures as a matter of law. In our system of government, Montesquieu's much-abused doctrine dictates that citizens shall be gaoled by the judicial arm only, (and then only following due process, that is a fair trial involving nations on onus of proof, presumption of innocence, right to silence). It is an essential protection against the tyranny of the executive arm of government that, whilst the Parliament makes laws, and the executive administers them, judicial discretions are brought to bear upon the conviction and sentencing of accused persons. However, the Parliament has blithely abandoned all this in the case of the Community Protection Act. In its original form the Act provided:

> s. 4 (1) The Minister may apply to the Supreme Court for an order under this Act that Garry David be placed in preventive detention;
>
> (2) An application under subsection (1) may be made ex parte.

Section 5 then went on to provide that where an application was made under s. 4, then, without more, Garry David continued to be a prisoner or a patient (assuming he was then in gaol or a psychiatric institution) or, if he was then neither a prisoner nor a patient 'he is deemed by reason of this Act, to be such a prisoner'. Thus, as the Act was originally passed, the mere making of an application—that is, arguably, the mere filing of papers in the Supreme Court—enabled the immediate gaoling of Garry David without any judicial involvement. This draconian provision was slightly ameliorated by the 1991 amendments. These replace the original s. 4(2) with the following:

> s. 4 (2) An application under subsection (1) —
>
> (a) must be commenced by originating motion served on Garry David and may proceed in his absence; and
>
> (b) must be heard by a Judge of the Supreme Court.

Although this ensures ultimate judicial involvement in the gaoling process, the original vice remains—that is, the mere making of an application (this time with service upon Garry David)—and still facilitates his instant imprisonment prior to any hearing or judicial determination. The speed with which that application is then brought to a hearing is, of course, a matter for the Minister. This amounts to detention upon executive discretion alone (the decision to file and serve an application) and raises constitutional issues concerning interference with judicial power by reason of Bills of Attainder.

Bills of attainder

Dawson J has recently stated in the war crimes challenge, *Polyukhovich v. Commonwealth* ([1991] 65 ALJR 521, p. 593):

> A Bill of Attainder in England imposed the penalty of death, forfeiture of land and possessions and 'corruption of blood' whereby the heirs of the person attained were prevented from inheriting his property. A Bill of pains and penalties inflicted lesser punishment, involving forfeiture of property and, on occasions, corporal punishment less than death . . . Historically, Bills (or more correctly) Acts of attainder constituted a particular form of law, generally of an ex post facto character, whereby punishment was inflicted upon a designated person or group of persons adjudged by the legislature to have been guilty of crimes, usually of a capital nature, such as treason or murder. The particular objection to Bills of Attainder was not so much that they may have had an ex post facto operation, but that they substituted the judgement of the legislative for that of a Court. In England, the practice evolved of giving the person with whom a Bill dealt some sort of a hearing, but the result was still secured by legislation and not by judicial action . . . In the United States . . . it was this aspect which was seen as the vice, not only because it was oppressive but also because it was thought (at least by 1965) to offend against the separation of powers doctrine.

Toohey J wrote in *Polyukhovich*:

> Bills of Attainder (which impose the death penalty) and bills of pains and penalties (which impose a lesser penalty) may be defined as legislative acts imposing punishment on a specified person or persons or a class of persons without the safeguards of a judicial trial . . . Legislative acts of this character contravene Ch. III of the Constitution because they amount to an exercise of judicial power by the legislature. In such a case, membership of a group would be a legislative assessment as to the certainty, or at least likelihood to the criminal standard of proof, of an accused doing certain acts or having certain intentions. Those acts or intentions would not themselves be open to scrutiny by the court. The vice lies in the intrusion of the legislature into the judicial sphere (*Polyukhovich v. Commonwealth* [1991] 65 ALJR 521, p. 593).

Replace 'membership of a group' with 'being Garry David' and, in the author's view, this statement may be applied in full force to the triggering of a power to detain upon the mere making of an application by the Minister. This initial procedure is to be compared to the ensuing application conducted before a Judge, about which, save that it is tainted by the initial offensive 'application', no criticism is made on this ground. Toohey J's comment arises in the context of the constitutional challenge to the war crimes legislation, more specifically, in assessing whether an ex post facto criminal law infringed the judicial powers vested in Chapter III courts under the Constitution. Such bills have been decidedly out of fashion in England for hundreds of years, and, as the Justices noted in *Polyukhovich:* 'the United States Constitution contains express prohibitions of any Bill of Attainder or ex post facto law' (Art. 1, 9, C1, 3 [Federal]; Art. 1, 10, C1, 1 [State])' (*see also* Deane J at ss. 561 for eloquent

statements of basic principles). The central vice in such bills of attainder was that they directed the outcome of a case by interfering with the judicial process, as against removing rights (*Liyanage v. Queen* [1967] 1 AC 259).

If this much is accepted, the difficult question still remains whether the doctrine of separation of powers is alive and well in Victoria. The Victorian Constitution Act 1975 is a relatively unlitigated beast such that the matter remains speculative. As to other states with similar 'formal' constitutional structures, it has been held that the doctrine of separation of powers does not apply in New South Wales (*Clyne v. East* [1967] 68 SR (NSW) 385) nor in Western Australia (*Nicholas v. State of WA* [1972] WAR 168).

It is not at all clear how a Victorian Supreme Court judge would decide this issue under Victorian constitutional arrangements. A thorough analysis of this issue is not appropriate here. However, at the technical level, the Constitution Act deals, in separate parts, with the Crown (Part I), the Parliament (Part II) the Supreme Court of the State of Victoria (Part III) and The Executive (Part IV), and wide powers are given to both the Parliament (s. 16) and the Supreme Court (s. 85). Long practice would suggest that the Parliament does not usurp judicial functions, at least not blatantly. Against this, unlike the US Constitution, but like United Kingdom constitutional structures, there is no express prohibition upon Bills of Attainders. This is a little worrisome given the conduct of our Parliament in this arena in recent times. Recent amendments to s. 85 of the Constitution Act, achieving a degree of 'entrenchment' of provisions vesting powers in the Supreme Court, has led to the suggestion by a Parliamentary Committee that the separation of powers, was 'at least partly contained within s. 85'. The Committee also, however, stressed that the basic value contained in s. 85 was the rule of law—'arguably . . . the only constitutionally entrenched human right of Victoria' (*see* Victoria. Parliament. Legal and Constitutional Committee 1990, p. 11). If this is so, perhaps the Community Protection Act may have the unexpected result of increasing pressure for a Bill of Rights at the federal or state level to protect us all against, inter alia, statewide community protection legislation.

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Appendix 1

BRITISH PARLIAMENTARY INSTRUMENTS STATING FUNDAMENTAL RIGHTS AND FREEDOMS 1215–1816

Magna Carta 1215

Magna Carta 1215 25 Ed. I.C. 29

Confirmation of the Charters 1297 (Parliamentary Records)

Parliamentary Bill 1301

Ordinances of 1311

Act: 25 Ed. III, St. V., C.IV 1351-52

Act: 28 Ed. III, C.III 1354

Act: 42 Ed. III, C.III 1368

Act: 7 Henry IV, C.I. 1405-6

Petition of Rights 1627 3 Chas. I.C.I.

Habeas Corpus Act 1640 16 Chas. I.C.X.

Habeas Corpus Act 1679 31 Chas. II C.II.

Bill of Rights 1689 1 Will. & Mary. Sess II. CII. (*see* Victorian *Imperial Acts Application Act 1980*, pp. 390–6)

Act of Settlement 1701

Habeas Corpus Act 1816 56 Geo III C.C.

Appendix 2

MODERN SELECTED INTERNATIONAL TREATIES, DECLARATIONS, AND SIMILAR DOCUMENTS STATING FUNDAMENTAL RIGHTS AND FREEDOMS

United Nations Documents

Charter of the United Nations 1945

Universal Declaration of Human Rights UN Paris, 10/12/1948

Standard Minimum Rules for the Treatment of Prisoners UN 1955

International Covenant on Civil and Political Rights UN 1966 plus Optional Protocol 1966

Declaration on the Protection of All Persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment UN 1975

Declaration on the Rights of Disabled Persons UN 1975

Code of Conduct for Law Enforcement Officials UN 1979

Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment UN 1982

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN 1984

Europe

European Convention for the Protection of Human rights and Fundamental Freedoms Rome, 1950, plus five Protocols 1954, 1970, 1970, 1968, 1971

European Parliament Declaration of Fundamental Rights and Freedoms 1989

United States of America

American Declaration of the Rights and Duties of Man 1948

American Convention on Human Rights 1969

INDETERMINATE SENTENCES AND DANGEROUSNESS

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Statutory Preventive Detention

AN INDETERMINATE SENTENCE OF IMPRISONMENT AT THE GOVERNOR'S Pleasure, imposed in addition to or in substitution for, a finite sentence, is available in most of the Australian states and territories. These provisions override the common law requirement of proportion between the crime and the punishment (*R v. Veen (No. 2)* (1988) 164 CLR 465).

The provisions are of two main types. Those in Western Australia and Tasmania (Western Australia: s. 662 *Criminal Code 1914*; Tasmania: s. 393 *Criminal Code 1924*) do not tie preventive detention to any particular type of offence. However, the trial judge must have regard to the antecedents, character, age, health or mental condition of the person, or the nature of the offence or any special circumstances of the case. This extremely broad power is not restricted to violent and mentally disordered offenders, although it is clearly able to be employed in sentencing them. There are similar provisions in some other countries with a common legal heritage (Canada: s. 688 Criminal Code; New Zealand: s. 75 Criminal Justice Act 1985).

The second type of provision is that found in Queensland, South Australia and the Northern Territory, and it links the preventive detention to a conviction of an offence of a sexual nature and two reports from medical practitioners, who must both attest (*Johnson* [1962] QWN 37) that the offender is incapable of proper control over sexual instincts. This also enables the trial judge to order detention at the Governor's Pleasure in addition to, or in lieu of, any finite sentence (Queensland: s. 18 *Criminal Law Amendment Act 1945*; Northern Territory: s. 401 *Criminal Code 1983*). In the case of South Australia, the courts are empowered to direct that the offender be detained until further order of the Supreme Court (South Australia: s. 23 *Criminal Law (Sentencing) Act 1988*), and a mechanism is provided for review—by the Parole Board of South Australia—and discharge of this indefinite sentence—by the Supreme Court of South Australia. The reviewable nature of the South Australian sentence distinguishes it from the

older counterparts in Queensland and the Northern Territory. In each of these latter models, offences of a sexual nature are not, by definition, confined to offences of violence or the use of physical force (*Ruler* [1970] QWN 44).

There is no equivalent statutory power in New South Wales and Victoria. The absence of the specific power tied to sexual offences was once decried in Victoria (*Chapman* [1947] VLR 442), but this absence is no longer felt in that state (Victorian Sentencing Committee 1988: para. 3.14.6). In these two states, the common law principle of proportion between the sentence and the crime prevails.

Section 662 of the Criminal Code (Western Australia)

The origins

The origins of s. 662 of the Criminal Code 1914 (WA), lie in the 1898 Royal Commission into the Penal System of that state, and a glimpse into the tenor and perspective of the Royal Commissioner's report can be obtained from the fact that it was recommended that decisions as to release of prisoners should be vested in a 'Board of Medical Jurists'. Although this proposal was never adopted, this patent reformative perspective and its attendant faith in medical science was influential. In 1918, s. 661 (permitting indeterminate sentences for habitual offenders) and s. 662 were inserted into the Criminal Code. The aim was to permit trial judges to order imprisonment in a reformative prison (Western Australia. Parliament. Joint Select Committee on Parole 1991, p. 20). Needless to say, the rhetoric of reform was never matched by the reality: the creation of a reformative prison has proved as elusive in Western Australia as it has everywhere else.

Use of Section 662

The indefinite sentence under s. 662 is exceptional. The total number of prisoners under s. 662 sentences is small. Limited data are available, and present a series of snapshots: only sixteen prisoners were held under s. 662 at 24 October 1988, sixteen were held at 30 June 1990 and fifteen were held at 30 June 1991, which represents less than 1 per cent of the state's average daily muster (R. Fitzgerald 1991, pers. comm., September). In dynamic terms, in the period 1982–87, there were eighteen receivals under s. 662(a), which permits an indefinite sentence to be aggregated with a finite sentence for the same offence, and eighteen under s. 662(b), which permits an indefinite sentence to be imposed in lieu of a finite sentence, for a total of thirty-six receivals for the period (Western Australia. Inter Departmental Committee 1989, pp. 93–4). This represents a minuscule 0.001 per cent of total sentenced prisoner receivals for the period. In two subsequent years, 1989–90 and 1990–91, the receivals have dropped to one and none respectively (R. Fitzgerald 1991, pers. comm.). This effect may be the fallout from the High Court's decision in *Chester* ((1988) 165 CLR 611), apparently curtailing the use of s. 662 sentences, about which more will be said later.

The Canadian equivalent, although not offence-specific, has been largely used for the indeterminate detention of sexual offenders (Jakimiec et al. 1986; Sorochan 1988). The same can be said of Western Australia. Sexual offences

feature prominently in the offences for which s. 662 sentences are imposed (R. Broadhurst 1991, pers. comm.). Of the sixteen offenders held under s. 662 at 30 June 1990, the most serious offences for which they were convicted was breach of Governor's Pleasure (2), breaking and entering offences (3), rape or sexual assaults (8), armed robbery (1), going armed in public (1) and attempted murder (1). More interestingly, with one exception, all the s. 662 prisoners had been simultaneously convicted of multiple crimes. The multiple ranged from twenty-nine offences down to three offences. The average was nine offences for which the offenders were sentenced at the time when the indeterminate Governor's Pleasure sentence was imposed. Some of these offences may have been quite minor, but among the three most serious offences were deprivation of liberty (5), sexual assaults (11), breaking and entering offences (6), armed robbery (3), other offences against the person (2), child stealing (1) and a Prisons Act offence (1).

What is notable about these data is that rape and sexual assault has featured very prominently in judges' decisions to impose a s. 662 sentence. The eleven sexual assaults were rape, aggravated sexual penetration, aggravated sexual assault, aggravated indecent assault and indecent assault. The prominence of these offences is exacerbated if deprivation of liberty charges and breaking and entering charges are also taken into account as part of the transaction of sexual violence. All but two of the s. 662 prisoners who had been convicted of deprivation of liberty or breaking and entering offences were simultaneously convicted of a sexual offence.

Furthermore, in so far as it is possible to draw a distinction between violent and non-violent sexual offences (West 1984), the s. 662 sentence appears to have been invoked for those of a violent nature rather than for those which are usually not accompanied by violence.

Problems with Section 662

Treatability

The first of the fundamental problems with s. 662 is that there is no pretence that the sentence is reformative or rehabilitative, or to be invoked only when there is a genuine prospect of treatment of psychiatric illness. Despite the reformative euphoria which influenced the enactment (Western Australia. Parliament. Joint Select Committee on Parole 1991, p. 20), this was not carried over into the legislative drafting.

The assumption of the courts has always been that the s. 662 sentence is purely incapacitative. Like counterparts in Tasmania and South Australia, Western Australian judges may impose preventive detention upon taking into account the 'mental condition' of the offender. This does not signify treatability of that condition, however. This phrase has been interpreted to refer to any 'state of mind' (*Kiltie* [1986] 41 SASR 52, 61, 71), or the 'mind's activities in all its aspects' (*Kiltie*, supra 66), and is not confined to recognised illnesses.

Comparison with indeterminate life sentences in England. This might be compared with the position in England, where the courts have developed a

common law principle which enables a disproportionate life sentence to be imposed for sexual offences and offences of violence where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future (*Hodgson* (1967) 52 Cr App R 113). The warrant for the sentence is the instability of the mental condition of the offender (*Picker* (1970) 54 Cr App R 330; *Spencer* (1977) 1 Cr App R (S) 75; *Headley* (1979) 1 Cr App R (S) 158; *Pither* (1979) 1 Cr App R (S) 209), and the resultant danger which the offender represents.

Like the Western Australian, Tasmanian and South Australian statutory equivalents, the English disproportionate life sentence is not linked to treatability of the mental illness. The lack of cooperation in treatment (*Aarons* [1964] Crim L R 484; *Saunders* [1965] Crim L R 250; *Woolland* (1967) 51 Cr App R 65; *Glasse* (1968) 53 Cr App R 121), or untreatability because of the nature of the disorder (*Ashdown* [1974] Crim L R 130; *Thornton* [1975] Crim L R 51; *Skelding* (1974) 58 Cr App R 313) does not inhibit the courts from imposing a disproportionate life sentence.

Contrast with hospital orders. The s. 662 sentence is to be contrasted with the hospital order, which can be made in Victoria and Tasmania, inter alia, if the person is mentally ill and should be detained in hospital for treatment (Victoria: s. 15 *Mental Health Act 1986*; Tasmania: s. 51(1) *Mental Health Act 1963*). The gravamen of the hospital order is not the presence of mental disorder, but the treatability of it (*Gills* [1967] Crim L R 247; *Woolland* (1967) 51 Cr App R 65). Instability of personality short of a treatable mental disorder will not suffice to ground a hospital order (*Woolland*, supra). Moreover, a judge is obliged to obtain the views of the hospital with regard to the course of treatment proposed by the psychiatrist, and obtain the consent of the hospital to the admission of the offender for that purpose (Victoria: s. 15(2); Tasmania: s. 51(3); *see also Tutchell* [1979] VR 248).

Hospital orders have one major drawback. They are regarded as unsuitable for mentally disordered offenders who are predicted to be dangerous, unless the hospital is willing to provide security for the offender (*Morris* [1961] 1 QB 237; *Higginbotham* [1961] 3 All ER 616; *Cox* [1986] 1 All ER 386; *Tutchell*, supra). The making of a hospital order by the court does not ensure that the detainee will receive the contemplated treatment or be detained for any specified period (Great Britain. Committee on Mentally Abnormal Offenders 1975, paras. 14.13–14.25). The Victorian judges lack the power to make an order restricting the release of the offender from hospital, unlike their counterparts in Tasmania who may make a restriction order to protect the public if the trial judge is satisfied of the need to detain the offender in conditions of strict custody (Tasmania: s. 48(2) Mental Health Act 1963). An equivalent order is available in England and New Zealand, where the power to restrict release can be exercised to prevent danger from the offender (*Elliot* [1981] 1 NZLR 295, p. 302; *Clarke* (1975) 61 Cr App R 320, p. 323; *Ex parte H.* [1981] Tas R 194, p. 204). Unlimited restriction orders may be imposed on the basis of mental disorder and dangerousness, even though the offender may have been convicted of a relatively trivial offence (*Eaton* [1976] Crim L R 390; *Haynes* (1981) 3 Cr App R (S) 330).

The result is that superimposed on the hospital order is an indeterminate preventive mechanism, imposed incongruously on supposedly therapeutic detention in a hospital. The absence of a power to make a restriction order, under the predecessor of the Mental Health Act 1986 has prompted the Victorian Full Court to the view that if the offender is likely to represent a danger, or possibly not cooperate in treatment, then a hospital order should not be made, and that the need to ensure the safety of the community dictates a prison term (*Judge Rapke; Ex parte Curtis* [1975] VR 641, p. 643; *Carlstrom* [1977] VR 366, p. 367–8; *Tutchell*, supra 255; *see also Clay* (1979) 22 SASR 277, p. 282). The lack of restriction orders had the effect that hospital orders were rarely used in that state (Fox & Frieberg 1985, p. 424). Under the Mental Health Act 1986, a patient detained under a hospital order may only be discharged by order of the Mental Health Review Board or the authorised psychiatrist, and regard must be had to the criteria for involuntary detention in making that order (Victoria: ss. 36, 37 Mental Health Act 1986), and these restrictions upon discharge give reason for confidence in the use of hospital orders by the Victorian courts.

Behind the labels. Despite the fact that the s. 662 sentence is incapacitative in philosophy, behind that label, treatment and remediation may be at work.

Transfers from prison to Graylands Hospital in Perth enable psychiatric treatment to be administered where it is appropriate (Western Australia: s. 27 *Prisons Act 1981*). The procedures for transfer are unavailable for offenders who are personality disordered or intellectually impaired (Western Australia. Inter Departmental Committee 1989, p. 88). Some tension has been felt, however, in that the Department of Corrective Services may maintain responsibility for security even after reception at Graylands Hospital, if the transferred prisoners are rated strict security (the sentence category) or maximum security (the prison category). Although prisoners are detained in the locked wards of Ashburton House in Graylands Hospital, it is not unknown for leg-shackles or handcuffs to remain on and for Department of Corrective Services officers to remain in attendance. There is no standard practice in this respect, however. Negotiation between hospital staff and Corrective Services can reduce the omnipresence of security.

There are no complete data on the extent to which transfers are used for s. 662 prisoners, although in the planning processes for the new Graylands Secure Unit, it was recommended to, and has been accepted by, the Department of Health that five beds should be available at any particular time for such prisoners (Western Australia. Inter Departmental Committee 1989, p. 94), and a further ten beds should be available at any time for transfers from the general prison population (Western Australia. Inter Departmental Committee 1989, p. 95). Whatever their status, prisoners admitted to Graylands Hospital tend to be short-stay patients. Some staff members of Graylands have estimated that prisoners are usually only detained in Graylands for a maximum of about six weeks.

Non-psychiatric disabilities of s. 662 prisoners may be catered for within the prison system. Since sexual offences feature so prominently among their number, it might be expected that specific sexual offender programs might be directed at s. 662 prisoners.

The Department of Corrective Services introduced in 1987 a Sexual Offenders Treatment Program in Fremantle Gaol. It operated as a therapeutic community, in a separate part of the prison, serving up to twelve offenders at a time for programs of twelve months based on behaviourist-cognitive principles. For this reason, seriously psychiatrically disturbed, intellectually handicapped and some Aboriginal offenders are regarded as unsuitable participants (Hacket 1989). The program was available to the general prison population, and was not confined to prisoners sentenced under s. 662. The program ceased amidst acrimony over resources and philosophy in 1989 and, while it has been revived in a varied form, clearly no long-term evaluation has yet been possible, even if appropriate criteria by which to evaluate success could be agreed (Genders & Player 1989).

What is significant, however, is that this sexual offender program is designed for the offender who is motivated or who can be persuaded to recognise a problem with his behaviour. Whether by design or not, it has been the non-violent sex offender who has largely benefited from the program, which purports to equip the offender with the social skills to enhance relationships with the opposite gender, family therapy, anger management, and drug and alcohol education and control. The violent and aggressive sexual offenders appear rarely to meet the criteria for participation. It was noted earlier that the s. 662 sentence has been largely directed at the violent and aggressive sex offender. A s. 662 sentence appears to have carried no guarantee of participation in such a program.

These procedures and programs provide a fuller picture than the label attached to the sentence of indeterminate imprisonment might otherwise suggest, but, apart from hospital transfers, there is no particular program by which the s. 662 prisoners are targeted. Hospital transfers are short-term palliatives and the sexual offenders program rarely attracts those who receive s. 662 sentences. The s. 662 sentence has operated, and continues to operate, as a purely incapacitative prison sentence.

The meaning of dangerousness

According to Bottoms and Brownsword (1982, p. 240) dangerousness has three constituent elements of the predicted act, viz. (i) seriousness; (ii) temporality, with two ingredients of frequency and immediacy (or recency); and (iii) degree of certainty about the future conduct. These elements can be employed for analysis of the s. 662 sentencing practice in Western Australia.

Seriousness. Trial judges in Western Australia have been admonished to employ a s. 662 sentence only in exceptional situations, and only if the offender is shown to be dangerous to others (*Chester* (1988) 165 CLR 611, p. 618); *Tunaj* [1984] WAR 48, p. 51; *Cooper* (1987) 30 A Crim R 19, p. 21), even though the legislature has not so limited the sentence. Until recently, the courts have had little guidance as to what dangerousness actually means, but the High Court in *Chester* (supra 618) has indicated that the indeterminate sentence should only be imposed when the offender was ' . . . so likely to

commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community'.

This reflects the common law requirement in England that the risk must be the commission of an offence of serious violence, whether of a sexual nature or not (*Spencer* (1977) 1 Cr App R (S) 75; *Johnson* (1982) 4 Cr App R (S) 143; *Wilkinson* (1983) 5 Cr App R (S) 105). The High Court in *Chester* specifically rejected the state of Western Australia's submission that the powers under s. 662 could be exercised for any serious offence, and ruled that it should be confined to very exceptional cases where the predicted offending is of crimes of violence, including sexual offences (*Chester*, supra 618).

However, it would be wrong to imagine that the High Court's decision in *Chester* represented a significant departure from the previous practice of the Western Australian courts. Violent sexual offenders appear to have been targeted previously. For example, most of the s. 662 prisoners detained on 30 June 1990 (thirteen out of sixteen) had been sentenced before the High Court delivered its judgment in *Chester*.

Since there has been such an emphasis upon violent sexual offenders in the imposition of s. 662 prisoners, it is noteworthy that, regardless of sentence type, the recidivism risk of sexual offenders in Western Australia appears to be high, and that the probability of ultimate recidivism is slightly but significantly higher for violent sexual offenders than for non-violent sexual offenders (Broadhurst & Maller 1991, pp. 63–4, p. 91; Broadhurst & Maller 1992). However, recidivism among sexual offenders in Western Australia has been found to be best predicted by the usual actuarial factors of race, gender and youth, regardless of type of sexual offending (Broadhurst & Maller 1991, p. 63).

These data indicate that the use of the s. 662 sentence as an incapacitative tool is highly selective and, given the slight differences in the rates of recidivism of violent and non-violent sexual offenders, somewhat value-laden.

Recency and frequency. The Western Australian Court of Criminal Appeal court has required evidence of 'constant danger' of the offender (*Tunaj* [1984] WAR 48, p. 51; *Yates* (1987) 27 A Crim R 361, p. 364–5) and the High Court has indicated that the courts must require 'cogent evidence that the convicted person is a constant danger to the community' before the indeterminate sentence is imposed (*Chester*, supra 618). However, s. 662 provides that that must appear from the antecedents, character, age, health, mental condition, the nature of the offence and any special circumstances.

Of all the listed factors, two stand out as having critical weight. The requirement that courts have regard to antecedents enables them to require overt behavioural manifestations of danger. The overt act requirement is one which is common to many statutory schemes of civil commitment in the United States of America (Brooks 1984, p. 284; Mestrovic & Cook 1986). Many explicit statements by courts and legislatures require that any psychiatric prediction of dangerousness be anchored by a proven recent act of violence to the person (*Lessard v. Schmidt* (1974) 379 F Supp 1376, 1379). New South Wales at one stage adopted this requirement for civil admission criterion (New South Wales: s. 5 *Mental Health Act 1983*; but see now s. 9 *Mental Health Act 1990*).

It has also been employed as a statutory requirement for indeterminate sentencing provisions for dangerously violent offenders in Canada (Canada: s. 688 Criminal Code), and in New Zealand (New Zealand: s. 75(1) Criminal Justice Act 1985). The Canadian provision, paraphrasing the relevant parts, requires that it be established beyond reasonable doubt (*Kirkland* [1957] SCR 3) that the person has engaged in conduct (of which the instant offence is a component) which is:

- a pattern of repetitive behaviour . . . showing failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damages upon other persons . . .

- a pattern of persistent aggressive behaviour . . . showing a substantial degree of indifference . . . to the reasonably foreseeable consequences to other persons of his behaviour . . .

- any behaviour. . .of such a brutal nature that as to compel the conclusion that the person is unlikely to be inhibited by normal standards of behavioural restraint.

The Canadian provision provides a statutory meaning of dangerousness, makes plain the need to anchor any determination of dangerousness in the demonstrable facts of a past criminal offence as part of a pattern of conduct unless the brutality of the offence speaks for itself. Pattern is established by two or more offences of the same type (*Langevin* (1984) 11 CCC(2d) 336). The New Zealand scheme is similar, in that the offender must have been convicted of at least one offence on a prior occasion since the age of seventeen. A similar indeterminate sentencing provision was proposed for England by Floud and Young (1981) and for the United States of America by the American Law Institute's Model Penal Code, Proposed Official Draft 1962, s. 703(3).

The overt act requirement has had some impact under s. 662 of the Western Australian Criminal Code. Burt CJ, in dissent in the Western Australian Court of Criminal Appeal in *Yates* ((1987) 27 A Crim R 361, pp. 364–5), has stated that the absence of any patterned conduct of the offender, or the fact that the instant offences were the first involving any violence to the person, militated against a s. 662 sentence. This gives expression to an overt act requirement. This view was mirrored in the judgment of the High Court of Australia in *Chester*, in which it was considered that a preventive detention sentence should be quashed because the prisoner's criminal record was not such as to permit the judge to be clearly satisfied that the prisoner was a constant danger to the community (supra 78–9). However, neither decision goes so far as to make a pattern of similar conduct an essential prerequisite of the s. 662 sentence.

On the other hand, Brinsden J in *Yates*, with whom Smith J concurred, focused on clinical factors, principally the lack of insight of the offender and the lack of response to previous treatment, as the primary indicators of dangerousness (supra 369). Interestingly, the judgment of Brinsden J in Yates suggested that the situational quality of dangerousness could not be ignored.

Brinsden J took the obligation of the judge to take into account the nature of the offence to permit consideration of the situational factors of the sexual violence, namely that it was committed against a young child and that it was committed in a particular location—a suburban shopping centre—to which both the offender and people in the class of his victim had habitual resort.

Nonetheless, in light of the approach of the High Court in *Chester*, clinical factors alone cannot provide a satisfactory factual predicate for courts to act upon predictions of dangerousness, and it is certainly consistent with the approach being taken to the question of the prediction of dangerousness in most of the common law world.

Since the prediction of dangerousness must be anchored in overt, patterned and seriously violent criminal conduct, an observer is compelled to ask why there is any need for an indeterminate sentence at all if the patterned multiple offences can be the subject of sentencing under determinate sentencing principles. Patterned offending can attract cumulative sentences, if preventive effect is desired. Indeed, there has been a recent suggestion that a prior record should serve to render an offender more culpable than a first offender might be, and thereby attract a greater punishment (Von Hirsch 1985). This view does not reflect judicial orthodoxy that a prior record should merely cancel out mitigating factors but cannot increase the culpability for an offence and thereby extend the tariff range (*Cameron v. Josey* [1970] WAR 66; *Clark* (1972) 4 SASR 30; *Cook-Russell* [1976] Qd R 35; *Lemass* (1981) 5 A Crim R 230), but even under this orthodoxy, there is proper scope for consideration of dangerousness within the confines of a finite sentencing regime.

Degree of certainty about dangerousness. It is unnecessary to review the well-thumbed pages of the literature on the fallibility of predictions of dangerousness. The false positives and false negatives in predictions of dangerousness continue to be observed, despite some high true positive rates well above chance for some particular offender groups. It suffices to note that the ineradicability of false positives has signalled, for some, the need to abolish or at least limit to the greatest possible extent any form of preventive sentencing based upon fallible psychiatric judgments (Radzinowicz & Hood 1981a, 1981b).

However, the expectation that predictions of dangerousness need to be completely valid and reliable, or of a much higher order of validity and reliability than has been observed to date, before they can be acted upon is disingenuous. Dworkin has written, for example, that speculation as to what might happen is no basis for abridgment of the rights of one predicted to be dangerous, but that abridgment could be justifiable in the case of a genuine emergency. Borrowing from Holmes J in *Schenck v. United States* ((1919) 249 US 47, 52), Dworkin has suggested that a genuine emergency is one which is a '. . . clear and present danger, and the danger must be of some magnitude' (1985, p. 195). In the same vein Rawls has written that:

> Justice does not require that men must stand idly by while others destroy the basis of their existence. Since it can never be to men's advantage, from a general point of view, to forgo the right of selfprotection, the only question then is whether the tolerant have a right to curb the intolerant

> when they are of no immediate danger to the equal liberties of others (Rawls 1971, p. 218).

However, it is difficult to translate 'clear and present danger' or 'immediate danger' into operational terms of an acceptable rate of error before a community might regard itself as acting justly in abridging the offender's rights by a prediction of dangerousness which has a one in three chances of being wrong.

The comment has been made by Burger CJ in the United States Supreme Court decision in *Addington v. Texas* ([1979] 441 US 418, 429) that, in view of the invalidity of predictions of dangerousness, '. . . there is a serious question as to whether the state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous'. Some commentators have suggested that such a standard would require a degree of satisfaction lying between 70 per cent and 90 per cent or more (Simon & Mahan 1971, p. 319; Simon & Cockerham 1977, p. 57; Eggleston 1983, pp. 118–19).

However, not all disputes regarding issues of fact need to be established beyond a reasonable doubt for sentencing. Certainly, the essential legal ingredients connoted by the verdict or plea of guilty must be established by the Crown beyond a reasonable doubt (*Morse* [1977] WAR 151, 156; *Chamberlain* (1982) 14 A Crim R 67, pp. 69–70; *Perre* (1986) 41 SASR 105, 116–17; *O'Neill* [1979] NSWLR 582, pp. 588–9). However, the issues need only be proven beyond a reasonable doubt where they constitute the nature of the crime itself for which the offender stands to be sentenced. It is the offence or offences proven against the accused which govern the punishability of the offender, and the limits of that punishment.

If the dispute concerns issues which are outside the essential legal ingredients of the offence, such as part of the narrative or matters personal to the offender, for example age, occupation, marital status, mental disorder and so on, then they too must be proven if the trial judge is to act on them, but these issues do not have to be proven beyond a reasonable doubt, even if part of the Crown's submissions, but merely to the satisfaction of the court (*Chamberlain* (1982) 14 A Crim R 67, pp. 70–1; *Welsh* (1982) 7 A Crim R 249, pp. 251–2; *Xiao Dong Liu* (1989) 40 A Crim R 468, pp. 474–5). It need only be established as more probable than not that the offender is likely to be dangerous for a sentencer to act upon such a prediction, where that prediction is considered within the range of tariff sentences marked out by the seriousness of the offence.

The High Court of Australia in *Chester* has indicated that the likelihood that the offender will be dangerous is enough to activate the indefinite sentence. The court stated that the judge must be '. . . satisfied by acceptable evidence that the convicted person is . . . so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community . . . [This] . . . requires that the sentencing judge be clearly satisfied by cogent evidence . . .' (supra 78). The courts of England have addressed the required degree of risk, stipulating that the degree of dangerousness must be a 'substantial risk of repetition' (*Laycock* (1981) 3 Cr App R (S) 104, p. 106).

In other contexts, the meaning assigned to 'likelihood' has been that something 'may well happen', 'it may not happen, but there is a good chance that it will', and that there is the underlying notion that there is a substantial or real chance that an event will occur, and not merely a possibility, without equating the meaning with a better than 50 per cent chance or odds-on chance of the event occurring (*Boughey* (1986) 60 ALJR 422, pp. 426–7). This sort of assignment to proof of mathematical chances is done frequently in civil matters, determining and apportioning damages (Eggleston 1983, chapter 15), but, for preventive detention of dangerous offenders, what appears to emerge is that the courts do not regard themselves as inhibited by the chance of a prediction being wrong in sentencing upon a prediction of dangerousness, even though this may appear to be fatal to a formula which demands proof of something as more probable than not.

However, there is another way of regarding this issue of standard of proof of dangerousness for the s. 662 sentence, which is consonant with the opinion expressed by Burger CJ in *Addington v. Texas* and with the Canadian requirement of proof beyond reasonable doubt under *Kirkland* ([1957] SCR 3). At stake under s. 662 is a different level of punishment for an offence, and hence proof of dangerousness under s. 662 is not the same thing as proof of dangerousness with the tariff cap of finite imprisonment for the offence. Since a finding that the offender is a likely danger does determine the level of punishment which might be imposed under s. 662, by lifting the range of sentencing options from a tariff-capped to an indeterminate sentence, then the chances that a future offence will be committed ought to be established beyond reasonable doubt under current sentencing doctrine, adverted to earlier.

With a requirement that the trial judge must be persuaded beyond reasonable doubt that the offender would re-offend when set at liberty, there is a considerably reduced scope for s. 662 to be utilised, given the level of uncertainty in predictions of dangerousness. Of course, it does not mean that s. 662 could never be used, but it does mean that there should be an even greater reluctance to employ an indeterminate sentence.

Review of Section 662 Prisoners

The Parole Board of Western Australia must report initially one year after the s. 662 detention commenced (Western Australia: *Offenders Community Corrections Act 1962*, s. 34) and thereafter annually (Western Australia: s. 34(2)), or at any time upon request by the Minister of Corrective Services. However, the decision as to release is made by the Governor on the Parole Board's recommendation (Western Australia: s. 40C(1)(b)). This is made difficult by the fact that some s. 662 prisoners may be held in a psychiatric hospital. That Board does not review hospital patients. It has not been the practice for the forensic psychiatric staff at Graylands Hospital to review transferred prisoners with the sort of regularity which governs the Parole Board, for fairly pragmatic reasons. The turnover of prisoners on transfer is such that six weeks is estimated to be the longest period in hospital.

It has been recommended that the Parole Board should continue to be the monitor of all s. 662 prisoners, although it has also been recommended that the

Parole Board ought to have power to order release of any person detained under s. 662, rather than simply make recommendations to the Governor as is now the case, and that the terminology of the sentence be accordingly altered from 'Governor's Pleasure' to 'indeterminate sentence' (Western Australia. Inter Departmental Committee 1989, pp. 84–5). The Law Reform Commission of Western Australia has agreed with these proposals, adding that the sentencing court should also have power to review the sentence upon application by the person (Law Reform Commission of Western Australia 1991, pp. 86–7). The Western Australian Working Party to Review the Mental Health Act has also resolved that no special review mechanism under that Act is required for s. 662 prisoners, and that they ought to remain the responsibility of the Parole Board.

To determine whether the review process works constructively relies upon some guesswork. The available data present the barest of pictures. For the s. 662(a) receivals over the 1982–87 period, the shortest duration in prison was fourteen months (of which fourteen months was the finite term, and the Governor's Pleasure period had not commenced), and the longest duration was 203 months (eighteen months finite period and a stunning 185 months of Governor's Pleasure detention). The average duration was sixty-eight months (of which thirty-seven months was the finite sentence and thirty-one months was the Governor's Pleasure detention) (Western Australia. Inter Departmental Committee 1989, p. 93). It is significant that the finite terms for which prisoners have been sentenced under s. 662 appear to have been relatively short—the average finite sentence being just over three years. This suggests two possible explanations. One is that the s. 662 sentence was being used for some relatively minor offences, at least before the High Court's decision in *Chester*. However, this possibility seems unlikely, for reasons outlined earlier. Another, more probable, explanation is that the finite term was adjusted downwards, knowing that the s. 662 sentence was also to be imposed.

It is also notable that for the prisoner who had been detained for the longest time, the Governor's Pleasure detention was a multiple of ten times the finite sentence. This demonstrates the potential for gross disproportion to which provisions such as s. 662 lend themselves. The average length of time in custody under the indeterminate sentence was almost as much again as the time in custody under the finite sentence, thereby doubling the length of time served in prison.

The s. 662(b) prisoners received over the same period were often required to serve concurrent finite sentences for other offences. For this group, the shortest duration in prison was twenty days (a finite period of six days and fourteen days Governor's Pleasure), about which one can only wonder at the utility of such a sentence; the longest was 197 months (twenty-four months finite sentence and 173 months Governor's Pleasure detention). The average period in prison was fifty-one months (the average finite period being twenty-nine months and the Governor's Pleasure detention being twenty-two months). The same patterns emerge under s. 662(b) as for s. 662(a), and the same observations might be made.

The Future of Section 662

The 1991 Parliamentary Joint Select Committee on Parole called for review of the provision (Western Australia. Parliament. Joint Select Committee on Parole 1991, pp. 95–6), seemingly unaware that such a review process has been under way for some years. Section 662 has been under scrutiny over the past decade or so. Both the Murray Report (Murray 1983) and the Inter Departmental Committee report (Western Australia. Inter Departmental Committee on the Treatment of Mentally Disordered Offenders 1989) recommended that s. 662 should be retained. The Law Reform Commission of Western Australia has considered whether it ought to make any recommendation for repeal of s. 662, and has noted the considerable difficulties with and injustice of the provision, but has decided to make no such recommendation (Law Reform Commission of Western Australia 1991, p. 86).

However, that may not be the last word on the matter. As part of a report commissioned earlier this year by the Crown Law Department of Western Australia for final polishing of many of the Murray Report's proposals for Code amendment, it has been recommended that s. 662 should be repealed. The future of s. 662 is still open.

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THE PRINCIPLES OF SENTENCING VIOLENT OFFENDERS: TOWARDS A MORE STRUCTURED APPROACH

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IN ORDER TO ACHIEVE CONSISTENCY OF APPROACH IN SENTENCING, IT IS desirable to have a structure or theoretical framework in which that objective can be promoted. However, there are many competing philosophies and many judicial officers from diverse backgrounds, with differing attitudes, and this task of achieving consistency of approach is not a simple one.

For example, if one selects rehabilitation of the offender as the primary objective of a sentence then one would expect a different result from one where retribution or general deterrence is considered to be the dominant purpose. In the sentencing of offenders, retribution (variously referred to in this paper as the sentence which is regarded as being commensurate with, or proportionate to, the seriousness of the offence or the justly deserved sentence), protection of the community, specific and general deterrence, rehabilitation or reform of the offender, and incapacitation are amongst the most commonly cited justifications for the selection of the ultimate sentence.

Neither the courts, which have embraced the maxim that in sentencing 'the only golden rule is that there is no golden rule' (*R v. Geddes* [1936] 36 S R (NSW) 554, per Jordan CJ) nor leading commentators such as Walker (1980) who have endorsed an eclectic stance, have provided an adequate

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1 The views expressed in this paper are those of the author. They are not intended to reflect the views of the Australian Institute of Criminology or the Judicial Commission of New South Wales.

formula for indicating whether sentences are intended to be primarily utilitarian, and concerned with future crime prevention and community protection, or retributive, where the emphasis is on bringing the offender to account through an appropriate measure of punishment for the particular offence which he or she has committed.

Indeed, the yet to be commenced *Sentencing Act 1991* of Victoria reveals contemporary thought on this issue by listing some of the traditional objectives of sentencing offenders in section 5 of the Act. However the following guidelines are cited as the only purposes for which sentences may be imposed:

- to punish the offender to an extent and in a manner which is just in all of the circumstances; or
- to deter the offender or other persons from committing offences of the same or a similar character; or
- to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
- to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
- to protect the community from the offender; or
- a combination of two or more of those purposes.

Notice that the purposes listed are alternatives but may be used in combination and there is no single purpose which is said to predominate over any other. The fundamental point is that the choice of purpose or purposes of sentencing is a discretionary one for the sentencing judge.

This does not mean that the choice of purpose or purposes is an arbitrary one. Indeed Sir Laurence Street pointed out in one of his judgments, that the sentencing judge is not cast adrift on an uncharted sea for 'the judicial discretion underlying the formulation of a sentence must be exercised with due regard to principles of law deducible from authoritative decisions' (*R v. Rushby* [1977] 1 NSWLR 594, pp. 597–8).

Yet there remains something mysterious or magical about how the process of sentencing works. We are left with propositions such as 'sentencing is an art rather than a science' or that 'ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the sentencing process' (*R v. Williscroft* [1975] VR 292) or again, that the general principles of sentencing 'jostle one another for paramountcy'. One may seriously question whether the governing principles, and particularly those provided in the Victorian legislation will advance the cause of sentencing consistency. An attempt to rank these purposes in order of importance however, may have been a more effective strategy, and it is this theme the author wishes to explore later in this paper.

The Victorian Act goes further than simply listing the purposes for which sentences may be imposed. It also specifies certain considerations in respect of which a sentencing court is obliged to have regard, such as the maximum penalty prescribed for the offence, current sentencing practice the offender's culpability and degree of responsibility for the offence, the offender's previous character and various other aggravating and mitigating factors. It also contains guidelines which generally are intended to apply the principles of parsimony to the selection of the sentence. Apart from providing a comprehensive list of considerations, which may now have the advantage of clarity and focussing attention to them, the principles do not appear to alter the common law in any significant respect.

Intuition and Reason

In *Beavan* (unreported, NSW CCA, 22 August 1991) Hunt J, with whom Badgery-Parker and Abadee JJ agreed, was considering the extent to which a guilty plea may be taken into account in order to mitigate the sentence. His Honour said:

> Sentencing is largely an intuitive process. It does not lend itself to the application of rigid formulas. The influences of the different factors to be taken into account in each case are infinitely various. In many cases, the different factors overlap, and it would be almost impossible for a judge to identify the precise influence which any one factor has had upon the sentence ultimately imposed.

His Honour then pointed out that sentencing is not the same as awarding damages for injuries where each step of reasoning is usually exposed, and continued:

> As sentencing appeals to this Court are not rehearings, it is unnecessary for a sentencing judge to expose the precise reasoning by which the ultimate sentence is reached. What is important for the parties and (if necessary) this Court to know are the judge's findings in relation to any facts upon which the sentence is based and which were in dispute and the various considerations which were taken into account in determining that sentence where it would be expected that reference should be made to them in that particular case. Where more than a judge's intuition is involved, the actual mathematics adopted by him or her need not be exposed. The very nature of the art of sentencing is such that it is usually simply not possible for judges to describe the often difficult processes by which the ultimate sentence is determined.

Beavan, therefore, is authority for the proposition that with the exception of discounts for assistance given to the authorities, it is both unnecessary and often unwise for a sentencing judge to identify the sentence thought to be appropriate to the particular case without reference to one factor and then to identify the discount which is thought to be appropriate with regard to that particular factor.

Ultimately then, provided the sentence is within range we need not attempt to dissect and apportion to each relevant sentencing factor a numerical value or

weight, in order to justify the sentence imposed. To do so would be artificial and not likely to reflect the actual thought processes involved.

Some Authoritative Decisions

When one turns to common law sentencing principles it is possible to find authoritative decisions which do attempt to explain and rank in order of priority some of the key principles. Thus the concept that the penalty should not be excessively lenient, that it must accord with the seriousness of the offence, emerges from the following well known extract from *R v. Radich* ([1954] NZLR 86), a passage which gives paramountcy to deterrence and the principle of proportionality and relegates characteristics personal to the offender and predictions relating to future conduct of the offender to a secondary and subsidiary level of significance (ibid., pp. 86–7).

> . . . one of the main purposes of punishment, . . . is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilized countries, in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. If a court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this fact is necessarily subsidiary to the main consideration that determine the appropriate amount of punishment [emphasis added]. (Note that the sentence italicised suggests that imposing retributive penalty has a preventative effect; cf. Ross 1975, pp. 37–8).

This concern for both proportionality in punishment, which is based on a retributive concept and protection of the community which is an utilitarian concept in sentencing is also well expressed in the following passage from the judgment of Herron CJ in *R v. Cuthbert* ([1967] 86 WN (Pt 1) NSW 272).

> The sentence should be such as, having regard to all the proved circumstances, seems at the same time to accord with the general moral sense of the community and to be likely to be a sufficient deterrent both to the prisoner and others (Per Jordan CJ *R v. Geddes* 1936 (NSW) 554).
>
> Courts have not infrequently attempted further analysis of the several aspects of punishment, (*R v. Goodrich* [1952] 70 WN (NSW) 42) where retribution, deterrence and reformation are said to be its threefold purposes. In reality they are but the means employed by the courts for the attainment of the single purpose of protection of society (ibid., p. 274).

Although the terminology is not used, the limiting principle of 'just deserts' or the recognition of a ceiling or roof above which a sentence should not go clearly emerges from the cases. Indeed, the leading cases on the proportionality principle are the High Court of Australia decisions of *R v. Veen (No. 1)* ([1979] 143 CLR 458) and *R v. Veen (No. 2)* ((1988) 164 CLR 465) (*see also* Fox 1988) but for present purposes, the following passage of the judgment of O'Brien J in the first New South Wales Court of Criminal Appeal decision in *R v. Veen* (Unreported decision, New South Wales Court of Criminal Appeal, 6 August 1977, pp. 17–18) provides a good description of the relevant considerations:

> The court should reserve the maximum sentence for the worst examples of the offence concerned, and otherwise impose a term which, having regard to the maximum, is in all the circumstances *in fair proportion to the gravity of the offence* with which it is dealing. In reaching that proportion the court should have regard to the background of the offender in determining whether or not leniency is warranted and if so, in what degree. Included in that background are such matters as previous offences committed by the offender especially if they indicate he is a persistent offender in the same or similar kinds of offence, for then he would normally forfeit any claim to leniency. *A sentence should not, however, inflict heavier punishment by way of sentence longer than bears a fair proportion to the gravity of the offence assessed against the background of the offender because of the likelihood of his commission of further such offences.* Whether this likelihood be determined from his record of previous convictions or from a disposition otherwise shown to the further commission of such offences, *a heavier punishment would be to punish him for offences for which he had already been punished or for offences he had not committed.* All punishment for offences is fundamentally for the protection of the community and the court should not impose a longer sentence than is otherwise fairly proportionate to the gravity of the offence considered upon the background of the offender in order that the community will thereby be afforded greater protection from his crime [emphasis added].

None of the preceding three passages from *Radich*, *Cuthbert* or *Veen* ignores the application of utilitarian considerations, and all place considerable emphasis upon the need to protect the community from crime. However, the author believes these cases show that the utilitarian considerations are subsidiary to the retributive aspects of sentencing in so far as the latter define the range, that is the upper and (sometimes) the lower limits of a just sentence. Once the range has been identified utilitarian considerations may then be considered in order to fine tune the sentence.

There appears to be a general confusion between the role of the sentencing judge and the role of the legislature in this regard, for it is submitted that the primary role of the sentencing judge is to do justice, and not to concern himself or herself excessively with larger considerations of social policy. Indeed one of the aspects of the application of the principle of just deserts is that it need not be concerned with the effectiveness of sentencing at all. Provided that the sentence is just and fair in all the circumstances whether it achieves the aims of general deterrence or

rehabilitation is of no moment. Utilitarian principles on the other hand must concern themselves with effectiveness, and with effectiveness alone. These principles are intended to achieve more than simply punish the offender for the offence.

Some Philosophical Considerations

Can retributive and utilitarian considerations be reconciled? Dare we prioritise and select one above another, or are we forever to apply an eclectic approach and simply decide amongst the competing considerations on an *ad hoc*, or case by case basis?

Morris (1974) in *The Future of Imprisonment*, provides a key to this dilemma. According to Morris, the object of community protection, a utilitarian goal, may be pursued within the range permitted under the limiting principle of just desert (a retributive principle). Indeed Morris is prepared to sacrifice uniformity in sentencing when there are good utilitarian grounds for not treating like cases alike. He concedes that to exceed the upper limits of just punishment is morally objectionable. It is both cruel and tyrannical, to exceed the upper limit of deserved punishment. Yet he is prepared to tolerate a more flexible lower limit, even to the point of allowing some offenders to escape punishment altogether if no useful social purpose is gained by imposing deserved punishment. The latter course is sanctioned by application of his principle of parsimony, a principle which provides that the least restrictive (punitive) sanction necessary to achieve defined social purposes should be imposed and is consistent with the vague but nevertheless important maxim that imprisonment is a sanction of last resort.

It is erroneous to believe that the retributive principle of just deserts cannot contribute to the utilitarian goal of crime prevention. Sir Rupert Cross (1981, p. 203), for example, has expressed the opinion that 'the proper function of state punishment is to reduce crime by giving offenders their deserts' and that while this does not rule out leniency it does 'argue against the imposition of sentences going beyond the gravity of the offence'. On these views therefore there is little opposition between a system of punishment that is both preventive and punitive.

Ross in *On Guilt, Responsibility and Punishment* (1975, pp. 60–6) argues that the traditional debate—retribution versus prevention—is a pseudo-problem resting on a misunderstanding relating to the aims of punishment. According to Ross, the debate as to whether punishment as a judicial sanction is essentially retributive or preventive is a meaningless question because for him the two are not contraries. He argues that retribution is a form of censure, which in turn has a preventive function. He says *inter alia*, that:

> Retribution, censure is an emotional, hostile reaction which in itself acts as a punishment, i.e. directly, preventatively.

Ross refers to 'revenge' (the retributive principle) as simply a delayed defence reaction. Thus he says that 'awareness that someone will avenge himself, just as much as awareness that he will defend himself, has a deterrent effect on the aggressive aims of others'. Ross' view of retribution, and in particular his

insistence that disapproval manifested by the application of criminal punishment has a conduct influencing (preventive) function, is dismissed rather too lightly by Barbara Wootton (1978, p. 221). She simply asserts that 'the deterrent effect of social disapprobation strikes [her] as extremely naive, and . . . not borne out by the facts'. She refers to her personal contact with serious offenders, particularly the 'psychopaths' who appear 'insensitive to reproaches from any quarter' and concludes that while some offenders of 'respectable background' may be 'shamed into new attitudes by the disgrace of a conviction' such an approach is not sufficient for modern complex societies. She then returns to her theme which is critical of the principle of criminal responsibility, pointing out that the best solution in one case may be quite wrong in another.

Hence for Wootton, focussing on the offence as the basis for limiting punishment is of no value. What matters is the future behaviour of the offender and sentences should therefore be tailored to the treatment needs of the offender and to the protection of the community. Some will benefit from a relatively light sentence, while others may have to be detained for a considerable time, in order to protect society.

Wootton never really accepts the value of the preventive function of retributive punishment, and she appears not to fully appreciate the implications of Ross' argument. Ross at no time suggests that the preventive effect of retributive punishment need be as mild as suggested by Wootton. Indeed from the very same page of the extract which Wootton criticises, Ross (1975, p. 89) comments that the reaction from the reproach or censure (the consequences of a retributive punishment) can vary in strength over a wide range 'from a gentle snub to seething anger and indignation, which may be succeeded by violent aggression' (for example, lynching). Thus Ross' concept of social disapprobation can have considerably more force than is suggested by Wootton. Ultimately, however, the principle of retribution under the law ensures that penalties are not unjustly severe by placing an upper limit upon the coercive powers of the state. It ensures that 'the infliction of punishment although tending towards crime reduction is unjustified if it is not also morally deserved, a matter that is to be considered further' (Ross 1975, p. 118).

In the preceding pages care has been taken not to dismiss the application of utilitarian considerations from punishment, and it has been argued that retributive punishment itself has a preventive function.

However, another way of looking at the problem is to distinguish the judge's role from that of the legislators'. As Nowell-Smith (1954, p. 236) has observed, the judge's duty is to pronounce verdict and sentence in accordance with the law. He says the judge:

> . . . is not concerned with the consequences, beneficial or harmful, of what he pronounces. Similarly, the question 'Was that a just sentence?' is one that cannot be settled by reference to its consequences, but solely by reference to the law.

He adds that the probable effects of any sentence are relevant only in so far as judges are given discretion to take into account other considerations, such as reform or deterrence. However, the legislator's duty is quite different. Its

concern is not whether a particular application of the law is just or not, but it is concerned with deciding what laws ought to be adopted, and what penalties ought to be prescribed in respect of these laws. Nowell-Smith suggests that the judge's questions are different from the legislators, for . . . if we interpret the legislator's question as one to be settled by asking 'What does the law lay down for such a case?' we shall either be involved in an infinite regress, a hierarchy of laws in which the justice is determined by reference to a higher law, or we shall be forced to claim intuitive insight into a system of axiomatic laws, themselves requiring no justification, but providing the justification of all lower laws.

This is a useful insight for it shifts the burden of community protection from the shoulders of the sentencing judge to that of the legislator and ultimately (in a democratic society) to the community itself. The important point here is simply that the judge's primary duty is to do justice and he or she should not be overly concerned with community protection. An examination of the case law tends to demonstrate that judges do see their utilitarian role in sentencing as limited particularly in serious cases such as drug trafficking and those involving violence.

Limiting Rehabilitation[2]

There is no doubt that the rehabilitation philosophy has contributed to a more humane and individualised sentencing system. Concerned as it was for the offender's welfare, rehabilitationists tended to ignore the offence itself and began to concern themselves with the offender's future behaviour. Indeterminate and semi-determinate systems of sentencing were seen as better placed to meet the offender's rehabilitative needs. Both the community and the offender would benefit—those who were regarded as more dangerous could be cured and released at the earliest opportunity—that is when they could be regarded as safe for release. If they could be cured quickly, they could be released quickly.

There would be no losers in such a system. All would benefit—the offender who would be treated, the community which would be protected, the judge who would be relieved of having to decide how long the prisoner should serve in custody. The failure of the rehabilitation ideal, the uncertainty and unreliability of clinical predictions, the finding that 'nothing works' in corrections, however, has turned attention back to what seems a fairer means of distributing justice—to the offence itself and to the culpability of the offender (Bailey 1966, p. 153).

Thus, in more recent times, the pendulum has swung back in favour of a justice model of sentencing, and the application of what is here described as the limiting principle of just deserts. This principle places a lid on what may be done by way of rehabilitative zeal and ensures that the penalty of imprisonment is not transformed into a benevolent disposition that can be

2 Some of the following discussion is taken from I. Potas, *Just Deserts for the Mad* (1982, 186 ff).

extended for an indeterminate period for the good of the offender at the whim of administrative or executive decision-makers.

Perhaps the way in which the object of rehabilitation and community protection are circumscribed is best illustrated in cases where the offender has a psychiatric abnormality. Thus if what has been advanced in the preceding pages is correct, it is not appropriate for a sentencing court to impose extra punishment in order to afford the offender an opportunity for rehabilitation.

In *Channon v. R* ([1979] 20 ALR 1, p. 9; cf *R v. Veen* above, p. 178) Brennan J said that 'the limits of a proper sentence' are determined 'without taking into account the treatment of psychiatric abnormality'. A sentence within those limits, said his Honour, would constitute proper punishment, being neither excessive nor referable merely to the treatment of the abnormality. Thus once the penalty was set within those limits . . . 'to enable a cure to be undertaken', the various objectives of sentencing are properly evaluated, including the interests which society and the offender have in his psychiatric rehabilitation. A proper balance is struck, and punishment is limited accordingly.

Brennan J considered that psychiatric treatment could be taken into account for the purposes of determining sentence where:

- the offender suffers from a mental abnormality which contributed to the relevant offence;
- psychiatric treatment for that abnormality is likely to be made available to the offender during imprisonment;
- the offender is likely to avail himself of that treatment; and
- there is a reasonable prospect that the treatment will reduce or eliminate the abnormality (ibid, p. 10).

These factors may be seen as constituting some of the considerations involved in 'fine-tuning' a sentence once the limits are determined. However, it is submitted that the first factor would more properly be relevant for determining the upper limits of just punishment, because this consideration more properly relates to the offender's moral culpability in the commission of the offence. The other factors may affect both the quantum and the kind of sentence within the permissible range, and therefore both humanitarian and utilitarian considerations may be taken into account. Where, for example, the object of community protection is considered relevant, other factors relevant to sentencing which do not bear on culpability, may be prevented from functioning so as to mitigate the sentence. Sometimes rehabilitation or treatment objectives may allow mitigation particularly where the risk to the community is not serious, or where there are strong humanitarian reasons for following a lenient course.

Sometimes a penalty may be reduced below the range dictated by the principle of just deserts. In such a situation, assuming that the sentence is not erroneous, the result may be described as involving an act of mercy. Mercy

should also play a part in the sentencing process but its overuse by judicial officers may lead to a weakening of the just deserts principle. It should be used sparingly and always with good reason (Potas 1980, pp. 69–74).

Deane J in *Channon* expressed the view that it was not part of a criminal court's function to impose 'either within or outside' the permissible limits of a sentence a longer term of imprisonment than would otherwise be appropriate merely on the basis that it would benefit the mental health of the accused ([1979] 29 ALR 1, p. 21). His Honour added that:

> A sentence of imprisonment must be regarded as a punishment (*Power v. R* [1974] 131 CLR 623 at 627; subnom *Lyons v. R* [1974] 3 ALR 553 at 555–6). It can only properly be imposed on the basis that it is the appropriate punishment for the particular offence in the particular circumstances.

Similarly, Toohey J said that it was an improper exercise of sentencing discretion 'to impose a sentence solely for holding a prisoner for psychiatric treatment'. However, his Honour went on to qualify this by stating that where the offender, by reason of abnormality, constituted a danger to the community, then this would be a relevant consideration for the purposes of determining the proper sentence. He referred to the passage from *Cuthbert* (p. 178) and observed that the purpose of community protection did not make it inappropriate for the court to take into account the availability of a cure for the accused. However, such a consideration could not be used to justify a sentence of imprisonment 'longer than would otherwise be a proper sentence' ([1979] 20 ALR 1, pp. 27–8). He then referred to the need to identify 'the limits of a proper sentence' adding that it is improper to increase a sentence beyond the appropriate range for the offence itself 'merely in order to provide an opportunity to cure' the offender (ibid. *R v. Moylan* [1970] 53 Cr App R 594).

Toohey J also observed what he described as a logical difficulty in first excluding from consideration the curative element, and then bringing it into account. However, he expressed the opinion that only on pragmatic grounds was such an approach justified and that it provided a desirable solution and one likely to safeguard the prisoner's interests ([1979] 20 ALR 29).

These days, the non-rehabilitative nature of imprisonment is acknowledged and it is almost a daily occurrence in the criminal courts to hear counsel for the prisoner contend that his or her client has good prospects for rehabilitation and therefore should not be visited with a custodial sentence.

The focus on a just deserts policy in sentencing frees the sentencing judge from being overly concerned with the effectiveness of his or her decisions. Provided the decisions are fair and just there can be no ground for complaint. Rehabilitation has never really replaced the principle of proportional punishment, and some commentators have suggested that it has never really been tried. Frankel (1973, p. 93), for example, has said that the sentence of imprisonment that purportedly is 'tailored to the cherished needs of the individual turns out to be a crude order for simple warehousing'. Others have found also that characteristically there are no treatment facilities of any substantial nature in prisons (New South Wales. Royal Commission into New South Wales Prisons 1978; Braithwaite 1980).

Application of Utilitarian Principles to Just Deserts

If, as has been suggested, the principle of just deserts is a limiting rather than a defining principle (it does not indicate what the precise sentence should be), then the sentencing judge may, in the exercise of his or her discretion, apply utilitarian considerations to determine where, within the acceptable range, the ultimate penalty should lie. Normally a sentence may be reduced below the ceiling indicated by the gravity of the offence and the culpability of the offender in order 'to reflect the presence of mitigating factors in the offender's character or personal circumstances' although, in general, no penal objective justifies the imposition of a sentence that exceeds that ceiling (Thomas 1979).

Thomas (1979) has identified a number of special cases in which the English courts have refused to make allowances for mitigating factors. These include cases where the courts have made use of the exemplary sentence[3], where the prisoner is labelled a dangerous offender[4], where the prisoner is considered to be a social nuisance[5], or a persistent offender, or in circumstances in which it is considered that the prisoner is likely to benefit from treatment in prison.

It has been held, for example, that the fact that the offender is a social nuisance, for whom the health and social service authorities are unable or unwilling to provide, is no justification in itself for a long sentence (*R v. Tolley* [1979] Crim Law Review 118). In *R v. Clarke* ([1975] 61 Cr App R 320, 323) Lawton LJ, when dealing with an offender who was sentenced to eighteen-months imprisonment for breaking a flower pot worth one English pound in a violent fit of temper, said 'very firmly indeed' that:

> Her Majesty's Courts are not dustbins into which the social services can sweep difficult members of the public. Still less should Her Majesty's judges use their sentencing powers to dispose of those who are socially inconvenient. If the courts become disposers of those who are socially inconvenient the road ahead would lead to the destruction of liberty. It should be firmly understood that Her Majesty's judges stand on the road barring the way. The courts exist to punish according to the law those convicted of offences. Sentences should fit crimes.

While these special cases constitute examples of where the court may refuse to take into account the usual mitigating factors, they have not been held to justify increasing the severity of a sentence beyond that required by application of the proportionality principle. This general principle is consistent also with the passages quoted from *R v. Veen* above and is

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3 The 'exemplary sentence' refers to a sentence which serves the purpose of general deterrence by being referable strictly to the facts of the offence and makes no allowance for mitigating factors.

4 The dangerous offender is one who by virtue of his offence, his prior history and his mental condition, is considered likely to commit violent crimes in the future.

5 The social nuisance is one who has a long history of minor offences and suffers from a mild form of personality disorder with 'a history of intermittent stays in mental hospitals'. He will generally have shown himself to be unresponsive and uncooperative with social welfare and criminal justice agencies.

supported by the recent High Court decision of *R v. Veen* below. In the USA it is usual to challenge disproportional punishment on the basis that it constitutes cruel and unusual punishment in violation of the eighth amendment to the United States Constitution. In *Weems v. United States* ([1910] 217 US 349), the court held that it was a 'precept of justice that punishment for crime should be graduated and proportioned to the offense'. In *R v. Langley* ([1970] 70 SR (NSW) 403), for example, the New South Wales Court of Criminal Appeal reduced a sentence of six-years imprisonment to one of three-years because the original sentence was held to contain an element of preventive detention for which there was no legislative mandate. Similarly, as recently as November 1990 in *Roadly* ([1990] 51 A Crim R 336), the Court of Criminal Appeal in Victoria, substituted a common law bind-over for a sentence of imprisonment of six years, on the ground that the court went beyond the sentence which was proportionate to the crime and instead had imposed a sentence of preventive detention.

Preventive Detention

It might be thought that Wootton's social defence objective could be achieved in part at least, by providing the courts with added power to detain those who pose a threat to community safety. Under the present system, this requires legislative provisions that enable the bad risks to be identified and isolated from the community for extended periods.

It has long been recognised that the probability of future imprisonment increases with each term of imprisonment, and therefore the logical course for reducing crime is to detain the recidivist for extended terms. In 1895, the Gladstone Committee (C.7702, para 28) published statistics showing how the probability of further imprisonment increases with the number of prior sentences. Within a decade, New South Wales introduced its *Habitual Criminals Act 1905* and shortly afterwards other Australian jurisdictions followed suit (Potas 1982, pp. 191–6). However, the history of recidivist provisions shows that while such laws are often approached with enthusiasm they gradually lose judicial favour as it becomes recognised that the petty offender rather than the so-called dangerous criminal recidivist bears the brunt of such legislation.

Thus in England, the typical preventive detainee has been described as 'an incompetent, petty swindler or pilferer, whose dishonesties cost society little more—and in some cases less—than his maintenance in prison' (Potas 1982). These laws have failed to catch the type of offender for which they were designed (Great Britain. Advisory Council on the Penal System 1978, paras 84–115). Where legislation is directed specifically at an individual person, as apparently is the case with Garry David in Victoria, one cannot help feeling that such a person would have a 'justifiable sense of grievance' (Wood 1990). However while such a selective approach may appear unfair and sets a dangerous precedent, this may be preferable to a preventive detention statute which applies across the board.

In view of the difficulty of predicting who may properly be designated as dangerous, and particularly due to the lack of hard evidence supporting its

benefits, preventive detention is a highly selective and potentially discriminatory strategy of dubious efficacy and morality. The only saving grace is that in Australia, and particularly in New South Wales, it has generally fallen into disuse (Biles 1979).

Structuring the Discretion

Indermaur (1991) recently completed a study comparing judicial and public attitudes on crime seriousness and sentencing in Perth and has found that the majority of the public did not think that sentences received by offenders were fair and consistent. He also found that while there was a general consensus about the relative seriousness of crimes, sentencers placed more emphasis on rehabilitation, while the public favoured greater use of imprisonment or incapacitation—particularly in relation to violent crime. He comments:

> The fact that there always tends to be a combination of purposes associated with both individual sentences in general reflects the vagueness and the uncertainty regarding sentencing (Indermaur 1991).

The eclectic approach, he suggests, leads to confusion, and fuels the antagonism and dissatisfaction of the public.

It is not merely that sentencers have a smorgasbord of purposes from which they may select—they also have different styles or approaches to sentencing (Lawrence & Howell 1986). If at least some structure or direction were articulated—a structure which would provide a rational basis for resolving how to select amongst the competing objectives of sentencing, the prospect for achieving greater consistency in sentencing and community satisfaction with sentencing would surely be enhanced.

In *R v. Young, Dickensen and West* ([1990] 45 A Crim R, 147, 149), the Victorian Court of Criminal Appeal considered that a two-step approach to determining sentence was such a departure from long-established practice in Victoria that its adoption was likely to lead to sentencing error.

The two-step approach means first making a decision upon the outer limit of the sentence, usually by reference to the objective circumstances of the offence, and then applying the recognised aggravating and mitigating factors to that determination in order to arrive at the appropriate sentence.

The Victorian Court of Criminal Appeal held that to hold sentencers to such a rigid formula would work injustice, and cited a passage from *Williscroft* ([1975] VR 292, at 299) where the majority of the court had stated that it 'is profitless . . . to attempt to allot the various considerations their proper part in the assessment of the particular punishments presently under examination' (*R v. Young, Dickensen & West* [1990] A Crim R 147 at 151–2).

If this two-stage process means that the sentencing judge must spell out what the ceiling is, and how much discount is to be given for each of the various considerations, then the author would agree with the views expressed in *Young, Dickensen and West*. This criticism is similar to the views expressed by Hunt J, discussed at the beginning of this paper.

What the author is advocating, however, is a rational and consistent approach to the task of sentencing—a framework for the thought-processes

within which the various elements of sentencing can be considered in a logical or sequential order by the sentencing judge. This still leaves room for the 'instinctive synthesis' to occur, but at the same time ensures a uniformity of approach to the task at hand. It provides the climate, in the author's opinion, for promoting a consistency of approach which is regarded as vital to the administration of sentencing justice.

A Consistent Approach to the Sentencing of Offenders

This paper will now briefly outline in more concrete terms how a more consistent approach to the sentencing of offenders might be achieved.

Stage one would require the sentencing court to give careful consideration to the objective circumstances of the offence. This primary analysis involves an assessment of the seriousness of the criminal conduct under review. Here seriousness would include an analysis of such factors as the offender's motives, intent, the degree of premeditation, as well as the extent of harm (or threatened harm) resulting from the offence. In order to assess the degree of criminality the author would also include an assessment of the offender's mental capacity, or degree of insight or appreciation of the possible consequences of the act, as such factors may bear on the culpability or degree of blameworthiness which may properly be attributed to the offender.

In addition to taking into account these objective factors, other considerations—such as the statutory maximum penalty and the penalties imposed in like cases—would need to be considered. These then, should assist the sentencer to assess the degree of criminality of the offender and notionally derive the upper limit of a just sentence for the offence.

By the upper limit of a just sentence the author means the penalty which is commensurate with or proportionate to the seriousness of the offence. To impose a sentence beyond that limit would be unjust or morally objectionable having regard to the circumstances of the offence.

It is not necessary, and indeed may not be desirable, for the sentencer to expressly state what he or she considers to be the upper limit of the proportionate or justly deserved sentence. Indeed, what the sentencer may have in mind at this stage is a range within which the appropriate penalty should fall.

Having derived the upper limit or ceiling of the penalty—and possibly also a lower limit—other considerations relating to the offender, that is the subjective consideration, should be taken into account.

The most important of these is the offender's prior criminal record. A bad criminal record may diminish the effect of factors which operate in mitigation of sentence, while a clear record (or prior good character) may indicate that a more lenient sentence should be considered.

At this stage also, we can call upon the utilitarian considerations of sentencing. Thus if the offender is mentally disordered and the disorder is of a temporary nature and amenable to treatment, then this factor may operate so as to mitigate the penalty. On the other hand if the offender's condition is such that the prognosis of a cure is poor, and that, on the best evidence available, there remains a significant risk of the offender committing serious crime in the future, then it may not be appropriate to mitigate the sentence on

account of the offender's mental condition. The point is that the fine-tuning of the sentence involves an application of utilitarian considerations (such as deterrence, rehabilitation, protection of the community).

In *Roadly* ([1990] 51 A Crim R 336), for example, the offender was a forty-year-old intellectually disabled paedophile with a mental age of a six-year-old child. He had pleaded guilty to the sexual penetration of an eight-year-old boy while the latter was bending over picking up some lollies behind some shops. There was evidence that the offender had committed similar offences in the past, had minimum appreciation of the consequences of his behaviour and had limited, perhaps non-existent, impulse control. The Victorian Court of Criminal Appeal regarded imprisonment in this case as going beyond the sentence proportionate to the crime and, in view of the offender's mental condition, considered that little weight should have been given to the principle of general deterrence.

The author believes it is this kind of case which illustrates the primary position of the principle of proportionality and the secondary or subsidiary place of utilitarian considerations. It also illustrates, and in the author's respectful opinion properly, the limited scope of court's role in protecting the community from crime. Certainly the legislature proscribes certain forms of behaviour and prescribes penalties for their breach in an effort to discourage criminal behaviour, and this is done for utilitarian purposes. However, it has been argued in this paper that the sentencing judge's role is, first and foremost, to ensure that the sentence that is imposed is fair and just having regard to the seriousness of the offence and the background of the offender.

Finally then, the author would add a third stage to the sentencing process. Having derived what is regarded as an appropriate sentence, the sentencing judge, prior to pronouncing the sentence, should consider whether the sentence so derived but not yet articulated is fair and reasonable in all the circumstances. This involves a reconsideration or further consideration of the pattern of sentences imposed in similar cases, a consideration of whether in the opinion of the sentencing judge the resultant sentence would be acceptable to the community (it should accord with their moral sense). The principle of parsimony should also be considered to ensure that the penalty under consideration is not unduly severe.

Special considerations may also apply in the case of the multiple offender, where concurrent and consecutive sentences are involved. In these circumstances the court should be satisfied that the aggregate sentence is neither too lenient nor too severe in all the circumstances. The 'totality principle' and the practical significance of the sentencing order should also be assessed with care (*R v. Holder & Johnston* [1983] 3 NSWLR 245 per Street CJ at 260).

Any of these policy considerations may necessitate an adjustment of the sentence which the sentencing judge has in mind before it is finally imposed by the court.

Concluding Remarks

If consistency of approach in sentencing is a desirable objective, it seems sensible that an attempt be made to prioritise the general principles or purposes of

sentencing. Further, some attempt to structure the judicial discretion by providing guidance as to how information relevant to sentencing should be considered or processed must surely be a positive step forward.

Although reasons for judgment should be given and all appropriate principles referred to, it is not suggested that the sentencer should be required to articulate each step in the process. Nor should the sentencer be required to indicate what precise weights are to be given to the oft competing considerations that arise in the decision-making process. It is simply that if the method for arriving at the appropriate sentence is approached in a uniform way by all judicial officers there is likely to be more consistency in sentencing itself. In turn this must lead to an improvement in the respect and confidence of the community in the administration of criminal justice.

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THE CASE FOR DUE PROCESS IN REVIEWABLE SENTENCES

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GIVEN THE APPARENT PUBLIC CONCERN ABOUT VIOLENT AND DANGEROUS offenders, the aims of this paper are to briefly traverse the various Australian jurisdictions possessing legislation governing dangerous offenders, persons considered to be incapable of controlling their sexual instincts, and habitual criminals. On the basis that legislation is thought to be necessary to regulate dangerous offenders, this paper will then propose a skeletal model for consideration which will attempt to tread the fine line between the civil liberties of the offender and the protection of the public.

It is suggested that the general community believes, rightly or wrongly, that there is an increasing tide of violent crime endemic in Australian society. While it may be true that there is no sound statistical basis for such a perception, it is contended that the perception itself becomes a significant political dynamic which may compel governments to deal with the problem of violent offenders being released back into the community.

In a democracy, and all that that entails in regard to political sensitivity to public opinion, it may be said that the majority view on matters of crime (as of any other topic) should prevail; even over the enlightened views of legal, medical or sociological experts because it is perceived in a democracy that the will of the majority is paramount. In regard to dangerous and violent offenders, a balance needs to be struck between the sentencing, detention and release processes on the one hand, and the need to protect the community on the other.

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[1] This paper was presented by an officer of the Queensland Attorney-General's Department and, therefore, the views expressed in this paper are those of the writer alone and do not reflect the views of the Queensland State Government, the Attorney-General, the Honourable Dean Wells MLA, or the Department of the Attorney-General.

In this paper, it is not intended to debate the three main philosophies of punishment; that is, retribution, deterrence and rehabilitation. While it is inevitable that aspects of those philosophies and the broader concept of punishment generally may impinge upon the stated aims of this paper, the principal focus is to assess and suggest a legislative scheme which aims to protect society and safeguard the rights of the offender.

Thus it is not intended to engage in any philosophical debate or take on such eminent jurisprudential writers such as Professors Williams and Campbell. Similarly, while it is accepted that there are substantial difficulties in predicting 'dangerousness', it would be presumptuous of this paper to further review the literature (for example, Mestrovic & Cook 1986, pp. 443–69; Task Force of the American Psychiatric Association 1974). The references are noted and recommended.

It must be acknowledged that the skeletal legislative scheme which is proposed in this paper may be seen to cut across the concept of proportionality of sentences, but the paper is principally directed to the practical issue of protection of society rather than concern with the philosophy of sentencing per se. Thus this paper poses no danger or challenge to the entrenched philosophy of proportionality as reflected in *R v. Veen (No. 1)* ([1979] 143 CLR 458) or, more particularly, *R v. Veen (No. 2)* ((1988) 164 CLR 465).

The focus of this paper is on the protection of society by the development of an appropriate legislative scheme. The main feature of the proposed scheme is the availability of reviewable sentences coupled to due process in order to monitor, not only the imposition of the reviewable sentence at first instance, but also to monitor continuity of that sentence and determine the release of an offender from a reviewable sentence. The central concept is to balance the perceived need for public protection with review by due process; especially in the release determination which is believed to be better vested in the courts—who are most experienced in administering concepts of natural justice and individual liberties—than in the executive by way of Governor's or Sovereign's Pleasure.

Proportionality versus Protection

To proceed further without acknowledging the issue of proportionality of sentencing would be unwise. The clearest expression of the principle of proportionality can be found in *R v. Veen (No. 2)* ((1988) 164 CLR 465) per Mason CJ, Brennan, Dawson and Toohey JJ at 472:

> The principle of proportionality is now firmly established in this country. It was the unanimous view of the court in *R v. Veen (No. 1)* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.

In the writer's view, that now famous *dicta* can only be read as applying to courts imposing sentences in the normal way. That view becomes clear when regard is paid to various other expressions falling from that court in *R v. Veen*

(No. 2) which clearly leaves the door open for legislation to provide for sentences to be imposed on the basis that society needs to be protected from the offender. *See*, for example, Wilson J at 482: '. . . the complaint being that the Court of Criminal Appeal had embarked on a policy of preventive detention *without legislative warrant . . .*' . At 486: 'I find myself fundamentally opposed to the notion that, *in the absence of expressed statutory authority*, courts should find in the common law of Australia a power to impose sentences of preventive detention'. Further down the same page: 'Of course, *it is always open to a legislature to provide for preventive detention*' [emphases added].

Turning to Mr Justice Deane, at p. 495:

> There is one further matter which I would briefly mention. That is *the protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint* to deal with the case of a person who has been convicted of a violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence.

Justice Gaudron, at p. 496, said:

> I am fundamentally opposed to the idea that a sentence of preventive detention may be imposed *in the absence of expressed statutory authority* [emphases added].

It is therefore suggested that the learned Judges in *R v. Veen (No. 2)* clearly intended their remarks on sentencing and punishment to be confined to those sentences recognised by the common law; but also recognised that the traditional common law concepts of punishment may be inadequate to deal with persons who may be a 'continuing danger to society'. Those words quoted are taken from the judgment of the majority in *R v. Veen (No. 2)* at 470 and it is suggested form the best basis upon which, in the following legislative model, a court may assess the danger to society from the activities of an offender.

Thus an offender who is found by a court to 'constitute a constant threat to the community' (per the High Court in *R v. Chester* ((1988) 36 A Crim R 382 at 385) may become subject to the imposition of a reviewable sentence. In *Chester*, the High Court was considering the principles to which a court should look in administering a legislative scheme of indeterminate sentences provided by section 662 of the Western Australian Criminal Code. Further consideration of the judgment in *Chester* will be given as a preamble to the proposed model for reviewable sentences.

In the final analysis, it is suggested that the expressions of proportionality found in *R v. Veen (No. 2)* must be augmented by a legislative scheme which has two foci: protection of the individual offenders' civil rights by way of review by due process and, as far as possible, ensuring that offenders found to be a constant danger to society be detained.

The need for legislation to protect the community was also recognised by Jobson and Ferguson in their review of the Canadian sentencing structure. At the

time of their review in 1987, the Canadian Criminal Code (section 687) permitted the prosecution to seek a special hearing following the conviction of a person for a 'serious personal injury offence'. At that hearing, a determination of whether the person was a dangerous offender could be made. In the event of the court concluding that the person was dangerous as defined, the court could impose an order of preventive detention for life. It should be noted that, since the review, section 687 appears to have been repealed and replaced in the Canadian Criminal Code by Part XXIV (sections 757–61).

In their overall review of sentencing provisions throughout Canada, Jobson and Ferguson (1987) said:

> *We are of the opinion that sentencing provisions must address the incarceration of particularly dangerous individuals . . .* It must be noted that the reliability of predictions of dangerousness is far from accurate, and further, that the provisions are presently applied in a very inconsistent fashion . . . The apparent reluctance of courts in some provinces to use the provisions, the excessive length of the indeterminate term, and the need for a periodic judicial review of such sentences require a re-examination of the Code provisions [emphasis added] (Jobson & Ferguson 1987, p. 20).

While it is accepted there are substantial difficulties in predicting 'dangerousness' as a criterion for preventive detention of violent offenders in order to protect society, if the democratic expression of a community requires a parliament to legislate for such protection, it is the central thesis of this paper that such mechanisms of preventive detention be attended by due process, openness and accountability.

Review of Legislation

It is now intended to very briefly review current Australian legislation dealing with the imposition of indeterminate sentences or other legislative provisions concerned with habitual offenders, dangerous offenders and persons adjudged incapable of controlling their sexual instincts. It will be seen that while there is some degree of commonality in Code jurisdictions, there is not discernible any concept of uniformity or even consistency across the nation. The review herein is brief and is undertaken, not only to assess what is currently available, but also to consider possibilities in choosing an appropriate model legislative scheme which could draw on the best elements currently available, consistent with review by due process. It will be noted that, in a number of jurisdictions, the release decisions are made by a process which is neither clear nor widely understood by the societies in which they operate.

Queensland

Chapter LXIV A of the Queensland Criminal Code makes provision for the declaration and detention of persons designated habitual criminals. Without going into too much detail, section 659A of the Code permits a Judge to declare a convicted person an habitual criminal if that person is convicted of designated offences and has been previously convicted on two or three occasions (depending on the offence). Section 659D requires that, at the

conclusion of an habitual offender's sentence, the offender be detained during Her Majesty's Pleasure. The discharge of such an offender is regulated by section 659G which permits the habitual offender to apply to the Supreme Court for a recommendation that: '. . . such person having sufficiently reformed, or for other sufficient reason, may be discharged'. Upon application, the court may make inquiry in such manner as it seems fit and, on being satisfied that the applicant has 'sufficiently reformed or that there is some other sufficient reason to warrant his discharge', may recommend to the Governor accordingly who may direct the discharge of the offender.

Section 18 of the *Criminal Law Amendment Act 1945* provides for the detention of persons incapable of controlling sexual instincts. The application of the section is restricted to cases where an offender has been found guilty of an offence of a sexual nature relevant to a child under sixteen years.

The judge may direct an examination of the offender by two or more medical practitioners (one of whom may be a psychiatrist) to inquire whether the offender is capable of exercising proper control over his sexual instincts. If not, the judge may, either in addition to or in lieu of imposing any other sentence, declare that the offender is incapable of controlling his sexual instincts and direct that the offender be detained during Her Majesty's Pleasure. Section 18(5) provides that the offender shall not be released until the Governor in Council is satisfied that it is expedient.

In each enactment, although the courts are empowered to make the declaration confining the offender to (effective) preventive detention, the courts have no powers of review during the period of detention and only a limited advisory role in regard to the release of habitual criminals. Thus due process, having been utilised to incarcerate the offender, has little or no effective role in monitoring the detention or the release of the offender.

Northern Territory

Section 397 of the Northern Territory Criminal Code provides for the declaration and detention of habitual criminals. Where a person has been convicted and it appears by reason of the number of times he has been convicted previously, the nature of such convictions or the 'manner of his life revealed by the evidence of such previous convictions' indicate that it is 'likely' he is an habitual criminal, the court in addition to sentencing the offender may call upon him to show cause why he should not be dealt with as an habitual criminal. Should the offender fail to discharge that onus, section 397(3) permits the court to declare the offender an habitual criminal, and section 398 requires the habitual criminal to be detained in prison during the administrator's pleasure. Section 399 provides for the discharge of an habitual criminal by way of application to the Supreme Court which may make inquiry in such manner as is deemed fit and, if 'satisfied that the applicant has sufficiently reformed or there is some other sufficient reason to warrant his discharge', empowers the court to recommend to the administrator that the offender be discharged. The administrator is vested with a discretionary power, after having received a recommendation from the Supreme Court, to direct the discharge of the offender.

Section 401 permits the detention of persons incapable of controlling sexual instincts. Section 401(1) provides that where a person has been convicted on indictment of offences of a sexual nature or 'for any other reason that the offender may be incapable of exercising proper control', a judge may direct that two or more legally qualified medical practitioners inquire into the medical condition of the offender to determine whether he is so incapable. After having received the report, a judge may declare the offender is so incapable and may direct that the offender be detained during the administrator's pleasure.

Section 403 provides for the discharge of the offender by a similar mechanism to that applicable to the discharge of an habitual criminal in the Northern Territory. Again, in each enactment, the ultimate decision for release is vested in the administrator, and it is apparent that there is only a limited advisory role for due process.

Western Australia

The Western Australian Criminal Code, section 661, provides that a person convicted of any indictable offence, who has been previously so convicted on at least two occasions, may be subject to the declaration by a court that he is an habitual criminal. The court may direct that on the expiration of the term of imprisonment imposed, the offender be detained during the Governor's Pleasure.

Section 662 appears even more draconian. When any person is convicted of an indictable offence, whether such person has been previously convicted of any indictable offence or not, the court may either direct that at the expiration of the term of imprisonment imposed, the offender be detained during the Governor's Pleasure; or without imposing any term of imprisonment, immediately sentence the offender to imprisonment during the Governor's Pleasure. The effect of this latter section has, to some extent, apparently been modified by *R v. Chester* ((1988) 36 A Crim R 382). The High Court concluded it was not appropriate for an indeterminate sentence to have been given in that case, because the applicant's record did not establish that he posed a constant danger of violent injury to the community.

South Australia

This state has provided for sentences of indeterminate duration applicable to habitual criminals by way of section 22 of the *Criminal Law (Sentencing) Act 1988.* Depending on the classes of offences previously committed, an offender who has been convicted on two or three previous occasions may, on application by the Crown, be made the subject of an habitual criminal declaration in addition to any other sentence imposed. The offender is detained in custody until further order by the court (*see* section 22(7)). It is worthy of note that, in contradistinction to Queensland, Northern Territory and Western Australia, the habitual criminal in South Australia is discharged by the Supreme Court being moved on application by the Crown or the offender.

Section 23 of the Criminal Law (Sentencing) Act, provides for the detention of persons incapable of controlling sexual instincts. In such cases, upon conviction of the specified offence/s, the Supreme Court may, before

determining sentence, direct that at least two legally qualified medical practitioners inquire into the offender's mental condition and report back to the court on whether the offender is capable of controlling sexual instincts.

If the court is satisfied that the defendant is so incapable, the court may declare accordingly and direct that the offender be detained in custody until further order. However, by section 23(11), it is the Supreme Court, after having been moved by either the Crown or the offender, that has the power to discharge the order for detention. It is apparent that in South Australia due process in the release procedure has been ensured.

Tasmania

Section 329 of the Tasmanian Criminal Code provides for the indeterminate detention of 'dangerous criminals'. If an offender has at least one previous conviction 'involving an element of violence', then upon his second conviction of an offence 'involving an element of violence', the judge before whom he is convicted may declare that the offender is a dangerous criminal. The judge must be 'of the opinion' that the subject offence and the previous offence warrant such a declaration for the protection of the public. In determining whether the offender is a dangerous criminal, the judge may have regard to the nature and circumstances of the crimes, the antecedents or the character of the person, medical or other opinion and any other matter that the judge considers relevant. Upon being so satisfied, the judge is required to order that the person be detained during the Governor's Pleasure. It does not appear as though due process has any significant role in the decision to release an offender so declared.

A recent unreported decision of Green CJ in *R v. McCrossen* (Serial Number 2/1991; 18 January 1991) illustrates how widely the provisions of section 329 may be read. M. pleaded guilty to wilfully, and with intent thereby to intimidate (a female), did cause her to receive a letter threatening to kill her, contrary to section 162 of the Tasmanian Code. It was held that the making of a threat to kill with the intention of intimidating someone is capable of constituting a 'crime involving an element of violence' for the purposes of section 329. While the court considered *R v. Chester* ((1988) 36 A Crim R 382), that case was distinguished having regard to the different formulae set out in Western Australian Code section 662. Thus M., a 19-year-old with a criminal history which included five sets of offences involving violence, was detained during the Governor's Pleasure. At the time of writing, it does not appear as though an appeal has been heard. The evident lack of due process in reviewing either the imposition or continuity of detention, or in determining release from such a sentence, is most significant.

Victoria

It is understood that in Victoria there are no provisions dealing with habitual criminals or persons incapable of controlling their sexual instincts. However, the *Community Protection Act 1990* illustrates quite clearly the perceived need of a community to be protected from a particular person.

The purposes of the Act are to provide for the safety of members of the public and for the care or treatment and the management of that one individual. The Act specifically states in section 5(2) that the named offender 'must not be discharged or released from' detention except in accordance with an Order of the Supreme Court.

Section 8 provides that, if the Supreme Court is satisfied 'on the balance of probabilities' that this person 'is a serious risk to the safety of any member of the public' and is 'likely to commit any act of personal violence to another person', the Supreme Court may order that this person be placed in preventive detention. This person 'must not be discharged or released from preventive detention except in accordance with an Order of the Supreme Court' (section 12).

While it is apparent that due process is given the pivotal role in the imposition and discharge of the indeterminate sentence, the most disturbing feature of the legislation is that it has been specifically designed to restrain a single individual. Without going into the merits or otherwise of this particular case, as a general proposition, it appears unpalatable that legislation has to be designed to deal with an individual rather than an identifiable class of offender.

New South Wales

New South Wales appears to have very little by way of preventive detention provisions. The *Habitual Criminals Act 1905* which did permit a court to impose an indeterminate sentence was repealed in 1957. Shortly put, the *Habitual Criminals Act 1957* permits a judge to impose an additional sentence on a person found to be an habitual criminal. However, unique in Australia, the period of detention subsequent to the finding that an offender is an habitual criminal is confined to a period of not less than five years and no more than fourteen years. As the period is flexible and has a floor of five years, it cannot be described as an indeterminate sentence. In any event, inquiries revealed that, in common with habitual criminals provisions in Queensland, the Act is now effectively in disuse.

Reviewable Sentence Model

Having conducted that brief review of legislation across Australia, it is now intended to give a skeletal outline of a legislative scheme for a form of preventive detention, designed to balance competing interests of protection of society against the civil rights of the individual offender.

It is intended in the model to ensure due process at all levels of determination involving the imposition, continuity of, and release from, a reviewable sentence. It is not intended to echo the existing uncertain release mechanisms authorised under vague criteria which currently appears to apply in Queensland, Northern Territory, Western Australia and Tasmania.

The model seeks to draw into the release mechanism the best features of due process seen in South Australia's legislation and which is central to Victoria's Community Protection Act. It is suggested that the executive play no role in releasing an offender from a reviewable sentence.

The court, having imposed that sentence, should maintain scrutiny of it and retain the power to end the reviewable sentence. As noted earlier, the courts have had extensive experience in administering natural justice and in protecting individual rights, therefore it is proposed the executive no longer undertake the pivotal role in the release process. As the Queensland Attorney-General, the Honourable Dean Wells has said:

> If the protection of society demands that dangerous prisoners be confined, so they should be, *with the courts not the State—making the decision*. The protection of society is an overriding consideration [emphasis added] (*Courier Mail*, 27 June 1991, p. 9).

In proposing the model, it is respectfully suggested that it replace existing provisions dealing with 'dangerous offenders', habitual criminals and persons adjudged incapable of controlling their sexual instincts.

There appear to be three significant points raised by the High Court in *R v. Chester* ((1988) 36 A Crim R 382) relevant to a model of reviewable sentence legislation. The first is that the court (Mason CJ., Brennan, Deane, Toohey and Gaudron JJ) considered (at 385) unless an offender had shown himself to constitute a danger to the public or that his release 'will expose the community to the real likelihood of violent harm or sexual offences, an order for his indefinite detention should not be made'. Thus the 'mere probability' that an offender will offend again is not enough to sustain an order for indeterminate detention.

Secondly, the High Court considered that the propensity of an offender to commit crimes not amounting to crimes of violence did not provide a sound basis for imposing an indeterminate sentence. The third point was that the court considered: 'The exercise of the power should be reserved for those very exceptional cases which do not attract the operation of 'habitual offenders or mental health legislation' and 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 circumstances, so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community.' The criteria therein embedded will be sought to be expressed in the proposed legislative model.

'Serious personal injury' offence

At the outset, it will be necessary to define the sort of offence/s, a conviction for which may render an offender liable to a reviewable sentence application. Part XXIV of the Canadian Criminal Code, section 752 provides one guide. The term 'serious personal injury offence' has been adopted herein, borrowed from Canada; but the formulation of a definition will doubtless vary across jurisdictions. For this paper, the following definition is advanced:

> An indictable offence involving (i) the use or attempted use of violence against another person, or (ii) conduct endangering or likely to endanger

> the life or safety of another person, and for which the offender may be sentenced to imprisonment for life.

In some jurisdictions, offences involving sexual misconduct do not carry a maximum penalty of life imprisonment, and it is suggested that consideration be given to specifically identifying offences to which the model may be applied.

Application

It is proposed the legislation would apply when any person is convicted of a 'serious personal injury offence'. However, whether the legislation should be capable of application after conviction for a single serious personal injury offence, or whether it should apply only if the offender has been previously convicted of serious personal injury offences, there appear to be equally compelling considerations. They may be summed in the question: should a reviewable sentence be capable of being imposed on a 'first offender' solely on the grounds that the serious personal injury offence for which the offender has been convicted discloses features which may indicate the offender is a constant threat to the community? *Contra*: should the offender have committed at least one previous serious personal injury offence before being placed in jeopardy of the legislation? The writer finds both merits and demerits in both propositions and thus here avoids the answer by leaving it open to be determined by any enacting legislature.

Sentence and criterion

The legislation would empower a court before whom the offender was convicted, instead of passing a fixed (or 'term') sentence of imprisonment, to impose the sentence of a reviewable period of imprisonment; which shall be reviewed each two years (or such lesser period by special application). The sole criterion for the imposition of the reviewable sentence should be that expressed in *R v. Chester* ((1988) 36 A Crim R 382): '. . . whether the (offender) constituted a constant threat to the community' (p. 385); applied by the Western Australian Court of Criminal Appeal in *R v. Gooch* ([1989] 43 A Crim R 382).

Imposition

The logic of a reviewable sentence effectively compels such a sentence to be imposed at the outset, rather than being imposed after an offender has completed—or nearly completed—a proportionate term sentence. It may have been noted from the remarks of Mr Justice Dean (*R v. Veen (No. 2)* (1988) 164 CLR 465 at 495) that His Honour appeared to imply that the statutory system of preventative restraint he contemplated could be a type which would be imposed at the end of what represents a proper punitive sentence, whether or not that is what His Honour thought appropriate. This paper contends that a reviewable sentence should be imposed immediately after conviction, in lieu of a proportionate term sentence, rather than after the expiry of such a term sentence.

That proposition is based on three main considerations. The first is that it appears unfair to sentence an offender to a proportionate sentence and then, toward the completion of that term, reserve the right to further retain the prisoner beyond the term served. Such a regime denies the prisoner from knowing, at the outset of his/her detention, the full basis for the deprivation of liberty and appears to contain a degree of intellectual dishonesty.

Secondly, the system of reviewable sentences herein contemplated provides a periodic review from the commencement of imprisonment, whereas a proportionate term sentence contains no judicially reviewable mechanism during its currency, thus denying an early review of the continuity of the sentence in the light of any unchanged circumstances. Finally, even if it was thought any injustice may flow from the imposition of a reviewable sentence in lieu of a term sentence, the suggested model compensates for any perceived injustice by effectively back-dating the substituted term sentence when a court is no longer satisfied the prisoner is a constant danger to the community.

Procedure

In order to prevent 'ambush' of the offender, two strategies are proposed:

- if the prosecution seeks to invoke the legislation, the prosecution must first obtain the written permission of the Attorney-General. The court must stay further hearing of the application for at least twenty-eight days;

- if the sentencing judge considers the legislation may be applicable in the interests of community safety, the judge must notify the parties and again be prohibited from further hearing the matter for at least twenty-eight days.

Relevant conditions

It may be desirable for the model to set out a number of issues which must be taken into account by the judge upon hearing a resumed application on whether the offender is a constant danger to the community:

- the exceptional nature of the offence or offences;

- the antecedents, age and character of the offender;

- any medical, psychiatric, psychological, welfare, social, anthropological, prison or other relevant reports in relation to the offender;

- the risk of physical harm to members of the public in general if a sentence proportionate to the offence were to be imposed;

- the need to protect the members of the community in general from the risk referred to above; or

- any other matter that the court deems appropriate.

Evidence

The model should include a provision that the court shall hear evidence called by either party; and the ordinary rules of evidence should apply.

Reasons

Upon imposition of a reviewable sentence, the court should be compelled to publish specific reasons upon which the reviewable sentence was based, such publication of reasons should be made at the time of passing the reviewable sentence.

Onus and standard of proof

In contradistinction to the provisions contained in the Northern Territory, it is suggested that the model indicate clearly that the onus of proving that the offender is a constant danger to the community will at all times remain on the prosecution. The standard of proof applicable may be that the court is 'satisfied' that the offender is a constant danger to the community. Having regard to the judicial flexibility of 'satisfied' as a term, the standard of proof may perhaps be better described as being higher than the 'balance of probabilities', but less than 'beyond a reasonable doubt'. *See*, for example, *New South Wales Bar Association v. Livesey* ([1982] 2 NSWLR 240).

Review

It is suggested that there be an automatic review of the continuation of the sentence, by the sentencing court, within a period of not more than two years from the date upon which the reviewable sentence was imposed. Periodic reviews of the continuation of the reviewable sentence at periods of no more than two years thereafter should be required. The insertion of such provision is recommended to ensure that there is regular assessment of the continuing danger (or otherwise) to the community. It is thought that a period of two years may be appropriate, having regard to the need to balance the individual rights of the offender with practical considerations of court administrations.

It is also proposed that the model contain a provision permitting the two year period to be abridged, upon application by the offender, in cases of exceptional circumstances.

It is proposed that the model will effectively compel the sentencing court, upon a biennial review of the continued detention of the prisoner, to vacate the reviewable sentence and substitute a fixed sentence unless the court is satisfied that the offender is still a constant and continuing danger to the community. The onus of proof, the standard of proof, the criteria and the rules of evidence will be the same in any biennial review as those to be

applied at the hearing of the initial application. To ensure that the court, on its biennial review, is provided with up to date information, it is proposed that the model contain a provision requiring the prosecuting authority, and enabling the offender, to provide the court with reports which must cover the period which has elapsed since the last review.

Release

Upon the hearing of a biennial review, where a court is not satisfied that the offender constitutes a constant and continuing danger to the community, it is proposed the court must order that the reviewable sentence be vacated and that the offender shall be sentenced to a fixed sentence.

It is also recommended a provision be inserted to provide that, upon a court substituting a fixed sentence for a reviewable sentence, that the fixed sentence be deemed to have been commenced upon the date upon which the reviewable sentence was first imposed.

Appeals

It is suggested that the model provide for substantive rights of appeal, not only from the imposition of the original reviewable sentence, but also upon the biennial review, to the Court of Criminal Appeal. The appeal should be available to both the prosecution and the offender.

It will be seen that the skeletal outline of the model proposed ensures that due process, administered by a court of appropriate jurisdiction, is central to the scheme. While the model purports to permit both reports and verbal evidence to be given by any class of expert, the ultimate decision is removed from non-accountable bodies such as parole boards or other committees of experts, and furthermore avoids granting to the executive the decision to release an offender.

Conclusion

In conclusion, while it is acknowledged that there exists substantial and grave reservations in legal, medical, psychiatric and other disciplines on both the efficacy and civil liberty aspects of indeterminate sentences, it is suggested that the model legislation providing for reviewable sentences avoids most of the dangers of existing systems, ensures that the rights of the individual offender are protected by due process and goes some distance to meeting public perceptions that society must be protected from the depredations of dangerous and violent offenders.

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COMMUNITY SAFETY AND SERIOUS VIOLENT OFFENDERS

Judge Paul Mullaly
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Victoria

THE FUNDAMENTAL PURPOSE OF SENTENCING LAW IS THE PROTECTION OF society. In *Williscroft* ([1975] VR 292), the Full Court quoted a passage from one of the published lectures of Sir John Barry entitled *The Courts and Criminal Punishment* (1969):

> Dr Leon Radzinowicz has rightly observed that the criminal law is fundamentally 'but a social instrument wielded under the authority of the State to secure collective and individual protection against crime'. It is a social instrument whose character is determined by its practical purposes and its practical limitations. It has to employ methods which are, in important respects, rough and ready, and in the nature of things it cannot take fully into account mere individual limitations and the philosophical considerations involved in the theory of moral, as distinct from legal, responsibility. It must be operated within society as a going concern. To achieve even a minimal degree of effectiveness, it should avoid excessive subtleties and refinements. It must be administered publicly in such a fashion that its activities can be understood by ordinary citizens and regarded by them as conforming with the community's generally accepted standards of what is fair and just. Thus it is a fundamental requirement of a sound legal system that it should reflect and correspond with the sensible ideas about right and wrong of the society it controls, and this requirement has an important influence on the way in which the judges discharge the function of imposing punishments upon persons convicted of crime (Barry 1969, p. 14).

(*see also Naylor* 15/2/90 CCA NSW).

It is important to distinguish the context in which the term 'protection of society' is used. In a general sense, 'protection of society' refers to the overall aim of sentencing law. Used in relation to individual offenders, 'protection of society' takes on the more limited meaning of incapacitating an offender, thus preventing the commission of future offences by that offender.

Section 5(1) of the *Sentencing Act 1991* (Vic.) states that 'protection of the community' is one of the purposes for which sentences may properly be imposed. In this context the term relates to incapacitation of an individual offender.

The role of the sentencer in the sentencing process is to determine the facts, apply the relevant rules of law and to exercise judicial discretion, in determining the proportionate and appropriate sentence in a given case.

The role of the sentencer is limited. It is essential that the sentencer does not transgress the bounds of the judicial function in an attempt to give society the protection the sentencer considers it requires or deserves. In particular, the sentencer should not attempt to remedy situations perceived to be inadequately provided for the Legislature, the Executive, or other institutions of society. The community ought not to expect sentencers to act as politicians or social engineers.

Similarly, in *R v. Clarke* ((1975) 61 Cr App 320), Lawton LJ emphasised the importance of not exceeding judicial bounds. The appellant was a woman who had been sentenced to eighteen months imprisonment for breaking a flower pot valued at one pound. He stated:

> There is some evidence that the attitude of the social service was, 'We cannot cope with this woman, let the Courts cope with her'. The first thing to be said, and said very firmly indeed, is that her Majesty's Courts are not dustbins into which the social services can sweep difficult members of the public. Still less should Her Majesty's judges use their sentencing powers to dispose of those who are socially inconvenient. If the Courts became disposers of those who are socially inconvenient the road ahead would lead to the destruction of liberty. It should be clearly understood that Her Majesty's judges stand on that road barring the way.
>
> The Courts exist to punish according to the law those convicted of offences. Sentences should fit crimes. The crime in this case was breaking a flowerpot in a fit of temper and doing damage to the extent of [one pound] (p. 323).

(*see also R v. Roadley* ((1990) 51 A Crim R 336).

The exercise of the judicial discretion ought to be rational, purposive and just. Sentencers do not exercise the official prerogative of mercy—nevertheless the exercise of mercy is inherent in the concept of judicial discretion (*Kane* 1974 VR 759).

Mercy cannot interfere with the application of proper principles (*Kane* [1974] VR 759). Compassion and sympathy cannot detract from giving due weight to relevant factors. However, in deciding what weight to give factors, mercy has its place (*Parker* 22/6/88 CCA Vic; *Garret* 12/4/88 CCA Vic; *Bugmy* 21/6/89 CCA Vic).

The sentencing discretion is circumscribed by the rules of law which confer it and regulate its exercise. As stated by the Victorian CCA in *Young* ([1990] VR 951):

> In exercising the discretion a sentencing judge is, of course, constrained by any legislation governing the matter before him and by the sentencing principles developed by the courts (p. 954).

The guiding principle of sentencing law is the principle of proportionality, and the principle of proportionality is best understood in the light of the jurisprudence on which it is based.

Sentencing in Australia is based upon the philosophy of just deserts. The essence of this theory is that punishment should be just. In order to be just, punishment must not exceed what is deserved. Lewis (1953, p. 225) maintained that the only connecting link between punishment and justice was the concept of just desert. Without it, the morality of punishment is lost.

The justification for the just deserts theory is moral rather than utilitarian. As Finnis (1983, p. 128) states:

> . . . the defining and essential (though not necessarily the exclusive) point of punishment is to restore an order of fairness which was disrupted by the criminal's criminal act.

Whilst other purposes for imposing sentence are significant, morally they cannot be justified in their pure form. Lewis (1953) argued that rehabilitation and deterrence were not relevant to justice, and that to speak of a 'just cure' or a 'just deterrent' beyond what was deserved, is strictly incorrect.

The concept of proportionality was extensively discussed by all the justices of the High Court in *R v. Veen (No. 2)* ((1988) 164 CLR 465). Subsequently the High Court has interpreted state sentencing legislation as operating subject to the principle of proportionality (*R v. Chester* (1988) 165 CLR 611; *Baumer* (1988) 166 CLR 51; *Hoare* (1989) 167 CLR 348).

In *Hoare* ((1989) 167 CLR 348), the High Court referred to the principle of proportionality and cited passages from *R v. Veen (No. 2)* ((1988) 164 CLR 465) as the authority for the principle. The court said in Hoare:

> Secondly, a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances (p. 354) (*see R v. Veen (No. 2)* (1988) 164 CLR 465, at 472, 485–86, 490–91 496).

In the original report of *Hoare*'s case, the word 'objective' is italicised for emphasis in the passage quoted above. Each of the page numbers cited after the reference to *R v. Veen (No. 2)* directs attention to each separate judgment of the High Court Justices, as supporting that proposition. It is clear that the High Court has unanimously endorsed the concept of proportionality as an assessment of the gravity of the offence in light of its objective circumstances.

By particular reference to the judgment of Deane J, the High Court in Hoare's case unanimously accepted that proportionality is a limiting principle. Proportionality requires a sentencer to ensure that the sanction imposed does not exceed what is objectively deserved for the offence committed. As Deane J stated in *R v. Veen (No. 2)* ((1988) 164 CLR 465):

> It is only within the outer limit of what represents proportionate punishment for the actual crime that the interplay of other relevant favourable and unfavourable factors—such as good character, previous offences, repentance, restitution, possible rehabilitation and intransigence—will point to what is the appropriate sentence in all the circumstance of the particular case (p. 491).

Application of the Principle

In *R v. Veen (No. 2)* ((1988) 164 CLR 465), the High Court was specifically concerned with that aspect of proportionality which prohibits the imposition of a sentence merely to extend the period of protection of society from the risk of recidivism on the part of the offender. However, the principle is not limited in its application to such cases.

A sentencer may not impose a sentence longer than that which is deserved in order to cure or rehabilitate an offender. As Murphy J stated in *Freeman v. Harris* ([1980] VR 267):

> In my view it would be quite wrong for a sentencing tribunal to impose a sentence of imprisonment upon an offender which is dictated not merely by the gravity or heinousness of the crimes committed; but by the tribunal's desire to cure the offender of some disease such as drug addiction . . .
>
> In sentencing, the punishment in the particular case should be proportionate to the offence. It is not open to the court to punish an offender more, because he is ill, and because it is considered to be for his own benefit to try to cure him. The gravity of the offence must be the first and paramount consideration (p. 281).

A sentencer is not permitted to increase a sentence beyond that which is proportionate where the offender has prior convictions for the same or similar offences. This was made clear in *R v. Veen (No. 2)* ((1988) 164 CLR 465) in the joint judgment of Mason CJ, Brennan, Dawson and Toohey JJ:

> . . . antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence.

This view is also expressed by the High Court in *Baumer* ((1988) 166 CLR 51):

> It would be clearly wrong if, because of the record, His Honour was intending to increase the sentence beyond what he considered to be an appropriate sentence for the instant offence (p. 57).

The application of the principle of proportionality was again addressed in *Naylor* 15/2/90 CCA NSW. In that case Allen J related the application of the principle to the fundamental object of punishment which is the protection of society. He said:

> In view of the arguments advanced to this Court it is appropriate to remind oneself of basic principles in relation to sentencing of offenders.

> One must start with an appreciation of the objective gravity of the offence. Unless one starts there, the other factors requiring consideration to arrive at the proper sentence cannot be put into their right perspective. It must also be remembered that sentence must be commensurate with the seriousness of the crime in the sense that having regard to the circumstances it must accord with the general moral sense of the community. If it does not, the sentence is wrong. The sentence must also serve as a sufficient deterrent, not only to the offender but to others. Whilst justice and humanity require that the previous character and conduct and probable future and likely conduct of the individual offender be given careful consideration, these are necessarily subsidiary to the main consideration which determines the appropriate amount of punishment, and that is the protection of the public. One cannot ignore reality. The fundamental purpose of punishment is protection of the society.

A sentencer has a duty at common law to consider all the circumstances of the offence and the offender. As stated by the Victorian CCA in *Young* ([1990] VR 951):

> . . . the task of a sentencing judge is to pass such sentence as in all the circumstances relating to the offence and to the offender is that which he regards as the appropriate sentence (p. 954).

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MANAGING VIOLENT OFFENDERS IN THE CORRECTIONAL SETTING: A COORDINATED APPROACH

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VIOLENT CRIME IS AN ISSUE THAT ENCAPSULATES MANY OF THE PROBLEMS of the criminal justice system. Violent crime is perceived by the community to be the most significant form of crime. One that demands effective responses from government to minimise its occurrence, to catch and punish violent offenders and, if possible, to develop and apply programs that will prevent violent offenders from re-offending.

Regrettably, the development of methods to reduce violent crime has proven to be a particularly intractable one. Over the past five years, expenditure on the criminal justice system—police, courts and corrections—has increased by 75 per cent, from just over $500 million in 1984–85 to nearly $900 million in 1989–90. Over the same period, the incidence of violent crime in Victoria has apparently risen significantly. Apparently, because one of the problems that we face is that we do not really have a very accurate picture of the changes in violent crime rates over time, so we do not know whether our responses to it are successful or not.

Certainly, the level of community concern about violent crime is significantly higher than in the past. In addition, the extent of some forms of violent behaviour, such as sexual abuse of children and domestic violence, has only recently become apparent.

Nevertheless, it is worth putting violent crime into perspective, both in the context of the criminal justice system and more particularly the corrections system. Firstly, violent crimes—homicide, assaults, sexual assaults and robbery—only account for around 1.5 per cent of all reported crime.

Secondly, although most crimes are property crimes, the proportion of violent offenders who eventually receive a prison or community corrections sentence is relatively high. For instance, around 40 per cent of all homicide offences reported to the police, result in an offender going to prison. Approximately 20 per cent of all serious assaults reported result in a prison or community corrections sentence. If one looks at those assaults cleared by the police—that is, where an offender may have been brought before a court—about one-third of cases result in a correctional sentence. By contrast, for burglary offences, only about 1 per cent of all offences result in a correctional sentence, and for other common property, traffic or good order offences, the figure is even lower.

Thus, for the Office of Corrections, violent crime has an important impact on its prisoner and offender populations. Of the total prison population of 2,300, over 1,000 or 40 per cent of prisoners are serving a term of imprisonment for a violence related crime. Similarly, of a total community corrections offender population of around 5,600, over 15 per cent are serving a Community Based Order as a result of committing a violent crime.

Within the prison population, numbers are determined not only by the number of persons received but also by the average length of sentence. Although there are about twice as many prisoners received each year for assault than for sexual assault, there are approximately equal numbers in each category at any time because sentences for sexual assault are much longer than for general assault. For homicide, where sentences are longer still, this effect is even more pronounced. In community based corrections, the violent offender population is principally composed of persons convicted of assault, and more serious violent offenders are only present in relatively small numbers.

Apart from having a clear understanding of the profile of the offender population, it is also important to have some understanding of the more significant causal factors of violence. The National Committee on Violence summarised them as follows:

- child development and the influence of the family—with families being seen as the training ground for aggression;
- cultural factors which includes such issues as society values, economic inequality, cultural disintegration and gender attitudes;
- personality factors relating to past aggressive behaviour;
- substance abuse, due to the close association of some drugs and alcohol with violence;
- biological factors—while violent behaviour does not appear to be an inherited characteristic, it is notable that young men (15–30 years) have a much higher propensity for violence;

- mental illness—some forms of mental illness are associated with violent acts;

- media influences—television, films and videos may be associated with subsequent aggressiveness by some viewers; and

- peers—the company of delinquents of aggressive peers may influence individuals to become aggressive (*see* National Committee on Violence 1990, pp. 61–3).

As the Committee noted, however, it is invariably the complex interaction of these factors that are associated with violent behaviour.

For those involved in developing criminal justice programs to prevent or control violence, it is useful to note that most of the causal factors identified by the National Committee on Violence have their origin in the social and family structures of our society, or in biological or mental conditions. There are two important implications that flow from this:

- firstly, one cannot expect criminal justice programs in isolation to produce dramatic changes in people who one can reasonably say are among the most violent in our community; and

- secondly, for criminal justice programs to be as effective as possible, they must be integrated with the array of programs operating in the wider community. In many cases, the most appropriate response to current criminality may be to invest resources in preventative community programs.

A Statewide Coordinated Approach to Violence Prevention

In developing and applying measures to prevent violence, it is important for agencies in the criminal justice system to understand that they are not working in isolation. As a result of growing disquiet about the perceived level of violence in the community, the Victorian state government is developing a coordinated approach in an endeavour to effectively tackle the issue of violence on a number of fronts. Key recent government initiatives include:

- National Committee on Violence—implementation in Victoria of the report's recommendations;

- Social Development Committee of Parliament—an inquiry into strategies to deal with the issue of community violence;

- Community Council Against Violence—an inquiry into violence in and around licensed premises, sexual assault, family violence and programs for perpetrators;

- Victorian Law Reform Commission—recently prepared a report on reforms to rape law and procedures;

- Safety, Security and Women Working Group—an interdepartmental group focussing on issues relating to women's safety and security.

All these recent initiatives are now being brought together as part of the state's new integrated anti-crime strategy. Responsibility for developing and monitoring the strategy will be the responsibility of the Public Safety and Anti-Crime Council chaired by the Premier. The role of corrections is central to the state's approach in tackling the crime problem.

A Coordinated Correctional Response to Violent Offending

Over recent times, the Office of Corrections has adopted a more coordinated management approach for the treatment of violent offenders.

Unit management

Traditionally prisons have been recognised as places where violence has been commonplace. With the construction of four new prisons over the last three years, the Office of Corrections has taken the opportunity to adopt a completely new way of managing prisoners known as unit management.

Unit Management encourages self-responsibility and determination and is targeted to meet the individual needs of prisoners by providing new facilities and improved prisoner management approaches. Already there has been a noticeable decline in the level of violent incidents in Unit Managed prisons.

High security units

For the few violent prisoners who continually are disruptive in mainstream prison life, several high security units are available to ensure their effective management. Unlike past practice these units are being developed along Unit Management lines. Staff and prisoner interaction remains important but management of prisoners will occur in small groups only.

Treatment models for violent men

Treatment programs for men who are violent vary enormously in their content and conduct. The Office of Corrections has adopted a range of programs including individual therapy, anger management groups and coordinated programs involving group treatment and community intervention.

Individual therapy. Individual therapy is probably the most common and most traditional form of treatment for men. The Office's seven psychologists provide a counselling service to individual prisoners. While they establish a supportive relationship they ensure that offenders are confronted with their crimes and do not perceive that their behaviour is being condoned.

Anger management programs. Anger management group programs are probably the most common of all of the newer breed of psycho-educational/ psycho-therapeutic approaches to violent men. Anger management programs in prisons provide participants with a range of relaxation strategies and may require participants to maintain an 'anger log' so that their emotional patterns and 'triggers' may be easily identified and controlled. Anger management programs may also provide participants with assertiveness skills training.

Group programs for violent men—the 'Alternatives to Violence' program. The Office of Corrections has developed and implemented a pilot group program for violent men who are in prison or under the supervision of community based corrections. The prison-based program is conducted on a voluntary basis and is only mandated to the extent that parole at the earliest eligibility date may be at least partially dependent on completion of the program.

Violent men under the supervision of community based corrections may be required to undertake the program as a condition of their Order.

As a crucial focus for the program, men are not permitted to divert responsibility for their crimes away from themselves. In order to achieve this, the Office of Corrections utilises professional psychologists and other appropriately trained staff to facilitate the programs and actively confront and challenge men's notions of 'justifiable violence'.

Staff conducting the programs have been required to undertake specific training prior to conducting any group sessions and are required to attend on-going professional supervision while the programs are underway. Staff are also required to monitor their own and each others' reactions to the justifications used by men to ensure that they do not unconsciously endorse sexist notions.

The program comprises a range of elements that teach men new ways of relating that are non-violent. Anger management training, relaxation therapy, communication skills, cognitive restructuring and behavioural strategies are included as are modules on denial of responsibility, developing empathy and gender socialisation.

In developing the program a key factor has been to ensure that the program's availability is part of the valid penalty for the criminal offence rather than a substitute for a higher criminal penalty.

Sex offender programs—the psychosexual therapy unit. Alongside the program for violent men, the Office has established prison and community-based treatment programs for men who have committed sexual crimes against women and children. In the prison, the Office has recently established a ten bed unit dedicated for the treatment of sex offenders.

Although their actions are, by definition, violent towards women and children, sex offenders who are classed as 'paraphiliac' require different treatment approaches than men who are rapists. This program will be used for the treatment of child molesters as well as rapists where there is clear clinical evidence that the program is the appropriate form of treatment for such offenders. There is a strong emphasis on victim empathy and facing up to the effects of the offenders violent crimes on the victim.

These programs also employ mechanisms to ensure that offenders take full responsibility for their actions.

Support and empowerment for women. The Office is also establishing a range of strategies to provide support and empowerment to women offenders in prison and under the supervision of community based corrections. Based on what is known about the prevalence of offences against women, a significant number of women offenders will have been victims of male violence at some time in their lives.

The program aims to ensure that women offenders are able to more assertively deal with the men they live with, and with the world at large, through education, training and employment opportunities, through parenting education for women who are mothers, and through better access to a range of programs to address their offence related needs and to enhance their capacity to live a crime-free lifestyle.

Intensive Correction Orders. Finally, as part of the new *Sentencing Act 1991*, a new penalty, the Intensive Correction Order, has been introduced which is designed as a direct alternative to imprisonment of offenders currently receiving sentences of twelve months or less.

Offenders undertaking the Intensive Correction Order will be required to undertake unpaid community work and participate in drug, alcohol or psychiatric treatment programs if considered appropriate. As well offenders may be required to participate in special residential or intensive community based treatment programs in areas directly related to their offending behaviour.

A coordinated community approach. Ultimately, the purpose of running programs for violent offenders within the corrections system is to return these offenders to the community at the end of their sentence with the minimum likelihood that they will commit further violent offences. Even if the corrections programs that this paper has described are genuinely effective in changing offenders' violent behaviour or attitudes, there are a number of additional conditions that must be satisfied if we are to have a real chance of producing lasting change in offenders. And it is in satisfying these additional conditions that our management of violent offenders must be a genuinely coordinated strategy.

We know that the most difficult part of serving a sentence for many, if not most, prisoners is returning to the community. Ex-prisoners can face extreme difficulty in re-establishing themselves: finding accommodation, getting a job or arranging benefits, and re-establishing contact with their family and friends. These are not tasks that are made any easier by being removed from the community for a long period. Failure to successfully reintegrate into the community almost inevitably means a return to offending.

The corrections system is poorly placed to help prisoners return to the community. We have limited expertise and are required by our legislated mission to focus on custodial and supervisory goals. The Office of Corrections does run a Community Integration Program that assists prisoners to prepare

for release and our community corrections staff provide assistance and support to released prisoners during their time on parole.

Even so, many prisoners do not recognise the need to prepare themselves for release. More importantly, once their sentence is finished most prisoners want nothing more to do with the corrections system. Effective assistance needs to come from within the community itself.

There are a number of organisations in the community that already do a tremendous job in providing assistance and services to ex-prisoners. Nevertheless, with more resources and greater community support, they could do even better.

A second aspect of a truly coordinated approach to the management of violent offenders is to ensure that the Office of Corrections strategy is linked to the overall state government strategy for reducing violence. One aspect of this is to provide offenders and ex-offenders with access to community programs and services for violent people so that there is continuity between corrections and community programs. Unfortunately, offenders tend to be difficult and unreliable participants in community programs and may be seen as undesirable or disruptive clients. Nevertheless, we have to overcome these problems if we want to maximise our chances of changing violent offenders.

Conclusion

Violent behaviour is the consequence of extremely deep-seated attitudes and values about personal and social relations. Changing the behaviour of the most violent members of the community may be the most difficult task facing the corrections system today. If it is to be done successfully, then it will require great commitment and support across the criminal justice system and the community.

Reference

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MANAGING SERIOUS VIOLENT OFFENDERS IN SOUTH AUSTRALIAN PRISONS: CONTROL, CONSENSUS OR RESPONSIBILITY

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THIS PAPER WILL ATTEMPT TO PROVIDE AN OVERVIEW OF OFFENDERS WHO are considered seriously violent and then suggest a framework within which such offenders can be managed. The argument is put that the existing management philosophies used in most Australian jurisdictions need modification, before individual interventions by specialist personnel such as psychiatrists have any chance of success certain conditions need to be met within prisons. While the correctional administrator must have an interest in the welfare and prospects for rehabilitation following release for the seriously violent offender, he or she must also take a high level of interest in what is happening within the prison community so that all prisoners have a chance to complete their sentences in a safe and reasonably decent environment.

Seriously Violent Offenders — How Many Are There?

Correctional administrators and criminologists usually have categorised prisoners as violent or non-violent on the basis of the major offence for which

1 The author would like to acknowledge the assistance of Mr Leigh Roeger, who read an early draft of this paper and together with Ms Vicki James provided the material on the Correctional Institutions Environment Scale.

they are being imprisoned. This is calculated by two methods and these give very different answers. The first method looks at intakes to prison and this method was used by Walker (1990). It found that fewer than one in six intakes to prison are violent offenders.

The second method, and more useful from a management perspective, is to look at the prisoner population on a census date. Using this method, on 30 June 1991 in South Australia there were 420 offenders or 40 per cent of the prisoner population imprisoned for committing a violent offence. Interestingly, another 191 had previously been imprisoned for a violent offence. This means that a total of 611 prisoners of the 1,042 prisoners on this day in South Australia have shown violent behaviour of such seriousness as to warrant a sentence of imprisonment. For all correctional administrators, minimising further violent behaviour is of paramount importance if a safe, secure and humane system of custody is to be provided.

The Present Technique for Managing Seriously Violent Offenders

The standard technique used in most jurisdictions, and the basis of South Australia's approach to this group, is to rely on Assessment and Classification as the basis for implementing a system of control where the primary objective is to minimise the opportunities for the seriously violent to cause trouble throughout the prison. The seriously violent offenders are separated from the mainstream residential units and other prisoners by the short-term strategy of placing such prisoners in socalled special handling units. To facilitate the control of offenders placed in these units, the units are usually purpose built and have specialised staff. Public scrutiny and debate about special units such as Katingal in New South Wales, and former units like Jika Jika in Victoria and S & D Division in South Australia has led to legislative constraints on their use in Australian jurisdictions.

In part, the debate has been due to a lack of clarity about who should be placed in such units and the reasons justifying their placement there. South Australia has attempted to overcome this difficulty by modelling the criteria for admission to its special handling unit—a twenty-four bed unit known as G Division located in the state's most secure facility, Yatala Labour Prison—upon those used in the Federal Correctional Service of Canada. In that jurisdiction prisoners are only held in special handling units in particular circumstances which include:

- those involved in hostage taking, possible confinement or abduction incidents;
- those responsible for very serious assaults upon staff or other prisoners;
- escapees or attempted escapees who have resorted to violence in their escape attempts, for example, the use of firearms or motor vehicles as a means of force;

- initially following conviction of murder of a law enforcement official, inmate or other person while under sentence;
- manufacture, possession, or introduction of firearms, ammunition, high explosive or any other weapon;
- incitement to conspiracy to kill or riot; and
- substantiated serious threats against the life of a staff member, inmate or other person (Coyle 1989).

If the objective is simply to isolate and neutralise the trouble makers then, from a managerial viewpoint, the strategy of placing them in special units must be regarded as reasonably effective. It allows the remainder of the prison population to be supervised and cared for in a far less harsh and intrusive regime. It also means that the staff have less reason to be constantly alert and fearful of personal assault although this threat can never be entirely eliminated. Fleisher (1989, p. 99) describes how:

> Tension, anxiety, and anger build daily in social interactions between staffers and inmates: line staff are particularly vulnerable to explosions of inmates' stress, and inmates are vulnerable to line staffers' anxiety, tension and fears.

However, eventually the seriously violent offenders must be released from such special units.

A classification model would suggest that they then be transferred to another unit, less restrictive than the special unit, but not as free as a medium security regime might provide. This is the method used by the South Australian Department of Correctional Services (DCS) which is proposing to adopt a six-level classification system.

There will be two 'high' security ratings. 'High 1' will be applied to prisoners who would constitute an extreme danger to the public if they escape or pose a significant risk of causing injury to staff or other prisoners. Prisoners will only be classified as 'High 1', or removed from that classification with the approval of the Chief Executive Officer. Such prisoners will normally be accommodated in G Division and may be kept entirely separate or may be permitted to mix with other, carefully selected prisoners.

It is planned that this group be kept quite small. The longest period any one has so far been kept in G Division as the equivalent of High 1 has been a group of five prisoners involved in the taking of two officer hostages in B Division at Yatala Labour Prison on 25 June 1990. They have been there fifteen months, but the Department is currently planning to move this group individually back into main stream regimes over the next three months. Subsequent to any period spent in G Division such prisoners may be placed in F Division which consists of a number of relatively small units where prisoners may have reasonable freedom but may not mix with the general prisoner population.

Violence in Prisons

The amount of violence occurring in prison is not easily measured. Another important measure of prison violence is assaults upon staff (*see* Appendix A). For example, as in the general community, many offences are not reported for various reasons. At the simplest level, correctional agencies record the number of assaults or serious crimes against the person such as rape or murder.

In his book *Warehousing Violence*, Fleisher (1989) describes a study he did on violence at Lompoc, a prison in the USA. Whilst his research shows it to be one of the better managed and therefore less violent of the Federal Bureau's prisons, he is still able to give plenty of examples of violence, even though he tends to discount the violence towards staff.

> In several cases of inmate unarmed assault on line staff, staffers black eyes, bloody noses and contusions weren't 'injuries' by staffers definitions, but obvious (and proud) signs of 'not taking any . . . from convicts', said a line hack (Fleisher 1989, p. 199).

Two models which refer to prison violence suggest that:

- violence in prison is due to the concentration of violent offenders in the prison system; and

- violence in prison is due to the pathology of the prison environment, where there are particular opportunities and rewards for violent behaviour.

Another example of violence, this time from Yatala Labour Prison in Adelaide which seems to contain elements of both models occurred on 12 October 1989 in the B Division recreation yard when prisoner Anthony Wesley Stone received a single stab wound to the chest. Stone died a few minutes later on his way to Modbury Hospital while travelling in the ambulance. There were ninety prisoners in the yard, and at this time the police have not been able to charge anyone with his murder because of the 'wall of silence'—that is prisoners refusing to speak with them. Stone's death must be seen as an assassination. It is likely to have occurred because of feuding prisoner gangs. It happened because the necessary ingredients were present in the prison yard—anger, hate, distrust, and violent men gathered together.

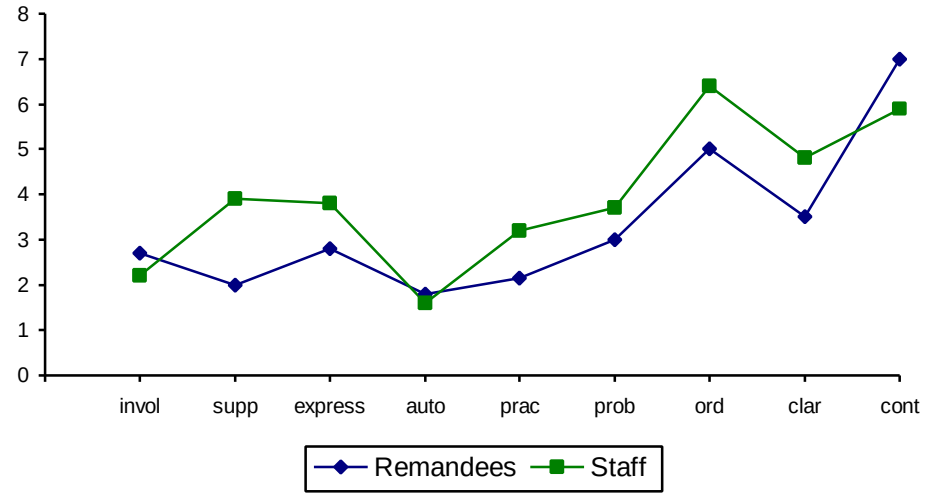
In South Australia, the Department has recently begun some preliminary research on the prison environment using an instrument titled the Correctional Institutions Environment Scale (CEIS) (Moos 1968). The rationale underlying the CEIS is that behaviour is some interactive function of individual needs and the environmental 'press' which either satisfies or frustrates those needs. The instrument is similar to the Ward Atmosphere Scale which has been used to differentiate between the atmospheres in psychiatric wards.

Some interesting findings have arisen from our initial research at the Adelaide Remand Centre and are summarised in the following graph (*see* Figure 1). Firstly, prisoners perceive that their environment is very orientated

towards order, clarity of rules and control and that it is not supportive nor does it encourage their involvement in the prison regime or allow them to express their feelings. There is also considerable incongruence between how officers and prisoners view their shared environment. This reflects the existence of two very different subcultures. Communication and interaction in these circumstances is unlikely to be either meaningful or extensive. The important question for administrators is how to introduce changes which will enhance the way the correctional environment is perceived both by staff and prisoners (pers. comm., Ms Vicki James).

Figure 1

Adelaide Remand Centre
Mean Scores for Staff and Remandees



KEY:

invol	=	involvement
supp	=	supportive
express	=	express feelings
auto	=	autonomy
prac	=	practical orientation
prob	=	personal problem orientation
ord	=	order
clar	=	clarity of rules
cont	=	control

DiIulio's Models of Prison Management

Correctional administrators require analytical tools to assist them to better understand what has been occurring in prisons in recent years and to develop a philosophical framework for change. One possibility is provided in *Governing Prisons: A Comparative Study Of Correctional Management* (DiIulio 1987). This study contains four essential features—it focussed on the formal prison administration, it was comparative using the state systems of Texas, California and Michigan and considered only high security prisons and was explorative in nature (DiIulio 1987, pp. 3–4). DiIulio (1982, p. 6) argues that the key differences among the systems are rooted in differences of correctional philosophy and that 'the quality of prison life depends more on management practices than on any other single variable'.

On the basis of his study DiIulio suggests that there are three approaches to managing prisons which can be demonstrated. Those models are control, consensus and responsibility.

The Control Model

The main ingredients of the control model according to DiIulio (1987, pp. 105–7) are:

- paramilitary organisation;
- official rules and regulations are followed closely and enforced vigorously;
- controlled movement;
- rewards and punishments are swift and certain;
- every inmate does his own time; and
- management attempts to ensure that there are no gangs or associations.

The control model is based upon the premise that prisoners can only be effectively managed by a rigid regime where interaction by staff with prisoners is frowned upon. The regime, however is not necessarily inhumane. The uniform is a highly valued symbol of the authority of the state and controlled movement underpins the basic daily operations.

Under a control model staff tend to see prisoners as enemies, as morally reprobate and dangerous and they seek to have as little to do with prisoners as possible in order to maintain their own personal wholeness and integrity. Myrl Alexander (1969), when Director of the Federal Bureau of Prisons, wrote about the forces which work to maintain such attitudes in officers. Alexander described this as the 'circle of rejection':

> This describes the natural 'reaction' of people who view irrational, irresponsible, and at times, unpredictable and threatening behaviour

> with a mixture of fear, frustration and frank bewilderment . . . In our field we live with the reality that there is no love lost on offenders, especially adults . . . The fact of imprisonment is in reality a form of rejection or temporary banishment of offenders from community life in free society. This is keenly felt by correctional practitioners, by inmates themselves, and by the general public.

Correctional officers come from all walks of life and along with their talents and skills, bring attitudes and views, beliefs and prejudices from society. Often included in these values are rejective and racist views about offenders. While training and the formal prison culture may modify and control these, correctional officers are still members of the community. Conflict and ambivalence between official policy on the one hand and the informal culture in prisons and community attitudes to offenders on the other have been identified as sources of stress on staff.

Alexander's 'circle of rejection' is completed when officers claim they feel inferior or rejected by the general community and asked why they choose to work with 'crims'. Officers experience this when confronted off duty with views and opinions, often very forcefully put, by their friends and acquaintances which suggest that government policy towards offenders is weak and soft, that sentences are too short and that prisons are like motels or holiday camps.

In many instances of prison violence, particularly assaults on staff by prisoners these have occurred and are still occurring because the control model is no longer an effective form of prison administration and in an era of open and accountable prison management it is based on premises which are no longer acceptable to either staff or prisoners. Prisoners will not accept the excesses of a control model and the high risk of staff abuse of prisoners which has characterised the worst features of the control model.

The Consensus Model

The consensus model according to DiIulio (1987, p. 137ff) was the way Californian prisons were managed. It seems as though the consensus model represents a transition between a control model and the responsibility model which is operating in Michigan. In this model, prisoners are classified to the least restrictive environment subject to the maintenance of prison security and consistent with a commitment to public safety. They have access to a wide variety of programs. While the workforce is unionised there is a recognition that 'prison government rests ultimately on the consent of the governed' DiIulio (1987, p. 129).

DiIulio (1987, p. 137) suggests that the main defect of the consensus model is that there is 'no coherent pattern of correctional principles and practices'. It comes about when some staff begin to see that the prison operates effectively and safely through a more positive approach to management, for example, having a wide variety of privileges which can be given and then taken away for misdemeanours, when a differential approach is applied to the care and supervision of prisoners, there is less emphasis on managing in large groups. It includes giving prisoners honest, accurate and

timely information about events which affect them and their life within the prison community and which they have every right to know about.

It seems that jurisdictions drift into a consensus style of management and the outcome is a lack of coherent policies and philosophy. It is a style which may result from a concerted push by prisoners and their supporters for what are regarded as privileges. This may be augmented by pressure from external agencies such as the Ombudsman, lawyers and Members of Parliament who take up individual cases which expose faulty logic in correctional practices, and inconsistencies or unfairness or capriciousness in the way in which certain prisoners are dealt.

Although practices change as a result of these pressures, they change in an unplanned way not based on a consistent correctional philosophy. An example might be that censorship of a prisoner's outgoing mail continues until challenged by an external authority such as the Ombudsman, simply because that is the way things are done. The authorities however, know that when prisoners make telephone calls they are indeed uncensored and that they have no control over what the prisoner says or indeed who he phones. Another feature of the consensus model of management is that it can easily be affected by changes in political climate. Power can often seem to swing widely back and forth between the prison authorities and the prisoners. However, on balance it must be regarded as a more enlightened approach to management than the control model allows.

The Responsibility Model

DiIulio (1987, p. 118) states that 'the responsibility model placed a premium on measures that maximised inmates' responsibility for their own actions'. The features of the responsibility model are: an emphasis on inmate classification with the prisoner being placed in the least restrictive setting, extensive visiting and telephone calls, an emphasis on normalisation and unit management.

The model also has its defects: low officer morale and animosity towards head office which is seen as responsible for the hair brained schemes and not being in touch with the real, hard, cold world of prisons. Correctional officers in DiIulio's study did not have a clear sense of mission and the Department was highly bureaucratic. Officers complained that prisoners had too much property in their cells and that this gave rise to a caste system of the haves and have nots. Officers also complained of mountains of paper work.

However, these negative features did not mean that the responsibility model was inadequate. DiIulio (1987, p. 127) states:

> Despite these defects, the quality of life inside Michigan prisons has been superior to the quality of life in many other State prisons.

The Australian Scene

In my view all Australian jurisdictions essentially operate on a control model but, in very recent years, have taken the first faltering steps to implement consensus style administrations in all states and the Northern Territory and, in a few isolated instances, a responsibility model. The Special Care Unit in

the Long Bay complex in Sydney is a good example of the responsibility model in a high security setting.

South Australia

The South Australian Department of Correctional Services operated on a control model through the 1970s and into the early 1980s and many elements of the control model as described by DiIulio are still in place. Controlled movement is a feature of the regimes at the Adelaide Remand Centre and Yatala Labour Prison. The Department still employs uniformed staff who operate along strict hierarchical and paramilitary lines. Nevertheless, the Department is committed to the responsibility model within a framework of unit management and is in the midst of processes which will move it from control and consensus models to a responsibility model. This will take some considerable time to achieve. One strategy it pursued in 1989 was to send a Divisional Head, a Chief Correctional Officer and a Senior Correctional Officer, the latter two selected by competition and examination, to visit prisons in The Netherlands, Denmark, Sweden and Finland with a view to studying the European approach—particularly Unit Management as it operates in Denmark. For good measure they were also able to visit prisons in the USSR, at Leningrad.

About twelve months later the Department had Mr Erik Anderson, the well known Danish prison manager and consultant spend time in South Australia conducting workshops for staff on how unit management operates in Denmark. In the time between the officers arriving back in South Australia and Mr Anderson's visit the three officers constituted a working group to begin the first steps in a process of getting staff familiar with the new proposed model for South Australia.

Some staff still hold views which are causing some problems for management as the Department grapples with issues such as award restructuring and how the job of correctional officers might be enriched as part of a transition to a consensus style of management. Staff have never been assisted to think in terms of a non-judgmental attitude towards prisoners, that you can work with an offender while not condoning the offence, that the human personality is a dynamic and evolving revelation of the person and that the criminal offence might have been a response to a situation that the officer may not have experienced and therefore cannot be certain as to how he or she might have faced such a personal challenge or situation.

The Department shares the view of Sykes (1958, pp. 63–83) who described the pains of imprisonment as deprivation of liberty, goods and services, heterosexual relationships, autonomy and of security. He suggested '[but] if the rigours of confinement cannot be completely removed, they can at least be mitigated by the patterns of social interaction among the inmates themselves'. His view was that deprivation of liberty constituted the essence of imprisonment. This was restated by Clarkson (1981, p. 77) in a Royal Commission report and he recommended it for adoption in South Australia.

The Clarkson Royal Commission was established in 1980 following allegations of mistreatment of prisoners at Adelaide Gaol and Yatala Labour

Prison. In retrospect, the control model was breaking down, the Department had grown too large to be managed as a benevolent autocracy and inadequate management information systems existed which were too slow and too inaccurate to assist the senior executive manage an increasingly restless and questioning prisoner population.

However, the recommendation was not acted upon immediately and officers received little guidance on how prisons should be managed and how prisoners should be cared for. Officers received just a few weeks' basic induction training and the Department was not well-resourced by the Government. Prisoners were cared for in a conservative and highly controlled environment and did not enjoy access to programs such as contact visits and access to telephone calls, to name just two examples of amenities which were becoming common in Victoria and New South Wales.

The Responsibility Model In A Social Context

Prisons must be seen as part of society and not as separate little worlds in themselves. That is why, for example, there is a drug problem in prisons. As modern prison management grapples with the effort to develop a coherent philosophy and, in particular, with what is humane containment of the seriously violent offender, it can be enlightening to set this challenge in the wider social context.

Accountability

Many public organisations are now much more accountable for what they do—through freedom of information, equal opportunity, and Ombudsmen and their own commitment to new values and the pursuit of excellence. Along with this goes;

Responsibility

Which is having reasons for one's actions, which need to be based on principles developed from a guiding philosophy.

Violence

We are seeing a considerable shift in community attitudes towards violence. Corporal punishment is banned in schools, child abuse is the focus of strong attention and domestic violence has a high profile. All these signal that aggressive interpersonal behaviour is to be moderated, a view shared at the highest levels of our community and one that led to the establishment of the National Committee on Violence (1990, p. xxi).

Prisons as part of society, must and will reflect these changes and correctional administrators and prison managements must see that they thoughtfully interpret and reflect them to their staff. This requires them to provide staff with enough time and the appropriate support and resources to manage the changes. Essentially it is about changing the face-to-face interaction between correctional officer and prisoner and dealing with the

issue of anger between them. It is about providing programs and structures which remove many of the pressures put on them by the control model of management. It is about developing a philosophical understanding that enables staff to have guiding principles that foster a non-judgmental attitude to the person in front of them. This will be based on seeing themselves there as not to add to the prisoner's punishment.

One area of research that has some promising potential to facilitate an understanding is that of loss and grief, for most of the prison population have experienced many deprivations throughout their lives and carry with them the contained anger, undealt with, that is part of the grief response to loss. Perhaps their most obvious loss is in their imprisonment which incorporates so many losses within it. It is little wonder that aspects of denial, depression and anger are manifest in the early part of the prisoner's sentence. Nor is it surprising that violence can easily erupt as it takes little to trigger off the undealt-with anger that so many prisoners carry with them.

So staff will need to have a high level of interpersonal communication skills, a manifestation of a very clear understanding of the guiding philosophy of correctional management. The design of buildings will also be important as well as the programs which are offered to the seriously violent offender.

Programs for the Seriously Violent Offenders in South Australia

Work

Every effort must be made to place the prisoner at constructive work. Work is seen as the core of management of such offenders. Challenging, creative work can improve self-esteem and give a sense of structure to the days and weeks, months and years of the prison sentence. Creative work enables longer-term goals to be aimed for and, if successfully achieved, can result in heightened feelings of self-worth and value. Unfortunately in South Australia the Department cannot provide full employment and in our smaller state, deeply affected by the recession, the opportunities to improve the number of work places seems limited.

Recreation and leisure

Long-serving prisoners, including the seriously violent offenders, are encouraged to participate in worthwhile and creative recreation and leisure activities. Individual and team sports are encouraged but, when the Mobilong Prison rugby team competed in the grand final of the local competition, it confounded the critics by being so successful and was subsequently expelled. It is essential that prison management be responsive and flexible not only to current trends and fads amongst the prisoner population but also to deal with such unexpected problems! The prisoners had to be encouraged to direct their energies elsewhere. Some long-term prisoners at Mobilong recently staged 'The Caine Mutiny', a welcome development as it is many years since drama was a feature of the South Australian prison system.

Education

The values of education for prisoners have been well documented elsewhere. At Yatala Labour Prison a sympathetic and creative art teacher has encouraged a succession of Aboriginal prisoners, some of whom are seriously violent, to free the wonderful artistic urges within themselves. The results have been renewed interest in their Aboriginal heritage and culture and an immediate boost to self-esteem through producing a desirable and saleable product.

Welch (1991, p. 146ff) argues that a formal Arts in Prison program operated by the Oklahoma Department Of Corrections has led to reduced costs for correctional staff and for vandalism. Arts programs, he states, are a time-management tool for prison administrations, and are a relatively low-cost way to introduce prisoners to a different set of values and positive role models. Finally he claims that there are reports of prisoners lives being dramatically changed as a result of commitment to prison art.

Health care

The Department of Correctional Services is fortunate in having good working relationships with the various providers of health care for prisoners. These include the Prison Medical Service, which is a unit of Modbury Hospital, and James Nash House, a special hospital for prisoners with serious psychiatric disorders. The Prisoner Assessment Committee, a unit of the Department of Correctional Services receives advice and assistance on placement and management of violent offenders with a psychiatric disorder from these service providers.

Department of Correctional Services Social Work Service

The Department has social workers placed in all its prisons. One-to-one programs which focus on anger management (with specific contracts between social worker and prisoner to work on behaviour) are used by social work staff. The Department is also presently negotiating with a not-for-profit agency to provide an anger management workshop at Northfield Prison Complex, a coordinate prison for men and women.

Sexual Offenders Treatment and Assessment Program

The Department works with the Sexual Offenders Treatment and Assessment Program (SOTAP), a unit of the Health Commission, which is run by a psychologist. Presently the program focuses on child sexual offenders. Prisoners in the last three months of sentence can be accepted for treatment by SOTAP at Northfield Prison Complex, with assessment usually occurring in the prior two months. Staff members in other prisons will receive training/briefing from SOTAP in the near future with an initial focus on social work staff from Port Lincoln and Mount Gambier prisons because these two institutions provide special placements to offenders who have been convicted of sexual crimes. Psychologists from SOTAP have also visited Port Lincoln Prison and Mount Gambier Gaol to assist selected prisoners. The

Senior Social Worker at Yatala Labour Prison also currently spends one day a week with the SOTAP program because the initial assessment of such prisoners is made at Yatala.

The Way Forward

In essence these programs are not vastly different from those available in most prison systems during the last decade with the exception of SOTAP. They may, however, be applied now with a more sophisticated understanding of their effects.

What is missing is an integrated approach coming from a coherent model of prison management so that the care of the seriously violent offenders is underpinned by the basic principles that dictate the patterns of care for all offenders.

DiIulio's responsibility model operating in a unit management framework appears to offer a way forward. Unit management in prisons is an approach which gives correctional officers more responsibility in a total way for the operation of a residential unit housing a discrete group of prisoners. The officers are required to take responsibility for all aspects of the prisoners' life including work, leisure, welfare and security. This will require a higher level of skill and therefore increased training.

The problem with 'the pursuit of excellence' is that better prisons can be seen as a solution by the community especially in times of escalating crime rates. Lest we are seduced by this idea let us remember that imprisonment remains essentially enigmatic in that people are deprived of their liberty and banished temporarily in order to prepare them to return to society. Imprisonment should be used as the punishment of last resort.

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Appendix A

Assaults upon staff have shown an increasing trend over the years 1984 to 1987 but have begun to reduce since then except for a once off increase in 1989–90. The data has only been collated in the Department since 1982 with the establishment of the incident reporting system. One indicator of the severity of assault is the number of working days lost by the staff who are assaulted. The year by year data is as follows:

Year	Staff Assaulted	Work Days Lost
1983–84	14	141
1984–85	21	162
1985–86	48	160
1986–87	70	771
1987–88	37	307
1988–89	31	409
1989–90	43	1508
1990–91	26	996

Anecdotal evidence suggests that the rates of assaults upon staff were lower in the years prior to 1983–84.

INDEPENDENT AND INTIMATE: THE SERIOUS OFFENDERS' REVIEW BOARD, NEW SOUTH WALES

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New South Wales

THE SERIOUS OFFENDERS' REVIEW BOARD (SORB) IN NEW SOUTH WALES has the responsibility of managing all prisoners who fit the definition of a serious offender. Set up under the *Prisons Act 1952*, the Board has an independence, which it always values, often stoutly defends and very occasionally revels in.

The Board meets its clients every six months and has formal and informal dealings with many of them in between. It has long-maintained files, regularly recorded interviews and a stability of membership. SORB knows its clients well and has fostered a degree of intimacy with them, which is rarely found in the official channels of gaols.

Constitution

The Board is constituted by the *Prisons Act 1952* ss. 59–72. It has the following ten members: chairperson and deputy chairperson; Head of Community Corrections; Head of Prison Security; Principal Psychologist; a police officer and four community members. The chairperson and deputy are both retired judges of the district court. All members, other than those nominated by the Director-General, Department of Corrective Services, are appointed by the Governor. The present Board includes only one woman, a departmental nominee.

There is no formal provision for the type of person to be appointed as a community member but the present members are a retired Director-General of the Department of Corrective Services, a retired New South Wales

policeman, a practising Queen's Counsel and the father of the victim of a notorious murder in 1986.

This membership gives the Board a conservative cast. It does not, however, pursue a rigid ideology and is sometimes conservative and sometimes liberal. The Release on Licence Board (ROLB), appointed by the previous Labor government, had a mildly liberal outlook but did not act in a significantly different way from the present Board. The Chairperson of the SORB also chaired the ROLB. Both Boards are, inevitably, formed somewhat in his image. The Board came into being on 12 January 1990.

History

The Board inherited most of the mantle of its predecessor, the Release on Licence Board. That Board, similarly constituted, had been set up following the 'early release scheme' scandal of the early 1980s, which eventually led to the gaoling of the Minister for Corrective Services at the time. Though the prime reason for that Board's existence, which was from February 1984 until January 1991, was to recommend release on licence for life sentence prisoners, its secondary role of the management of those prisoners, soon came to dominate its work.

In contrast the role of the SORB is almost entirely management, a role similar to that of its predecessor, the non-statutory and less powerfully constituted Indeterminate Sentence Committee. There is, therefore, a recent history of separate management of serious offenders.

Functions

To understand the functions of SORB it is necessary to define and identify the serious offender.

Definition

Regulations define serious offender as one who falls into one of the following categories:

- has been sentenced to a term of natural life (the new 'life is life' sentence);
- has been sentenced to life under the old laws;
- has had a life sentence imposed under the old laws replaced by a minimum and an additional term;
- has been convicted of murder, whatever the sentence;
- has a minimum term between three and twelve years and has special needs, because of the nature of the crime or notoriety;
- has a minimum term of twelve years or more;

- has been ordered by the court to be managed by the Board;
- has been convicted of an escape in the last three years.

This means that just on 400 of the state's approximately 6,000 prisoners are regarded as 'serious' and are managed by the SORB.

Classification and placement

These are the most significant aspects of the day-to-day management of prisoners and they take up most of the Board's time.

Prisoners are encouraged to move through the gaol system towards eventual release. The most common movement is from maximum security, after about half the sentence, to medium security for a couple of years and to spend the last four to five years moving through the three grades of minimum security. The Board encourages people to spend the final six to eighteen months of their sentences on work release. This provides a final test of a person's ability to live a crime free life and gives him or her a chance to save some money.

Most changes to classification and placement occur following discussions between the prisoners and the Board's visiting committee. The committee's recommendations are considered by the full Board and if accepted, as they usually are, go forward as formal recommendations to the Director-General of Corrective Services. Recommendations are almost always approved.

The Board has absolute power of refusal. If the Board does not agree with an application for a change of classification or transfer to another gaol, that is the end of the matter.

The Board takes the view that lower classification and more congenial gaols should be earned by prisoners' efforts and used for other than just an enhanced feeling of freedom. Needless to say, these aims are not always achieved and it is perhaps a re-affirmation of the resilience of the human spirit that craft and cunning occasionally outwit careful deliberations and well-ordered plans.

Resentencing reports

Under legislation proclaimed at the beginning of 1990, prisoners previously sentenced to life imprisonment can apply, after they have served eight years, to have their sentence redetermined and a minimum and additional term set instead. Of the 230 prisoners entitled to apply, 150 have done so.

The Board is obliged to prepare a report for the court stating all details concerning the prisoner's progress in prison. These reports are comprehensive with the concluding paragraph usually indicating what the Board believes the court should do. The early reports were tentative in their expression of opinion. Experience from forty resentencing hearings has shown that the Supreme Court judges who hear the applications value the reports, making much use of them in arriving at their decisions.

The reports are drafted mainly by the Board's staff, with a small number being done by a now retired Department of Corrective Services (DCS) staff member and member of the ROLB.

The pressure from prisoners for their reports to be completed is intense; however, pressure of other duties allows an average of only four to be done each month.

Release reports

The Supreme Court sets minimum and additional terms. The power to release on parole after the minimum term has expired belongs to the similarly named Offenders' Review Board (ORB) which is a parole board.

When the parole of a serious offender is being considered, the SORB reports to the Offenders Review Board. A member has a right to be heard during the ORB's deliberations but has no vote. At present the SORB report to Supreme Court is accepted by the ORB but as the time between resentencing and release consideration increases, so will the need for report writing.

Licensees

The Board still exercises suzerainty over those released on licence under the old system and the parole service carries out supervision on behalf of the Board. The Board can vary the conditions of the licence and revoke it as long as the judicial Chairperson agrees. The revocation power is a strong one—if a life sentence prisoner's licence is revoked he or she cannot be released again until resentenced and due for parole. There are no 'slap across the wrist' revocations.

Practices

Meetings

The Board meets for at least one full day a month. Two day meetings are scheduled four times a year to help clear the backlog of Supreme Court reports, brought about by the large number of life sentence prisoners, immediately eligible for resentencing. A court reporter attends each meeting. Formal motions are rare and votes taken only occasionally—decisions are usually reached by consensus after a few minutes of discussion. Some cases cause controversy and opposition but there is little open tension. A committee meets as required to consider special matters referred to it.

Each member is provided with a file. The agenda is detailed and by word processing and compression is turned into the minutes and subsequent submissions to the Director-General on Board recommendations.

Visits

Most of the Board's work arises from twice yearly visits to prisoners. An ad hoc visiting committee is set up at each meeting to carry out the visits scheduled for the coming month. As far as possible, a committee is made up of either the Chairperson or Deputy, one of the DCS representatives and one

of the community representatives. In the writer's four years with the Board, none of the police representatives has ever gone on a visit. Each has considered his presence on a committee likely to arouse too much hostility among prisoners to be of much help.

The DCS representatives tend to view the visits as a chore, while the community representatives are quite enthusiastic and there is genteel competition for a place on the committee.

Prisoners view the visits with anticipation and a good deal of anxiety. The interview, which lasts an average of twenty minutes, is their most tangible contact with the powers that control their daily lives. It is through these interviews that those daily lives are most able to change for the better by reduced security classifications, moves to other gaols and increases in freedom.

Discussions with the superintendent and staff always precede the interviews with prisoners. The worth of these varies according to how well the prisoners are known.

Expert opinion

The Board seeks expert opinions, wherever it can from education officers, psychologists, custodial staff, welfare officers, chaplains and anyone else with a knowledge of the prisoners. Some gaol staff lose objectivity when they work closely with prisoners tending to become advocates for the prisoners rather than dispassionate observers and assessors. The Board is aware of this and will discount an opinion it feels contains too much advocacy. It is accepted, however, as just another human facet of gaol life. An involved, advocating opinion may still present a previously unobserved side of someone.

Psychiatric opinion is relied upon quite heavily. The Board uses a number of psychiatrists to assess prisoners, in the same way as a court. If there is some aspect of the crime that seems beyond reasonable explanation, or if it is felt that a psychiatric assessment of the prisoner would provide useful insights, then a psychiatrist is engaged. The prisoner's agreement is always obtained.

These reports, from experienced forensic psychiatrists are usually helpful but, of course, they come with no guarantees. It is interesting to note that there is a degree of predictability in the reports. Psychiatrist A is usually more pessimistic than psychiatrist B. There is a danger that an opinion may be sought from a particular psychiatrist because the Board will be told what it wants to hear.

There are no answers in dealing with serious offenders, just lots and lots of questions and guesses which are, at best, informed.

Right to be heard

It is perhaps a measure of the Board's success that, overwhelmingly, the movement of serious offenders through the system is, by way of ever increasing freedom, to release. There are times, however, when that movement for certain individuals is interrupted and even reversed.

When the rules are broken, the Board insists on resolving the matter, by way of a charge. If misbehaviour is to be dealt with by a major step back, such as a move to a higher level of security, the Board always asks the

prisoner, usually by letter, to say why it should not happen, before it happens. In at least one case, where the man concerned was barely literate, the Board deferred any action, until the visiting committee had heard what he had to say on the matter.

The right to be heard extends to formal oral hearings, before a licence is to be varied unfavourably or, in the ultimate disaster for a licensee, revoked. None has been held by the SORB; a few were held by the ROLB.

A1 Program

The security ratings used in New South Wales prisons are:

- Maximum A1
- Medium B
- Minimum C1, C2, C3

Almost all maximum security prisoners are classified A2 and until recently A1 was so rarely used that it was virtually unknown. Its revival does not represent a return of the Visigoth style of custodial management but is a recognition that Visigoths sometimes lurk among the prison population and need to have a humane, systematic way of management. A program of this type is in operation at Goulburn. It houses the prisoners austerely but not brutally and rewards their improving behaviour by increasing privileges and more pleasant surroundings.

Prisoners classified A1 are reviewed more frequently than others and are not locked away and forgotten. It is, nevertheless, a very secure, highly directed existence, devoid of the daily comforts and opportunities for social interaction available in normal maximum security life. The Board does not run the program but has some of its serious offenders in it.

Open meetings

The Act provides for 'proceedings before the Board to be open to the public' except in special circumstances. The probable intention of this was to cover oral hearings but an adventurous chairperson interpreted this more widely and, as a result, all meetings of the Board are open to the public.

The Board's first meeting took place in the presence of television cameras. Media interest and attendance have been sporadic. Occasionally relatives of Board clients attend and, more rarely, relatives of victims. Sometimes such a person has asked to speak; this has usually been allowed. However, most meetings see the small public gallery empty. Interest seems to increase in proportion to secrecy.

Advantages of the Serious Offenders Review Board

Independence

It is not possible to overestimate the value of the Board's independence. The Prisons Act gives the Board its independent existence and by regulation sets out its rights and responsibilities. The Board guards those rights and responsibilities jealously and is not afraid to assert them when gaol administrators ignore them.

The assertion of the independence it always held (as SORB or ROLB) has increased in the last few years. Before this time, it seemed the Board was viewed as an appendage to the prison system, rather than a vital part of it. Some resurfacing of old practices, by the 'shanghai' and increases of classification without reference to the Board, was recently met with strong Board reaction.

The 'shanghai' is a sudden transfer of a prisoner, regarded as troublesome, from one gaol to another. It often followed allegations of misbehaviour, which were never resolved by charges.

The Board's independence is enhanced by powers similar to those of a royal commission. It can call people to give evidence, require the production of material and inform itself in any way it sees fit.

Judicial leadership

At present, the chairperson and deputy chairperson are retired District Court judges. Until 1987, neither judge in these positions with the ROLB (not the same men who now head the Board), was retired. The time they could devote to Board work was limited and visits were hurried affairs compressed into two exhausting six week periods each year.

Retirement means that true leadership can be exercised by the current chairperson who has had the time to go through the Prisons Act and Regulations with great deliberation, finding rights, obligations and privileges previously not thought available.

Outside input

More than half the Board's members come from outside DCS, are therefore free of gaol culture and not tainted with the tendency to see everything the departmental way. They bring a range of views and experiences to the Board which influence their relationships with prisoners and each other. They are realistic and pragmatic. This outside membership is a vital part of the Board's constitution and is also responsible for a large measure of its success. In dealing with serious offenders, doctrinaire approaches or those that are just part of the usual DCS processing are not always the best. Outsiders bring freshness and so long as their ignorance of gaols is not exploited, a different point of view combined with legally protected independence can be powerful.

Intimacy

The Board comes to know its prisoners very well, with the visits the main way to develop this degree of intimacy. Interviews are informal and sometimes lengthy, perhaps several hours.

Serious offenders are not considered by the local gaol committees or dealt with by the general classification system. Indeed, regulations preclude the local committees from dealing with them and limit the main classification committee to an initial classification and placement only.

In all other management matters, serious offenders interact only with the Board. Apart from the visits, prisoners' contact with the Board is by official gaol application forms, informal letters and telephone calls. The Board staff eschews a formal bureaucratic approach and this further increases the intimacy between Board and clients. The relatively small number of serious offenders (400) and the small staff (four) encourage and facilitate such an approach. Personality and natural inclination are important, as well. Small numbers alone do not guarantee intimacy.

The longest serving Board members, the chairperson and the principal psychologist, know most of the Board's prisoners very well. Names, crimes, backgrounds, hopes, fears and expectations are known. This deep knowledge may also mean that some prisoners feel exposed in front of the Board. There is nothing, however, to show that this has ever been a major problem.

The chairperson, in particular, knows and has access to the most senior officers in the DCS. This has enabled the Board to avoid the trammels of departmental policy, when that policy has been seen by the Board to interfere with its aims.

A recent example illustrates: DCS policy changed to ensure that prisoners liable to deportation were not housed in less than C1 security and were not on work release. The Board took the view that, in some cases, this was an unnecessary precaution. Its careful consideration of each case and independent contact with Immigration authorities entitled it to be satisfied of the correctness of its recommendation that two of its prisoners, who were affected, should proceed to work release. The Director-General agreed with the Board's view. (Liability to deportation does not preclude work. If the person is an illegal immigrant, however, Department of Immigration permission to work is needed). Both men will probably be deported immediately, after their release. The Board's intimate knowledge, gave them a privilege, which policy did not allow other prisoners.

This intimacy has led to considerable success with some particularly recalcitrant prisoners. It would be fair to admit, nevertheless, that a few difficult people remain impervious to the Board. Another example will illustrate:

> M is a very long term criminal in his early thirties. His in-gaol behaviour has rivalled the extent of his law breaking outside. He is very well developed and walks with the menacing, always tense muscles of the gaol 'heavy'. After many years in gaol, M was still in maximum security. His list of gaol offences, major and minor, is very long. M, a man of some intelligence, saw he could not go on forever that way and hope for release, while still young. He wanted to change and was encouraged,

> aided and abetted by the Board to do so. Minor infractions were ignored by the Board, so long as he kept his eye on the prize. A strategic lowering of classification and change of gaol showed the rewards possible and gave further encouragement. M could be frank, astonishingly so at times, with the Board's committee and feel confident that everyone at the gaol would not know about his thoughts and desires. The Board has enlisted the aid of sympathetic gaol staff and M's progress continues and is quickening.

A Supreme Court judge, who is aware of the Board and its work, canvassed the idea of sentencing a newly convicted drug importer to an 'old' life sentence (the convicted man's committal date gave the judge this option), because of the advantages of the Board's close attention. He eventually imposed a determinate sentence.

Special successes

The Board has enjoyed success in the sometimes murky world of prison operations, where punishment by administrative action, following nothing more than rumour and innuendo is not unknown. The most notorious of these has been the 'shanghai'—the sudden, speedy move from one gaol to another, sometimes accompanied by an increase in security classification.

The Board concedes that the occasional 'shanghai' is necessary, but it insists upon its regulated right to be consulted and to recommend the move beforehand. After a few memorable confrontations and threats of dire action, the Board is now contacted first and the permission of the chairperson or deputy or one DCS member and a community member, according to availability, is sought. It is not always given. The permission is ratified at the next meeting and finally submitted to the Director-General for approval. The Board accepts that an emergency might impel a superintendent to move the prisoner before the Board can be contacted but believes that such instances should be rare.

If misbehaviour is alleged, the Board insists that it be resolved by charging the prisoner with an offence. A not guilty decision is accepted as meaning exactly that. If charges are not laid, innocence is presumed. This attitude increases prisoner confidence in the Board, as they can be sure that the Board will not give serious consideration to anything that is not proved.

The Board has also enjoyed success in ensuring that its prisoners subject to segregation orders have been fairly treated and that the orders do not last longer than necessary. The Board's success here arose partly from the inexperience of its community members. The segregated prisoners were held in such isolation that the community members found the experience of interviewing them distressing. Those familiar with gaols are somewhat inured to the inevitable indignities of some aspects of prison life. It was partly as a result of the distress felt that the segregation orders were reviewed and eventually removed.

The Board is likely to have responsibility for segregated prisoners added to its already long list of duties.

Disadvantages

Legal weight

There are three lawyers on the Board, two of them retired judges. Lawyers do not always view the world through the same prism as the rest of humanity. The disadvantage is not really in the nature of the men themselves or their calling, rather it lies in their influence and effect upon the other Board members and the Board's clients. Without obviously meaning to, the lawyers tend to dominate discussion and intimidate other members with their knowledge, argument and sometimes, very presence.

Judges, especially richly experienced ones, are used to dominating their courtrooms and interrupting at will, interruptions which are met in court with instant silence. When this occurs in a meeting, the effectiveness of open discussion is diluted; during interviews with prisoners, it can destroy the communication that should take place. The presence of lawyers and their abhorrence of silence exacerbates a tendency that is present in the very structure of any Board.

Slowness of response

The Board meets only once a month, and the agendas are crowded. This means it can take months before a particular application is finally dealt with and decision made by the Director-General on a Board recommendation. The chairperson or deputy, or a DCS member and a community member, can provisionally consider any urgent matters.

The problem is not major, as assiduous staff efforts have managed to have the rest of the world turn in time with the Board. As Board clients come to understand the process, the need for time in considering any request is understood, if not always accepted. More frequent meetings would mean the Board was in danger of becoming a smaller version of the Department and this might compromise the special relationships it has built up.

Cost

The Board must be paid for out of the Department's budget. In 1990-91 its allocation was $250,000, including the salaries of its four full time staff members. That is about the cost of an ordinary house in parts of Sydney, and only a very small portion of a Departmental budget of about $150 million. Increases in prisoner numbers and an increase in staff by one will see that $250,000 rise but not by much.

The cost of the Board is low when its contribution to the management of serious offenders is taken into account.

Inexperience

Most of the Board members are inexperienced in prison matters. This was discussed above and seen as a strength, but it can have its weaknesses. The

likelihood some prisoners will be duplicitous and show only their very best behaviour to the Board is not always appreciated.

The desire to feel good by pleasing the prisoner sitting across the desk and who is making a nervous application is immense and very human. The Board as a whole, does not always agree with the recommendations of a, perhaps, over-enthusiastic visiting committee. When this happens, prisoners sometimes feel betrayed or, at least, let down.

Conclusion

Though not all serious offenders are violent and not all violent offenders are serious, New South Wales has placed a high profile, statutory Board in charge of all prisoners who are defined as serious because of their crime or the length of their sentence. This Board has worked at gaining the trust of its prisoner clients and the confidence of DCS administrators and prison staff. However, trust and confidence do not reside permanently with every prisoner, administrator and staff member and, as can be expected, criticism, resentment, impatience and exasperation sometimes flow in the Board's wake. It would be fair to say, however, that trust and confidence are overwhelmingly features of the Board's operation. The dissatisfaction which occasionally arises is not surprising and emphasises that the Board is operating well.

The twin themes of independence and intimacy enable the Board to engender trust and confidence. The Board's independence is its most valued asset, allowing it to carry out its task without fear. It can and does confront unfairness and unsatisfactory treatment, wherever they are found in the prisons. The Board is not seen as just another part of the prison system, thus giving prisoners the confidence to allow a degree of intimacy, the Board's other strong asset.

It has been said that everything has been tried in the field of prisons, that nothing works very much but everything works a little. The Serious Offenders' Review Board works more than just a little.

CANBERRA'S FIRST FORENSIC INSTITUTE FOR REHABILITATION SERVICES AND TRAINING

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Background: Problems Facing Australian Capital Territory Corrective Services

THE AUSTRALIAN CAPITAL TERRITORY (ACT) IS THE ONLY STATE OR territory in Australia that has no prison. Before trial, those accused in the ACT are held in a remand centre. There they spend boredom filled days, grateful only that it is thought to be better than what awaits them in Sydney or Goulburn.

Whatever the advantages of necessity and convenience that flow from this contemporary traffic in felons, there are drawbacks which prompt this paper. Firstly, once the prisoners enter New South Wales the ACT jurisdiction over them virtually ceases to exist. Specific directions from the bench seem to carry very little weight. Not only may the judge's special conditions or recommendations be ignored, they may not even be received by the New South Wales authorities if the relevant documents fail, for a variety of administrative reasons, to reach them. Likewise the ACT Department of Corrective Services has no control and seemingly little influence over the management of our prisoners in New South Wales institutions.

Second, legislative changes to the New South Wales sentencing system affect the fate of ACT prisoners, irrespective of the attitudes of the people and government of the ACT. The *Sentencing Act 1989* (commenced 25 September

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1 Chris Lidgard, Harry Lidgard, Hugh Selby and Andre Zagonski also contributed to the compiling of this paper.

1989) abolished the remission system in New South Wales. As all custodially sentenced ACT prisoners serve their sentence in New South Wales, there is now no remission applying in the ACT either.

Early data on the effect of the 'truth in sentencing' policy indicates a rise in the New South Wales prison population from September 1989 to April 1991 from 4,692 to 5,741 while the number of ACT prisoners resident in New South Wales increased from seventy-two to ninety-five.

As of 30 June 1991 there were 113 ACT prisoners (104 males and nine females). Of these, five females and nineteen males were at the ACT's Remand Centre while the rest were spread across New South Wales, with most to be found close to Canberra, at Goulburn, Mannus and Cooma. As elsewhere in Australia, the clear majority of ACT prisoners are males aged between twenty and thirty-four. Most were born in Canberra, New South Wales or Victoria. None were identified as of Aboriginal descent. Their common offences are robbery and theft, sex offences, assault and homicide. Not surprisingly drug offences—possession, supply and manufacture—are an increasing component.

Over one-third of ACT prisoners are classified as maximum security but it must be pointed out that detainees held in the Belconnen Remand Centre are routinely classified as maximum security. When adjustment is made for this, fewer than 20 per cent of ACT prisoners in New South Wales have been classified as maximum security.

Whereas in past years most ACT prisoners had less than twelve months to serve (as of 30 June census each year) in 1990 the greatest number had more than two years to serve. All indications are that numbers in prison will continue to rise, despite the fact that the ACT has the lowest imprisonment rate in Australia.

As for non-custodial sentences, there has been a clear increase in the number of persons serving community service orders over the past two and a half years, a slower increase in the use of probation and a declining use of parole.

Females constitute over 13.5 per cent of the total (54 out of 397 as at 30 June 1989) serving orders, in contrast to those serving terms of imprisonment. Drug offences, theft and breaking and entering were the major offences with violence constituting only a small element of the total.

Both groups of ACT convicted persons—custodial and non-custodial—show higher rates of employment and higher levels of education than the national average, but unemployment and incompleted education are still significant and important factors needing attention, both being much higher than for the general population.

The commonest kind of special condition attached to sentencing by judges and magistrates was a direction to receive drug, alcohol or psychiatric treatment.

It is the mentally ill convicted person, sentenced to a term of imprisonment who fares the worst in the ACT system. The tragic case of Kieran Sen illustrates how the mentally ill are poorly served as a result of placement in the New South Wales prison system. Sen was a chronic schizophrenic who had been mentally ill for some years. He had been admitted several times to the local psychiatric unit and, despite a concerned and caring family he was frequently itinerant.

In October 1989 he was apprehended by police after being found in the kitchen of a university residence. Some days before, a female resident had been attacked in her bedroom, the assailant placing a pillow across her face. Sen was interviewed and confessed to the offence. Later he denied charges of attempting to suffocate and inflicting bodily harm with intent to have sexual intercourse. Despite the testimony of three psychiatrists that he was mentally ill (and indeed thought disordered and delusional) at the time he was interrogated and despite conflicts of corroborating evidence, a jury found him guilty. Before sentencing, frantic attempts were made to secure him a place in an appropriate psychiatric institution in New South Wales but this was refused because of his status as a convicted person.

Admission to a suitable treatment centre in the ACT was obtained but the authorities could not guarantee custodial care. The presiding judge decided the offence was too serious for anything but a custodial sentence. Sen was given seven years imprisonment with a minimum period of four years to serve. He was taken to Goulburn gaol and was homosexually raped the day after his arrival. On the next day he hanged himself.

This case, and the shortcomings of the system, spurred the appointment of a Corrections Review Committee which is now grappling with the task of designing a better system.

Introduction

This paper outlines a proposal that may cut the knot in Canberra's long standing inability to look after its own prisoners, especially those who may benefit from psychiatric and/or psychological intervention. The concept is that the ACT should set up a special purpose system in which both most of its own and prisoners from elsewhere in Australia can be assessed and treated. By aggregating numbers there will be sufficient clients to pay for specialist programs, to employ properly qualified and experienced staff full time, to encourage research and to provide training so that the numbers of skilled forensic practitioners are increased around the country.

There is a hierarchy to all service provision and criminals—both convicted and accused—tend to be on the bottom of the list, regardless of the causes of their deviancy. Among the health services, spending on mental health runs a poor second cousin to other more 'glamorous' projects. The late twentieth century does not offer political glory for the building of institutions in which to help those who need to control their demons or who are simply unable to cope. Funding to provide trained psychiatrists, psychologists, other counsellors and social scientists comes a very poor second when the schools teaching numbers, nurses and police budgets are clearly more politically significant.

The judiciary may call for special treatment of particular prisoners. It may make remarks about the problems of sentencing, especially when there is an ever changing landscape of politically inspired 'administrative tinkering', but the truth in sentencing is that once the prisoner enters the system all the sermons and entreaties from the bench are as nought: the system delivers as much or as little of whatever it has, when and how it wants.

The ACT is not alone in its lack of services for adequate assessment, treatment and follow up of accused persons and prisoners: it seems to be a national problem. However, there is a way in which the capital can offer a solution which benefits both its local prisoners and others from elsewhere in the country—it is a program which tries to make the best of Canberra's geographic position and the money which has been spent there to make it a national centre.

As in the School without Walls (ACT School), the authors believe that good staffing is more important than purpose built structures, and that we can establish programs that work in existing buildings and then, after a few years, design places which accommodate proven programs and philosophy for people coming from around the country.

Target Groups

While what the accused did must be the focus for the police and sentencing, it is merely one of a number of factors that others must consider. Other matters are relevant to assessing a prisoner and forming a view about whether there are any services or specific arrangements which should be made to treat a condition or to ensure that the period of incarceration has some positive effects for the prisoner. When classifying prisoners for particular rehabilitation programs it is the prisoner, not his past deeds, which is the more important.

A report from a recent psychiatry symposium in Townsville (*The Australian*, 30 September 1991) notes that a recent study in Victoria found prisoners had a higher rate of mental disorder than the general community and that 21 per cent had had contact with psychiatric care before their gaoling. But most of the mental disorders were due to substance dependence and almost 70 per cent of the prisoners were substance abusers. However, severe mental disorder apart from substance addiction was 'relatively uncommon' with only about 6 per cent ever having been diagnosed as psychotic.

One significant change would be to recognise that proper assessment and the opportunity to take part in programs should be open to all prisoners before trial, not only after conviction. For some accused there is already a de facto system of this sort. For example, in the ACT, persons who are drug addicts may be given bail on condition that they reside at a particular drug program location. If they comply with that condition and are then found guilty or plead guilty to the commonly related offences of theft and fraud, then the sentence will likely be less than if they uselessly sat out the weeks or months before trial in the remand centre.

But apart from the drug rehabilitation programs there is very little assessment or treatment program available. The ACT remand centre does not have suitable interview facilities for a psychiatric or psychological assessment. Private practitioners request staff to bring remand prisoners to their consulting rooms so that the assessments can be done in a proper environment.

There is not only a lack of appropriate facilities; there are also too few properly trained practitioners. The problem has been illustrated this year by the fate of men who have been held in remand for alleged offences arising out

of domestic violence or the threat of it. In one example the accused's wife moved out, leaving him to look after several children. There was no history of domestic violence. The accused made several unsuccessful attempts to persuade his wife to return. After the last of these he sat in his car and drank a good portion of a bottle of Scotch and was found sitting there by a police patrol. The police took him to the watch-house where he scribbled on a piece of paper that he would end it all for him and the family. The police viewed this message as a threat to kill—a view which was shared by the magistrate who remanded him in custody for two weeks for psychiatric assessment. No assessment was arranged and the man sat, unassisted, until his next court date, when he was again remanded in custody.

It was quite obvious that if the man was in need of care, then the remand centre was not the appropriate place to keep him. But the system entirely failed to provide him with even minimal support and the case rather starkly shows how the line between criminality deserving of punishment and calls for help can be misplaced. His lawyers succeeded in getting him assessed by a private forensic psychiatrist and only then was he released on bail.

As a community we need a better system for promptly and thoroughly evaluating those in custody, both before and after trial. It would be a good investment for government to fund a research program to demonstrate just how much money could be saved by better and earlier assessment which could assist rehabilitation and determining release.

Among the prison population there are a number of groups for whom forensic psychiatry, psychology and counselling is relevant. The manner in which these prisoner and diagnostic groups may be listed can say much for the perspective of the author of the list. As the authors of this proposal are a multidisciplinary group, and a majority are or have been public servants, this list is alphabetical: Governor's Pleasure prisoners; juvenile offenders; mentally ill prisoners; organic brain damage; personality disorders leading to dangerousness; recidivist through institutionalisation; sexual offenders (the paraphilias); substance dependent/abuser groups; and, women with infants. The diagnostic categories relate to those in the *Diagnostic and Statistical Manual* (American Psychiatric Association 1987).

Types of Programs

We contend that a range of services should be offered selectively to accused and convicted prisoners in the belief that such services will benefit some of them, their families, and the community. Such benefit can be assessed by studies which examine not only outcomes such as lower rates of recidivism but also examine the costs of inputs such as comparing the costs of maintaining adequate levels of gaol security before and after implementing the kind of programs that we suggest. For example, would successful programs mean that more prisoners could be housed in low security residences, with substantial cost savings.

Obviously, a starting point is to evaluate how useful is early assessment of prisoners. Hence, would forensic assessments done routinely on persons in remand provide better information to a sentencing judge? Will it help both

the sentencing judge, the corrections administration and the community if offenders have already begun or even completed specific programs prior to sentencing? One would think the answer to each question is that such assessment and program involvement would help, albeit some rather more than others.

We recognise that such intervention pre-trial raises legal issues about voluntariness, whether the Crown can use such information at trial, privacy, and the possibility of remand prisoners manipulating such assessments. However, these problems can be resolved, particularly given that no action leaves the stark reality that remand is just prison by another name, just as ugly, and no less destructive of spirit.

Precisely what problems should receive priority is a function of interest and cost.

The Advantages of an Australian Capital Territory Site

The ACT is not alone in having inadequate assessment and treatment programs. Pragmatically there are insufficient resources to fund training, evaluation and treatment across the country. However, there must be sufficient resources to fund one training centre with all the practical offshoots of that.

Let us look at what opportunities already exist within the ACT. The Australian Institute of Criminology (AIC) is based there. This must surely be a good arrangement for having its experts doing fieldwork in the backyard. Both Monash University and the University of New South Wales have formal links with tertiary institutions in the ACT. Both universities have now appointed professors of forensic psychiatry and Monash has the only forensic psychology course in Australia. These universities have schools of social work. All these courses need practical placements and all could contribute, not only to assess clients, design, implement and evaluate programs, but also to conduct long-term, valuable research.

There are other bodies in Canberra which could play a significant role, including the Research Schools at the Australian National University, National Health and Medical Research Council, National Centre for Epidemiology and Population Health and Australian International Development Assistance Bureau—to take an international perspective.

Apart from the opportunities to put more of our tertiary sector to immediate practical use, the ACT also offers a very high standard of infrastructure, especially in transport links, communications and human services.

Because of the excellent road and air links the New South Wales, Victorian and even Queensland authorities might be persuaded that economics and social justice are both well served by using a Canberra based facility. Though distance may mean that users are not sent from other states, those states may wish to expand the numbers and skills of their forensic practitioners by sending clinicians to work in the proposed institute.

To test this proposal, a feasibility study might be commissioned from the Australian Institute of Criminology (AIC) and the Australian Institute of Judicial Administration (AIJA). The study should include a survey of possible populations which might benefit from these services, starting perhaps with

violent offenders. Some valuable work in this area has already been done by David Biles, Deputy Director of the AIC, for the ACT Corrections Review Committee. His work, and that of his assistants, is gratefully acknowledged as the source of the statistics quoted earlier in this paper.

The current interest in violence, as evidenced by this conference, the Report of National Committee on Violence (NCV 1990) and the work of the National Committee on Violence against Women (NCVAW) could be advanced by this practical proposal.

Undoubtedly, it is also an advantage that the Territory does not have one or more large gaols—so there is no investment in maintaining some relic of the past. However, as Canberra gets used to the 'user pays' consequences of self-government, there are vacant small buildings which could be adopted to the task such as recently closed schools.

What is Next?

The contributors to this paper are pragmatic, even phlegmatic about prisons policy. If this idea is to go any further then other, more powerful interests are going to have to become its champions. Perhaps the universities will see the opportunity, perhaps the ACT Government will be brave enough to be innovative, or perhaps the private sector will do its own feasibility study and decide that raw economics makes investment in a low security, program oriented, facility worthwhile.

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A RELAPSE PREVENTION APPROACH TO REDUCING AGGRESSIVE BEHAVIOUR

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THE TREATMENT OF VIOLENT BEHAVIOUR PROBLEMS OVER THE LAST TWO decades has increasingly utilised a cognitive-behavioural approach. Relapse Prevention (RP) (Marlatt & Gordon 1985) is a variety of cognitive-behavioural intervention which is gaining increasing currency in the area of violent behaviour, including sexual offending (Pithers 1990) and domestic violence (Jennings 1990). Given the situational and emotionally charged nature of much violent behaviour, a core advantage of RP approaches is that they help the individual avoid situations in which violent behaviour has proved likely to occur, rather than trying to modify the behaviour itself or 'cure' the psychological problems presumed to underly it.

An RP approach is highly suitable for use in a correctional framework. Philosophically, it is consistent with a system which focuses on the offender's criminal behaviour rather than their therapeutic needs, and which elects to retain an emphasis on the offender's continuing responsibility to be actively involved in a search for alternatives to offending behaviour. Strategically, a RP approach does not require high levels of clinically skilled personnel and can hence be 'mainstreamed' in the context of a sentence management approach to correctional programming. It is also able to be flexibly resourced, using a balance of departmental and contracted services.

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1 The views expressed in this paper are those of the author and do not necessarily reflect those of the Western Australian Department of Corrective Services

Issues and Approaches in Reducing Aggressive Behaviour

The cognitive-behavioural approach

The psychological study of aggressive behaviour has a rich history, towards which most major schools of psychological thought have contributed (Geen & Donnerstein 1983). As a result, aggressive behaviour as a clinical problem has been viewed and treated in a variety of ways. From this variety, however, there has arisen a strong tendency to see aggressive behaviour as arising via a social learning process (Bandura 1973) and to approach the clinical treatment of aggression via a cognitive behavioural approach which developed from Novaco's (1978) work and which is probably best currently exemplified in the work of Arnold Goldstein and his colleages (Goldstein & Keller 1987; Goldstein 1988).

In general terms, the cognitive-behavioural approach emphasises that many behavioural problems are maintained by maladaptive cognitions (attitudes, beliefs, interpretations, assumptions, and so on) and thus helping the client develop more appropriate cognitive skills and habits will reduce the problematic behaviour. Of course, new cognitive skills and habits need to then be integrated into adaptive behaviours, often via a process of behavioural skills training.

There are a wide variety of clinical strategies that can assist in this process of cognitive change, but they mainly fall under one of two categories; problem solving training and cognitive restructuring. In relation to modifying aggressive behaviour, cognitive skills training primarily contributes to more effective arousal control (Novaco 1978) although styles of reasoning and cognitive problem solving that provide the client with training in 'moral reasoning' (Kohlberg 1976) can also be included (Goldstein 1988). These cognitive skills are integrated into the behavioural level via behavioural skills training, where clients learn prosocial ways of managing typical situations that have the potential to elicit aggressive behaviour, for example asking for help, making a complaint, accepting a criticism, and so on. This approach to helping clients to modify their aggressive behaviour can be used in an individual or group format and has a substantial research and practice basis to affirm its effectiveness (Goldstein & Keller 1987).

Motivation to change

When these aggression management strategies are applied in a correctional framework it is common to find that the client population has not necessarily come to the conclusion that they require this 'help'. The forces that motivate them to engage in an aggression management program may be complex, and include feelings of frustration or failure in relation to a conviction for a violent offence, feelings of genuine regret and victim empathy, or knowledge that the Parole Board and/or Prisoner Placement Committee will require evidence that they have 'addressed the factors underlying their offence' prior to granting low security placement or conditional release. This problem is not confined to correctional work since many clients approach therapy with mixed feelings but it is an issue that requires early clarification.

Probably the best model currently available to address the issue of the motivation of aggressive offenders to be involved in a treatment program is 'motivational interviewing' (Miller & Rollnick 1990) which builds on Prochaska and Diclemente's (1986) model of the process of therapeutic change. In simple terms, the approach sets non-directive counselling skills in a framework that invites the client to assess the relative costs and benefits of their current problem behaviour and to make a personal assessment of the degree to which that behaviour is a problem for them, and hence the degree to which they are motivated to enter into the change process. Experience so far suggests that this model sits well with aggressive offenders who are characteristically ambivalent about entering an aggression management program.

Dimensions of aggressive behaviour

A major challenge in developing programs for reducing aggressive behaviour is the enormous variety of forms that such behaviour can take. The majority of referrals to such programs tend to be in response to what has been called reactive (or 'angry') aggression (Zillman 1979). This is the type of aggression which results from a process of escalating anger and perceived loss of control (the 'short fuse' syndrome). In contrast, aggression which is used to achieve some objective (for example, in armed robbery) is referred to as instrumental aggression. Where reactive aggression is the problem, anger management programs are generally seen as the most appropriate cognitive behavioural interventions (Howells 1989) although Goldstein's broader program also targets people who are reactively aggressive.

In the case of instrumental aggression it is usually assumed that the intervention must focus on helping the client develop other ways of securing rewards (usually money) from the environment and/or moderating their requirements (for example, by overcoming their drug problem). Since the clinical strategies required to assist reactively and instrumentally aggressive individuals are likely to be quite different, this presents problems in program development.

Another significant clinical dimension arising from research with violent offenders is that some of these offenders seem to resort very readily to aggressive behaviour. These individuals are referred to as being 'undercontrolled' and characteristically have offence records including several if not many assaultive offences. At the other end of the spectrum are the individuals who are often perceived by others as somewhat passive and 'laid back' but who in reality bottle up their angry feelings to such an extent that they may eventually explode into a sometimes murderous assault. These individuals often do not see themselves as being aggressive and will therefore resist involvement in an aggression management program.

The distinction between sexual and non-sexual violence is legally clear but many sexual assaults seem to have more to do with motives like power, control and anger than with sexuality as such. Programs for 'sex offenders' nevertheless bring together such diverse offenders as violent rapists and incest offenders, whilst drawing a line between less obviously different offences such as a violent rape and a violent non-sexual assault on a woman by a man.

This heterogeneity within the broad category of violent offences and behaviours requires that a program for aggressive offenders be able to cope, at least at an intake level, with a range of referred behaviours. Having emphasised the variety of aggressive behaviours it is also necessary to acknowledge, paradoxically, that programs for offenders as disparate as rapists and incest offenders contain significantly common elements, so to design a separate program for each subtype of aggression would be redundant and needlessly expensive. A major advantage of the relapse prevention approach, to be outlined below, is that it has some capacity to address this difficulty.

The Relapse Prevention Approach

Relapse Prevention (RP) is a variety of cognitive behavioural approach originated by Dr. G Alan Marlatt and his colleagues from the Addictive Behaviours Research Centre at the University of Washington (Marlatt & Gordon 1985). It now has a substantial research and practice base and in addition to the area of addictive behaviours, in which the approach was developed, it has been applied to other problems of impulse control such as overeating and gambling as well as a variety of sexually aggressive behaviours such as rape and child molestation (Nelson et al. 1989) and sexual aggression generally (Pithers 1990). Jennings (1990) has suggested that the RP approach is applicable to domestic violence. The RP model has clear applicability to aggressive behaviour generally and is outlined in that context as follows.

Underlying assumptions

Probably the key concept in RP is that rather than attempting to address the psychological issues presumed to underly the client's aggressive behaviour, RP helps the client to recognise the sequence of behaviours that typically lead to aggression, identify the situations in this sequence that represent a particularly high risk of aggressive behaviour and develop better ways to cope with these situations so that aggression is avoided or circumvented.

In this sense RP is a behavioural self-management program which helps the client achieve and maintain a reduction in their aggressive behaviour rather than 'curing' some underlying psychological problem. This approach engages the aggressive client as a co-therapist, giving them the primary responsibility for making changes. Reduction of aggressive behaviour is seen as a learning task that involves acquiring new skills.

RP is based on three key assumptions about behaviour change (Daley 1989) which, in the context of aggressive behaviour may be expressed as follows:

- The initial causes of aggressive behaviour (that is, what made the person develop a tendency to frequently resort to aggressive behaviour) and the process of behaviour change are governed by different principles. This means that it is not necessary to know exactly how aggressive behaviour developed in the first place in order to change it now.

- Changing aggressive behaviour involves three distinct stages:

  Stage 1—Making a commitment and becoming motivated to change: In its original form, RP applied to clients who have made a 'voluntary' choice or decision to change. It is only more recently that it has been applied to people who have been forced into treatment or abstinence (for example, by court or employer referrals). No change is likely, however, unless the client wants it. As was noted previously, techniques of 'motivational interviewing' (Miller & Rollnick 1990) are useful to help involuntary clients come to a clear decision about whether or not they are committed to reducing their aggressive behaviour.

  Stage 2—Implementing the change: RP uses the widest possible range of intervention strategies at this stage, including the variety of cognitive behavioural strategies outlined previously, and set out in more detail below. A clear distinction is made between this 'treatment' phase (when new coping skills are learned) and the 'maintenance' phase (when the new skills must be consistently applied in order to maintain control over the aggressive behaviour).

  Stage 3—Long-term maintenance of change: Achieving a long term reduction in aggressive behaviour is an ongoing challenge. Changes of job, family problems and other life events will all bring stresses and the accompanying temptation to use aggressive behaviour as a coping strategy. Aggression management is very much a lifelong process and many workers emphasise that adopting a balanced lifestyle is an essential supportive and coping strategy.

- The biggest problem in achieving long term success lies in the maintenance phase. In other words, it is easier to learn new coping skills than to maintain and apply them over a long period. Research demonstrates that the largest amount of variance in treatment success is attributable to this maintenance phase (Marlatt & Gordon 1985).

Lapses and relapses

Given that the aim of aggression management programs is to achieve a long-term reduction in aggressive behaviour, if a client of such a program resorts to aggression on a particular occasion this would be termed a 'lapse'. RP emphasises that a lapse is not a 'relapse', which refers to an ongoing reversion to previous levels of aggressive behaviour. A lapse must be construed as a warning that current coping skills are deficient in particular ways and as an invitation to review them and improve their adequacy.

The client's reaction to a lapse into aggressive behaviour will be a crucial determinant of whether a full-blown relapse will occur. The client who lapses must be seen as a person at a 'fork in the road', one path leading to the former problem levels of aggression, the other path leading toward positive change. According to this model, a lapse represents an opportunity for growth, a useful learning experience.

The relapse process

When an aggressive client decides to enter a program they declare their intent not to behave aggressively. As their day-to-day life progresses they face many situations and to the extent that they deal with them non-aggressively they maintain a strong sense of control. Some situations, however, present them with a sequence of events and responses that brings them closer and closer to a 'high risk situation' in which aggressive behaviour will be very hard to resist. If the person does not realise where this sequence of events is leading, or does not have adequate coping skills to deal with the high risk situation when it arises they may lapse, that is, behave aggressively.

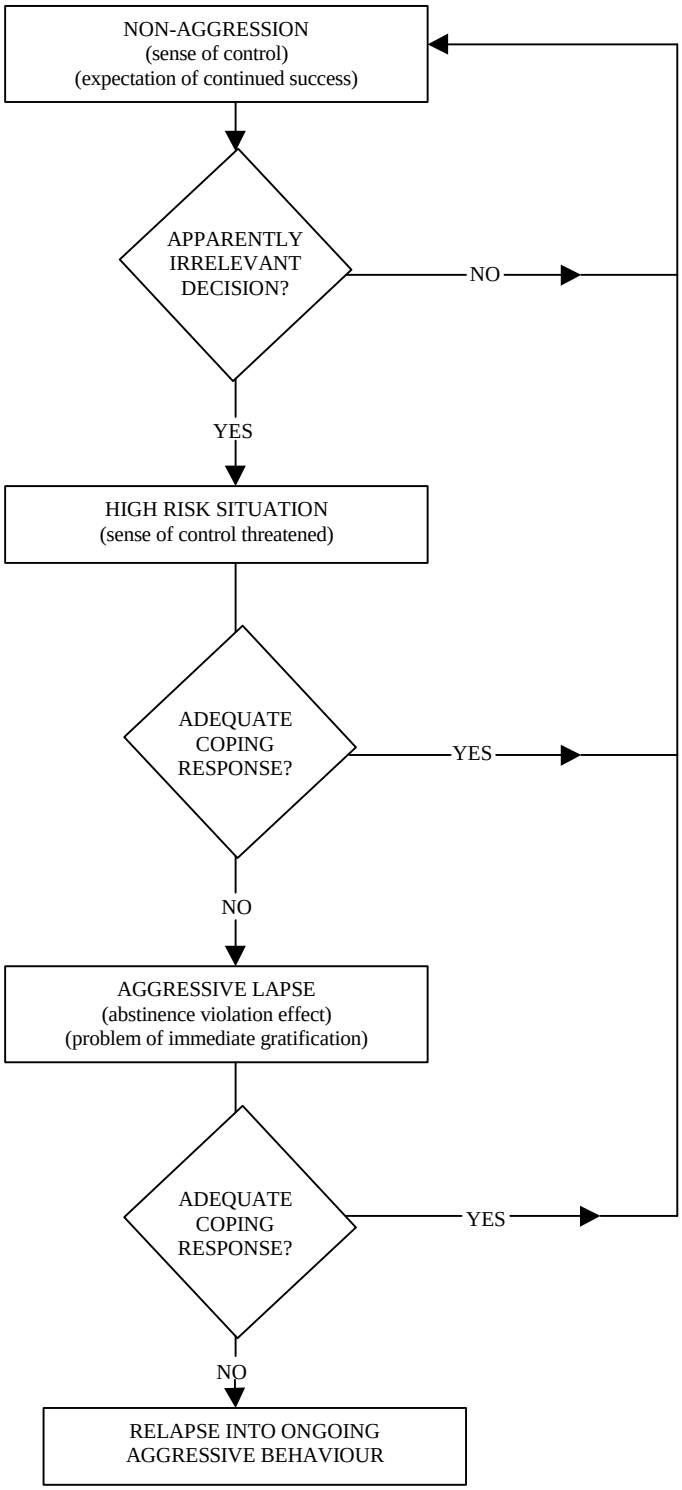
This lapse is likely to result in the person experiencing a complex mixture of thoughts and feelings. They may think that they have failed themselves and that they are 'no good'. They may feel disappointed, confused, anxious, frustrated or angry, and begin to think that trying to maintain control is just a waste of time, or that the lapse proves that they are just an aggressive person and there is nothing that they can do about it. This reaction has been called the *Abstinence Violation Effect* (AVE) (Nelson et al. 1989) and represents a conflict between the person's previous self-image as someone who can cope without aggression and their current experience of acting aggressively. Clearly, if they do not have the coping skills to deal with these thoughts and feelings they may well go on to a complete relapse, where seriously aggressive behaviour may reoccur.

Another problem that can arise from a lapse is that the power and relief that they experienced in being aggressive may leave them with a short-term 'high'. This is referred to as the *Problem of Immediate Gratification* (PIG) (Pithers 1990). This effect can be powerful and require significant coping skills to prevent it (combined with the confusion involved in the abstinence violation effect) leading the person to abandon their attempts at self-control.

This relapse process is shown in a diagram taken from Nelson et al. (1989) in Figure 1. An additional factor included in the diagram is the *Apparently Irrelevant Decision* (AID). This occurs when the person makes a small decision in the course of their day-to-day life which, though minor and seemingly inconsequential in itself, has the effect of leading the person into a high risk situation. For example, when driving to visit a relative the person takes a route that takes them past a hotel where they will be tempted to pick up some alcohol. In the past, drinking at this relative's house has often lead to arguments and fighting. Their decision to take that particular route is seemingly innocuous but it leads them towards a high risk situation: it is apparently irrelevant, but in reality is highly relevant to their ability to maintain control.

Figure 1

Cognitive Behavioural Model of Aggressive Reoffence



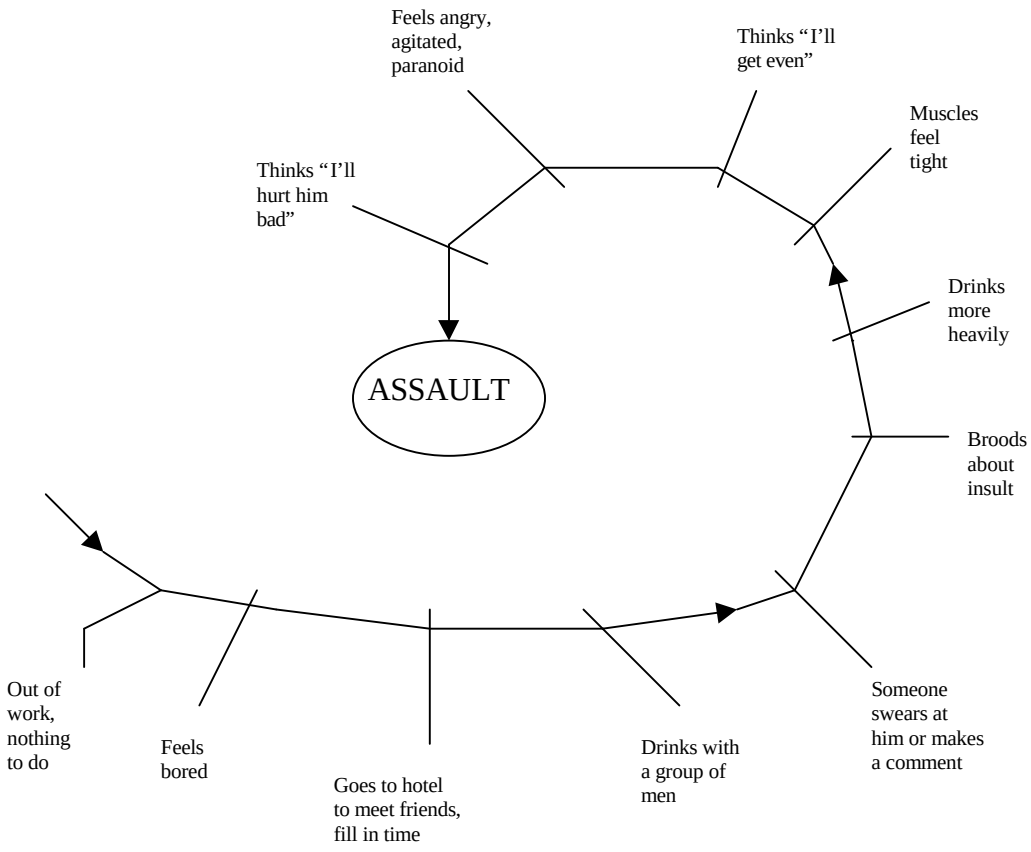
Relapse prevention strategies

The key to relapse prevention is identifying the sequence of events and behaviours that result in a high risk situation. Although high risk situations will vary to some degree there are usually common factors which, for a particular individual, will lead to aggressive behaviour. For example, for a particular person, being criticised or 'put down' in a social situation when they have been drinking may almost inevitably lead to their becoming violent.

In order for the person to avoid situations that are high risk for them, it is essential to identify the sequence of events that lead from life situations in which they are in effective control to situations that pose a high risk of lapse. In relation to aggressive offending, this offence sequence or 'cycle' (since the sequence of events tends to be repeated) will be different for different people, but Figure 2 gives an example of an offence cycle for a young man who has had several convictions for assault. As can be seen from the diagram the long-term antecedents of the assault behaviour include being unemployed, bored and seeking company in hotel peer groups. The short-term antecedents relate to being oversensitive to criticism, brooding, drinking to excess, vengeful thinking and feelings of paranoid anger and revenge.

Figure 2

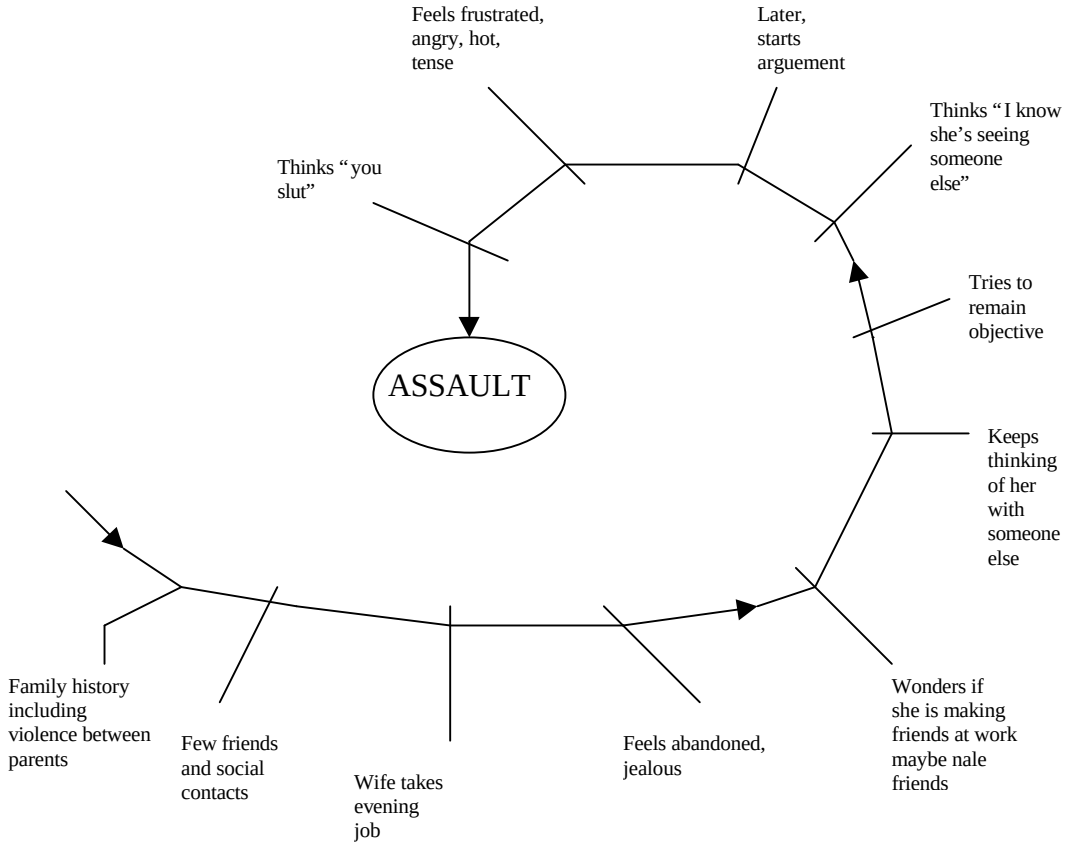
Example Offence Cycle



Another example of an assault cycle is shown in Figure 3. In this case the sequence comes from a man in his late twenties and results in him assaulting his wife. Such assaults have happened twice previously, once resulting in a conviction for aggravated assault. His current charge is unlawful wounding. The cycle shows long term antecedents of growing up in a family where violence between parents was common, a minimal number of friends and a job that involves few contacts with others. The more immediate long-term antecedents involved his wife getting work that involved her being out at night. This led to him feeling abandoned and jealous. He tried to remain objective about the situation but was obsessed by the idea that she was seeing other men. This led to arguments and an increasing frustration on his part. His anger and tension resulted in an outburst in which she was assaulted and injured.

Figure 3

Example Offence Cycle



Effective relapse prevention strategies will be based on three steps. The first of these comprises a detailed *identification of each person's unique offending*

sequence and associated high-risk factors. A detailed reconstruction of their assault cycle may involve self-monitoring records, self-efficacy ratings (self-efficacy is a concept that refers to the degree to which the person feels confident that they can avoid relapse), autobiographical statements, and a review of past aggressive incidents (relapses).

The next step will involve *assessing the coping skills* that will help the person deal adequately with the high risk situations identified in the assault cycle. This can be done via naturalistic observation of the person in an actual problem situation. Self-report, simulations and role playing can also be used effectively as assessment tools.

Once the person's coping skill deficits have been identified an *action plan* should be constructed so as to facilitate the person gaining the skills and information required. These skill and information needs may not all be equally important and they may need to be developed in different situations or gained from different sources. The action plan should be time lined and take these realities into account, with the key needs being prioritised.

When developing an action plan for a particular individual, a range of levels of intervention should be considered, from the specific to the general and covering both the cognitive and behavioural arenas. Some groups of strategies might include:

- Skill training strategies which help people learn to cope with high-risk situations through behavioural and cognitive responses. Dry runs, covert modelling, and lapse rehearsal are examples of useful skill training methods.

- Cognitive reframing strategies teach clients techniques such as alternative cognition, coping imagery, and reframing reactions to initial lapses into aggression.

- Lifestyle interventions, such as exercise or relaxation, are designed to strengthen total coping ability and reduce anxiety and stress. Any input that helps the person manage stress more effectively is useful in this context as is a review of their health status. An action plan could encourage the person to review their exercise habits, relaxation practices, use of drugs or medications, social and interpersonal activities, and religious beliefs. Based on their review of these areas, the client can be helped to include broad lifestyle changes in their action plan.

- Other broadly based interventions include helping the person find and keep a job, develop constructive recreational outlets and activities to promote their health and fitness, and so on. One of the concepts often used in RP programs when considering these broader interventions is the ratio of 'shoulds' to 'wants' in the person's life. The 'shoulds' in this context are the external demands placed upon the person, and the 'wants' are the activities and involvements the person engages in for pleasure and fulfilment.

Servicing the action plan

As was alluded to previously, many action plans will have elements in common, and some of these elements will be able to be provided through community resources (for example, employment and recreational facilities), existing departmental programs (for example substance abuse programs) and existing self-education resources (educational courses and self-development books, audio-visuals, and so on). Although it may be necessary to provide some purpose built programs, perhaps including anger management, the RP model outlined above is potentially extremely cost-effective since it uses the majority of its resources in performing only those functions that are essential to develop an action plan and to service the elements of that plan that are not already available elsewhere. It should be noted that not all RP approaches are structured in this way, and in particular those operating within prisons, without access to broad community resources, often have to provide all major action plan components 'in house'. In addition, some community based programs choose to be self-contained in this way. In programs such as this the RP model becomes the unifying theory around which a series of treatment modules are linked. Such modules would typically deal with interpersonal skills training, anger management, rational thinking and related cognitive skills, avoidance strategies, relapse rehearsal, relaxation training, and positive lifestyle analysis. Some programs go well beyond the cognitive behavioural realm in terms of the modules included, whilst maintaining a RP model as the core of the program.

Applying a Relapse Prevention Model in a Correctional System

RP approaches are particularly viable within a correctional framework. The reasons for this span the areas of correctional philosophy, policy and practice. From a philosophical point of view, there is a growing community impatience with an approach that puts expensive correctional resources into servicing the psychotherapeutic needs of violent offenders at the expense, as it is perceived, of services to the victims. The focus of RP methods on the reduction of violent behaviour rather than on broader psychotherapeutic goals is therefore attractive. In addition, some broader psychotherapeutic approaches tend to see offenders as being themselves the victims of their developmental histories, and thereby imply a lessened capacity for self-determination and culpability. The RP approach maintains a clear focus on the offender as fully responsible for their behaviour and for maintaining their efforts to improve it.

The rehabilitation ideal has taken a battering over the last two decades and in its current form asserts that nothing works for everybody, but that some interventions are effective for particular offender groups (Gendreau & Ross 1987). The RP emphasis on identifying each offender's idiosyncratic offence pattern(s) and identifying what will achieve change for them is consistent with this 'some things work for some people' approach.

It has been suggested that some forms of programs for offenders tend to be built around a somewhat middle class view of the world and therapeutic style. Because an RP approach requires each offender to be fully involved in

identifying the patterns of events and behaviour that does in fact lead to particular offences, and then identify the ways in which these sequences could be coped with in a non-offending manner, there is less room for workers to impose such an imperialistic framework on offending clients.

Since RP methods are so straightforward they can be implemented in a program framework by a blend of staff with varying levels of groupwork and casework qualifications and experience. In addition, the majority of these services can be acquired on a contract basis, with full-time program staff adopting a largely coordinating and training role. This means that the program can be more responsive to changing demands and resourcing levels than could a program using a more traditional team of full time clinical professionals. A significant demand that can be met in this way is the demand for services to offenders in outlying areas, where it has often been difficult to provide more traditional clinical services. Linked to this, custodial and supervisory staff can be trained to use RP methods both as an outreach of the major program and in their own sentence management work in prisons and community based offices. This 'mainstreaming' of the RP model throughout the organisation amplifies its value as more and more staff use the concepts in their day-to-day work.

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PSYCHIATRIC TREATMENT OF VIOLENT OFFENDERS IN PRISON

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THERE IS NO TREATMENT FOR VIOLENCE AS SUCH; PSYCHIATRIC TREATMENT clearly can only be applied to those with a psychiatric illness. What constitutes a psychiatric illness is in itself a problem and the Victorian *Mental Health Act 1986* does not define a mental illness. Further, violence in a person with a psychiatric illness is not necessarily a consequence of that illness and, conversely, all violence is not necessarily a consequence of mental illness. Psychiatrists, therefore, must be concerned with the aetiology of violence in the individual so that they may attend to that which is within their province. The aetiology of violence is a complex matter and is further confounded by terminology (Mackintosh 1990). Rage, anger, assertion, aggression and violence are terms which all have a common core of meaning. There are, however, subtle nuances of meaning in these terms and to ignore them may be to miss the diagnosis.

The concept of violence may be limited, as in the Macquarie Dictionary definition: 'any unjust or unwarranted exertion of force or power against rights, laws . . .', or broadened, for example, by the statement that:

> the concept of violence should allow for non-criminal activity and for the threatened as well as the actual use of outright physical force . . . violence is not always overt, its application may be subtle, but the effects can still be devastating. Psychological, emotional and financial abuse may be just as effective a means of subjugation, humiliation and manipulation as the use of outright physical force (Royal Australian and New Zealand College of Psychiatrists 1989, p. 1).

In view of these broad concepts, the ubiquity and increased incidence of violence, those of us involved in the direct management of individuals need a greater discrimination in the origins of that violence if we are to apply real solutions rather than an opportunistic face-saving activity. The aetiology of violence is multiple. Freud (1950) postulated that all people had a reservoir of aggressive urges of which some eventually are maladaptively displayed. Lorenz (1966), likewise, saw aggression as instinctual. Dollard et al. (1939) postulated an association between frustration and aggression, an issue that was enlarged by Berkowicz (1969). Bandura (1973) proposed a learned response; associated with this is the sub-culture of violence, which is most likely to arise in communities with economic deprivation (Hansmann & Quigley 1982). Organic brain disorders may be associated with violence (Eisenberg & Earls 1975).

With these factors in mind, one is then faced with the violent offender. For those psychiatrists conversant with the above hypotheses confusion about the individual is likely to be greater rather than lesser. By this is meant the practicalities of what to do with a plethora of information: the capacity to associate these hypotheses with the specific individual requires a complex information processing capacity. Not surprisingly, there is a reliance on the Diagnostic and Statistical Manual (American Psychiatric Association 1987) for the purpose of advising the relevant authorities what it is that psychiatry can provide. This psychiatric intervention is also confusing, as Klassen and O'Connor (1988) pointed out, in that the proportion of criminals in mental hospitals has increased, with a trend towards a medicalisation or psychiatricisation of criminal behaviour. On the other hand, de-institutionalisation of mental patients has resulted in more people at risk of committing a crime. Lastly, we may be criminalising mental disorders by arresting persons who need treatment. Under these circumstances, the psychiatrist does not have an easy task in assessment.

Treatment of Aggression

It should be re-emphasised that there is no treatment of aggression or violence as such. That a conference such as this should be held reinforces Eichelman's (1988, p. 32) view that 'the treatment of the violent patient has been marred by a lack of clear rationale for using a given intervention'. Further, 'Application . . . to treatment situations can easily fail if it is not carried out systematically' (Eichelman 1988, p. 32). Whilst he was specifically talking about drugs, the four principles that he enumerated can also apply to our present problem. These were, first, one should treat the primary disorder, second, we should use the most benign interventions when beginning empirical treatments, third, we need some quantifiable means of assessing efficacy, and four, we need to institute such trials systematically.

Again, the psychiatrist faces a problem in treating the violent offender. One has to question whether the offender, in fact, is a patient. This raises the Medusa's head of civil rights, informed consent and ethical responses to a problem. Where the psychiatrist works within a correctional setting, the defining of accountability and responsibility is a daily matter. As doctors, we

have to be clear for whom we are acting. Is it the state? Is it the institution? Is it society at large? Is it the prisoner/patient?

The management of the violent offender requires in the first instance, a containment of violence. The violence in its own right therefore, has to be defined. Is it verbal and/or physical? Is the violence secondary to a mental disorder or is it primarily derived from social, economic, political or characterological sources? Are we speaking of violence that leads to detention or are we speaking of a violence that is subsequent to detention? Is the violence specific, towards a particular object or person, or is it random? Is the violence towards self, others or property?

Within the correctional situation, a number of decisions and streamings will have already occurred. The police, the courts and remand centres, are effectively the first to determine whether the event merits some psychiatric intervention. The bizarreness of the individual or the offence, the degree of horror and revulsion that may be felt about the offence, or the consequences of determining guilt or, indeed, innocence may well result in referral. It is at this point that the offender is directed into a number of streams. These include psychiatric hospitals or prison psychiatric services. Clearly, the more serious and objectionable the offence, the more likely the offender is to be seen by a psychiatrist. The court may remand a patient for assessment in the correctional setting or effect a hospital order for assessment and treatment within a psychiatric hospital. When physical, human, attitudinal and administrative factors, preclude admission into a psychiatric hospital, remand in prison is inevitable. Given adequate resources, there is minimum objection to this, apart from the problems associated with the treatment of a remandee who refuses to comply. Where staff resources are limited both in numbers and skills, a pragmatic conclusion may be reached which does not question greater issues. Intellectual curiosity becomes difficult in a high stress situation with an excessive workload.

The objective of a psychiatric assessment is to inform the court on a range of factors, initially whether the offender suffers from a mental illness. Subsequently, opinions as to fitness to plead and criminal responsibility may be required, and finally, an assessment on sentencing issues. The court often wishes to know what avenues are available for the care of offenders with mental disorders. After sentence, continuing management of such an offender may need to be carried out within a correctional setting. The problems of self-injury, or violence towards correctional or psychiatric staff or other prisoners, may occur and require management necessitating the cooperation between correctional and psychiatric staff. As these staff come from quite different disciplines, and have different outlooks, conflicts about the approach to management occur. It is a tribute to staff who work in correctional settings that there is not greater conflict about the approach to dealing with violent offenders who form a difficult and divisive group.

It must be emphasised that assessment and management are not easy. In the first place, a proper assessment is time consuming and, in addition, staff are required to respond to the security demands of the prison system. During assessment, access to a corroborative history is difficult and at times impossible. Pertinent documents may be unavailable and interviews with

third parties are often out of the question. Arrangements for special investigations, the obtaining of a second opinion and other steps which may assist in forming a conclusive opinion may be frustrated by other imperatives in the correctional system. Often there is an overwhelming sense of concentration on the containment of the offender and under these circumstances aspects of good clinical care may be challenged.

The treatments which may be applied in such a setting may not be entirely clear. Some modalities of psychiatric treatment are powerful and have been designed for patients suffering from serious mental illnesses. Caution is needed to see that drugs and psychological modes of treatment are not misapplied where the problem is violence alone. Psychiatry, as it is a branch of medicine, is comfortable with the use of medication but this should be clearly directed at a disease process. Thus, if violence is used to define the presence of a mental illness obvious ethical problems arise. The psychiatrist is on firmer ground where mental illness is clearly present. Within a prison setting the issues are not simple and prisoners, with some aspects of their civil rights compromised, need to be protected from potential excesses of the state. In Victoria, involuntary treatment of a prisoner within the prison setting is not permitted. As a result, psychiatric staff may be left with a psychotic prisoner, devoid of insight, who requires medication but refuses and the issue cannot be forced. Invariably, this necessitates transfer to a psychiatric hospital but in the main most psychiatric hospitals are not geared to accept actively violent prisoners because of both security considerations and problems with attitudes and skills. Special units are therefore required to effect treatment and these are gazetted under the Mental Health Act. Treatment is provided within a unit that is competent and capable of providing treatment for violent offenders. Such patients may well recover from a psychotic illness and be fit to continue their sentence in prison, although involuntary continuation of maintenance medication is not possible in that setting. Staff are dependent on a patient acquiescing to treatment. Physical treatments such as electroconvulsive therapy clearly should not be provided within prison and so must be provided in psychiatric units.

Psychological treatments, the various psychotherapies and behavioural treatments can be performed within a prison setting given adequate trained personnel and the cooperation of the patient.

Types of Violence

Broadly speaking, violent offenders who come to the attention of psychiatry fall into four main groups: assaults in general (perhaps robbery with violence); assaults in the domestic setting; violence by drug offenders; and sexual assaults.

The first group may be referred to psychiatric services as a result of bizarreness in the offender or in the assault itself. Essentially, the psychiatric task is determining whether the offender has a treatable mental condition and whether psychiatry has some advice to offer regarding disposition. All too frequently offenders are found to have some personality disorder where there is little indication for drug therapy, and psychological treatment would be a

heroic task. In this group of offenders, the multifactorial aetiology of violence may be all too apparent. In trying to manage an offender one may be faced with attempting to overcome an inadequate upbringing, providing social support in terms of basic needs and addressing the impossible task of finding a sensible pursuit to occupy the offender. A psychiatrist may well be able to provide a diagnostic label, tease out some understanding of the way the offender thinks and behaves and indicate what services may be useful on release, should the offender be motivated to use them.

Other assaults occur in the domestic situation, invariably in the setting of a breakdown in relationships, with past life experiences or psychiatric illness playing a part. Again, treatment of a primary psychiatric disorder, if present, is indicated. If there is a clear psychiatric illness this may be straightforward but problems can be greater and relationships may have broken down for multiple reasons.

Violence among drug offenders is high and may be associated with drug use itself or the acquisition of money in order to obtain drugs. That an individual has a substance abuse problem indicates dysfunction in their psychological state, a primary issue which may or may not be amenable to intervention.

Sexual offences cause a particular revulsion within a community and also within the prison population, thus posing substantial problems for correctional authorities as groups of prisoners will require protection. Sex offender programs have been developed within the prison setting and in outpatient clinics. They are currently undergoing evaluation.

A major change in management now relates to those with a Governor's Pleasure disposition. These offenders have been found not guilty by virtue of insanity but have been required to be detained at a Governor's Pleasure for the security of society. Until 1991 they were held within a correctional facility, with a number of the floridly psychotic cases being detained in state psychiatric hospitals. Following the Law Reform Commission's deliberation, it was proposed that they should be transferred to secure psychiatric forensic units and this process has resulted in some five cases being held in this manner. Offenders in this group will be incarcerated for many years with their rehabilitation, no easy matter, being the task of forensic psychiatric staff.

The detainees are viewed as falling into two broad groups: those who have been chronically institutionalised within a prison setting, so developing many of the attitudes and views of a long-term prisoner, and another younger group, more recent offenders, who do not have the same degree of institutionalisation.

A number of the first group no longer have manifest psychiatric illness and, at some level, have adjusted to their institutional existence while harbouring a hope of some form of future freedom. The second group are, in the main, more floridly sick, require more active treatment and face the prospect of many years of incarceration. The present program is in its early days and raises a great number of issues. As with other groups of violent offenders the issues of prediction of violence is critical and there needs to be more research in this area. By virtue of their offence they have affected the lives of many individuals and involved a number of instrumentalities in

decisions about their future disposal. Very complex decisions have to be made about them, taking into account many different interests.

In considering this subject we have focused our attention on the offender and not other groups affected. It is not the place to deal with victims but some attention should be given to a large group of people who are often ignored. These are those who work with offenders.

Working with violent offenders can expose people to a world of psychological brutality and primitive thinking. A daily diet of containing, managing and understanding the less desirable aspects of human nature can have substantial effects on staff. There is always a risk of exposure to violence and the various forms of official response to it. Workers in such settings run a risk of becoming brutalised. Nursing and prison staff are in daily contact with the prisoners and patients and some force of character, understanding and training is needed to retain humanity when faced with an individual who may have committed a heinous crime and, in the midst of illness and distress, emits an aura of rage, despair, contempt and humiliation.

Therefore, while violence in an individual must be contained and recurrence prevented, it is necessary for workers in this field to understand violence. This requires the capacity to pay attention to the offender although this exposes workers to the psychological roots of the offender's violence. This can be daunting and systems of support involving regular debriefing is required for the welfare of staff.

Conclusions

Forensic psychiatry is one aspect of in the management of a proportion of violent offenders. While it is concerned with those who have psychiatric disorders, involvement occurs with offenders who do not have such disorders. It is important that psychiatric services are used to assist in the management of appropriate cases but a clear definition of what are appropriate cases is needed. As forensic psychiatry is only part of the process of the management of violent offenders, cooperation with other services is required to achieve a uniform program of management. There is a need for various services, legal, correctional and psychiatric, to understand each other's functions and limitations so a concerted approach to problems can be maintained. It is essential that all staff are given education and support.

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A PROFILE OF FORENSIC PATIENTS IN NEW SOUTH WALES AND AN ASSESSMENT OF THE ROLE OF THE MENTAL HEALTH REVIEW TRIBUNAL IN EFFECTING THEIR RELEASE

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Mental Health Review Tribunal
New South Wales

THE *MENTAL HEALTH ACT 1990* (NSW) AND THE *MENTAL HEALTH (Criminal Procedure) Act 1990* (NSW) (hereafter, the forensic review legislation), provide mechanisms for dealing with mentally and developmentally disabled people while they are detained in accordance with criminal law. Under the forensic review legislation, such people are called 'forensic patients'.[1] The purpose of this paper is to profile these patients, while protecting their identities, and to assess the effectiveness of the forensic review mechanisms.

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1 For the sake of clear exposition, the complex set of legal rules have been simplified in this paper.

In New South Wales, as at October 1991, there are eighty-six forensic patients whose lives are governed by the forensic review legislation. This represents only a small percentage of those currently detained in prison in New South Wales, whether before or after trial, who may be mentally ill or suffering from some kind of mental disability, or who may have a developmental disability. Many lawyers and psychiatrists working within the criminal justice system of New South Wales seek to prevent their patients or clients from falling within what are perceived to be the traps of the forensic review legislation. Furthermore, quite apart from any perception of the malodorous nature of forensic patient status, much mental illness, mental disability, and developmental disability simply remains undetected (Herrman et al. 1991), or non-addressed. This arises from a lack of resources within the criminal justice and corrective services systems, which are not equipped to deal with the problems posed by the mentally or developmentally disabled. Consequently, this paper deals with groups which are not representative of the general population of persons suffering from these types of disabilities.

Forensic Patients in New South Wales: Who Are They?

Of the eighty-six forensic patients in New South Wales, as at October 1991, sixty-five have been found not guilty on the grounds of mental illness; nine are 'unfit to be tried'; and twelve received forensic status after having been transferred to a mental hospital, having become mentally ill whilst in a prison (*see* Table 1).

Table 1

Forensic Patients in New South Wales as at October 1991

Type of Sentence or Reason for Detention		Number of Persons
'Transferees'		12
Fixed term sentences	6	
Limiting term sentences	2	
Awaiting trial (remand)	3	
Life sentence	1	
Unfit to be tried		9
Not guilty on the ground of mental illness		65
Total		86

These forensic patients are in New South Wales prisons or hospitals, or living in the community on conditional release. Table 2 shows the locations of these eighty-six forensic patients.

Table 2

Location of Forensic Patients as at October 1991

Location	Number of Patients
Prisons	10
Public mental hospitals	39
Community	19
Prison mental hospital	18
Total	86

Demographic data

Of these eighty-six persons, seventy-two (83.7 per cent) are men and fourteen (16.3 per cent) are women. This is higher than the ratio of men to women in custody in New South Wales prisons which in 1989 was 93.6 per cent: 6.4 per cent (New South Wales. Department of Corrective Services 1990). It is not clear whether this is due to women forensic patients remaining in the system for a longer period, or because women are more easily identified in the criminal justice system as being mentally ill. There are three Aboriginal forensic patients (3.5 per cent) and twenty-six who were born overseas, twenty-two of whom are from a non-English speaking country (25.6 per cent). Aboriginal and persons from a non-English speaking background appear to be over-represented when compared to their proportion in the general population.

The patients range in age from nineteen to sixty-nine, the average age being 40.7 years (mean is 40.7, standard deviation is 11.40 years). They have been forensic patients on average for 5.8 years. Some of them have been under detention for one year or less, and one person, who is serving a life sentence, has been a forensic patient for over thirty years. This patient had not been found not guilty on the ground of mental illness, but is a transferee from prison. A detailed analysis of the years detained is presented in Table 3 and Figure 1.

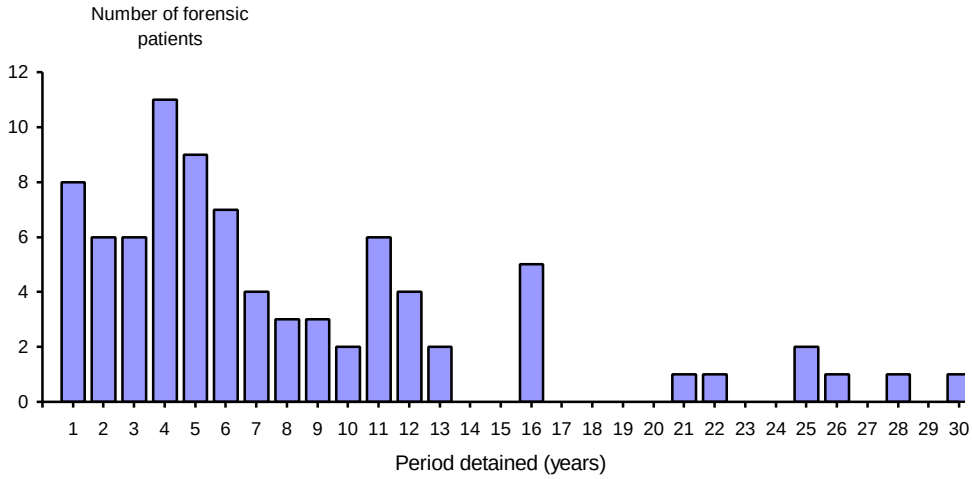
Table 3

Number of Years Patient Detained as at October 1991

Number of years detained	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Number of forensic patients	5	0	0	0	0	1	1	0	0	2	1	0	1	0	1
Number of years detained	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30
Number of forensic patients	8	6	6	11	9	7	4	3	3	2	6	4	2	0	0

Figure 1

Number of Years Detained Since Committing the Offence as at October 1991



Previous history

Some sixty-four (fifty-three male and eleven female) forensic patients (that is, 74 per cent), had a previous psychiatric history: there appears to be no difference between men and women in this area.

A previous history of drug addiction was present in twenty-four (28 per cent) forensic patients, twenty-three (27 per cent) had a previous history of alcohol addiction, thirty-seven (43.8 per cent) had a criminal record, and forty-two (48.8 per cent) had a history of violence. Details of these are shown in Table 4.

Thus, the forensic patients mostly had both a psychiatric and criminal history and over one quarter of them had a history of substance abuse.

Of those patients who had a previous psychiatric history, most had multiple admissions to hospital. Eleven had one admission, and one person had thirty-eight admissions. The average number of admissions was three. The number of admissions is represented graphically in Figure 2.

Diagnoses at the time of committing the offences were as shown in Table 5. The term 'offence' is used to describe the incident leading to forensic status, but of course, persons not guilty on the grounds of mental illness have committed no offence.

Table 4

Previous History of Forensic Patients* as at October 1991

	Male	% Male patients	Female	% Female patients	Total Number	% of Total
Psychiatric history	53	72	11	79	64	74
Criminal record	31	42	6	43	37	43
Violence	37	50	5	36	42	49
Drug addiction	20	27	4	29	24	28
Alcohol addiction	19	26	4	29	23	27

* This table is based on eighty-six patients (seventy-two male, fourteen female) but the criminal history of one male has not yet been investigated.

Figure 2

Number of Admissions to Hospitals as at October 1991

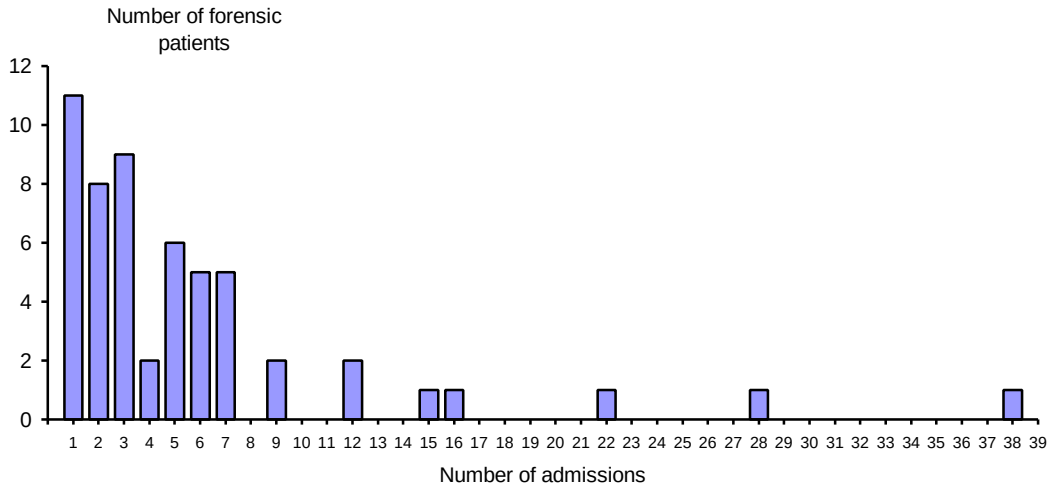


Table 5

Provisional Diagnosis at the Time of the Offence as at October 1991

Diagnosis	Number of Persons
Major psychosis	68
Depression	1
Drug/alcohol dependence	5
Personality disorder	10
Developmental disability	9
Organic psychosis	1
Transient organic psychosis	3
Total	97

Note: Several patients had two provisional diagnoses.

The offence

Of the eighty-six forensic patients, twenty-two were charged with having committed at least two offences, and ten patients with having committed three offences. The types of offence with which people were charged is shown in Table 6 below; the classification used is the recently adopted Australian National Classification of Offences.

Table 6

Details of Offences as at October 1991

Offence Category		Number of Offences
Offences against person		108
Murder	43	
Attempted murder	7	
Manslaughter	3	
Other	55	
Robbery and extortion		3
Breaking and entering and other offences involving theft		2
Property damage and environmental offences		4
Offences against good order		1
Total		118

Of these offences 55.8 per cent were committed in the home of the alleged perpetrator. The rest occurred in diverse places, from trains to psychiatric hospitals (*see* Table 7).

Table 7

Locations Where Offences Committed as at October 1991

Location	Number of Offences
Private home	48
Public place	22
Psychiatric hospital	4
Other	12
Total	86

Note: Some patients committed offences against more than one person at a specific location.

The victims of the offences were varied: wives, children and strangers were among the victims. The relationships of offenders to their victims are set out in Table 8.

Table 8

Victim Categories¾ Offences Against the Person as at October 1991

Victim Category	Number of Victims
Spouse	7
Parent	13
Child	13
Other relative	7
Stranger	60
Friends	12
Total	112

Thus, the offences were committed equally against friends or family members (fifty-two) as against strangers (sixty).

Judicial Role of the Mental Health Review Tribunal (MHRT) in Releasing Forensic Patients

People who are mentally or intellectually unable to undergo a criminal trial

Mental or developmental disabilities might make a person unfit to be tried for the offence(s) for which he or she has been charged. When an especially empanelled jury has so found, the judge may order the person's detention in a prison or hospital, and must refer the issue of ongoing unfitness to the Mental Health Review Tribunal (MHRT).

In relation to persons found unfit to be tried, those persons whom the MHRT determines will become fit during the period of twelve months after the finding of unfitness may be made subject to a court order that they be detained, in a hospital or other place, for a period not exceeding twelve months. The MHRT must, as soon as practicable after the making of the court order, review the case and determine whether the person has become fit to be tried, and whether the safety of the person or any member of the public will be seriously endangered by the person's release. If the MHRT is of the opinion that the person has not become fit to be tried and is satisfied on the available evidence that the safety of the person or any member of the public will not be seriously endangered by the person's release, the MHRT must make a recommendation to the Minister for Health for the person's release (s. 80 Mental Health Act).

When an accused person has been found unfit to be tried by both the court and MHRT, the Attorney-General may direct that a special hearing be conducted. The 'special hearing' process should be made the subject of separate and detailed analysis. Suffice it to say, however, that it is conducted similarly to a criminal trial and if the person is found not guilty of the offence charged, the person is no longer a forensic patient. Where a special hearing results in a qualified finding of guilty, a 'limiting term' may be imposed, with an order for detention in a hospital or other place. As with the previous class of case, the MHRT must review the matter and determine whether the person has now become fit to be tried, or if not, whether that person could safely be released (s. 80 Mental Health Act).

Even though a person has been exposed to the entire process and has received a limiting term, the fitness of the patient to be tried for an offence is re-examined at each subsequent six monthly review by the MHRT (s. 82(1)(b) Mental Health Act). Where the MHRT is of the opinion that the patient has now become fit to be tried, it must notify the Attorney-General accordingly (s. 82(3) Mental Health Act). The MHRT it would seem, as a consequence of the same review, could also make a recommendation to the Minister for Health as to the patient's conditional or unconditional release (s. 82(1)(c) Mental Health Act), but only where the MHRT is satisfied about the safety of any release (s. 82(4) Mental Health Act). The Attorney-General and the Director of Public Prosecutions would then be notified by the Minister for Health of the recommendation for release (s. 83(1) Mental Health Act). Presumably, where the recommendation for release is made by the MHRT, this may have some influence on the decisions of the Attorney-General and the Director, concerning the possibility of further

proceedings against the person (s. 29 Mental Health (Criminal Procedure) Act). Where a decision is made to institute further proceedings, the Attorney must request the court which held the initial unfitness inquiry to hold a further inquiry as to the person's unfitness.

Notwithstanding a finding by the MHRT that a person has become fit to be tried, the Attorney-General has a discretion to advise the Minister for Health that no further proceedings will be taken against the person. In such cases the 'prescribed authority' may release the person, after having informed the Minister for Police of the date of the person's release (s. 84 Mental Health Act as amended by the Statute Law (Miscellaneous Provisions) (No. 2) 1990).

Prescribed authority is defined by clause 20 of the Mental Health Regulation 1990 to mean basically the Governor, where a person has been found not guilty on the grounds of mental illness, the Governor-General, where the person is detained by an order of the Governor-General, or the Minister for Health, in relation to all other persons.

The MHRT must also review the cases of persons found not guilty by reason of mental illness, including where the person's primary and continuing problem is developmental disability, and where the mental illness finding was made after a special hearing. Following such a finding, where a court orders the person to be detained in strict custody in a hospital or other place, the MHRT must as soon as practicable make a recommendation as to the person's detention, care, or treatment, or, if the MHRT is satisfied that it will not be dangerous to do so, may make a recommendation as to the person's conditional or unconditional release (s. 81 Mental Health Act).

People who are detained following a finding of unfitness to be tried under this process must, as forensic patients, be reviewed by the MHRT at least once every six months. If the MHRT determines that any such person has become fit to be tried, it must notify the Attorney-General and Minister for Health accordingly (s. 82 Mental Health Act). The possible outcomes of such a notification are discussed below.

The general forensic review provision is set out in s. 82 of the Mental Health Act. It provides that the MHRT may at any time, and must, at least once every six months, review the case of every forensic patient and make a recommendation to the Minister:

> (a) as to the patient's continuing detention, care or treatment in a hospital, prison or other place; or
>
> (b) in the case of a patient subject to a determination that the patient is unfit to be tried for an offence, as to the fitness of the patient to be tried for an offence; or
>
> (c) as to the patient's release (either unconditionally or subject to conditions).

In the case of a person with a limiting term who has become fit to be tried and found by the MHRT to pose no risk on release, the MHRT *may* make a recommendation to the Minister for the person's release. However, there is

nothing in the legislation which states that the Minister *must* release such a person. It seems that such a person can be kept in limbo.

People who lack criminal responsibility because of mental illness or other mental conditions

A person accused of crime who is found not guilty by reason of mental illness will become a forensic patient, and must be reviewed by the MHRT as soon as practicable after the court order for his or her detention, and at least six monthly thereafter. The MHRT may make recommendations to the Minister as to the patient's continuing care or treatment in a hospital, prison or other place, and may make recommendations for conditional or unconditional release if the patient is not dangerous (s. 81 Mental Health Act).

Ordinary prisoners who manifest mental illness in gaol

Under ss. 97 or 98 of Mental Health Act, ordinary prisoners may be transferred to mental hospitals where the Chief Health Officer of the Department of Health, acting on medical certificates, by two practitioners, considers that the prisoner is mentally ill or has a mental condition which is treatable in a hospital and that the prisoner consents to the transfer. As soon as practicable after the transfer, the MHRT must review the prisoner (now a forensic patient) and make recommendations to the Minister as to the person's continued detention, care or treatment in hospital. The transferred prisoner remains a forensic patient for so long as he or she remains in hospital and is not reclassified by the MHRT, or remains on conditional release as ordered by the prescribed authority. As such a person's period in hospital is to be treated as a period in prison, the expiry of the transferee's fixed term of imprisonment while in hospital will terminate his or her forensic status. If the transfer is for longer than six months, the patient will be systematically reviewed by the MHRT under s. 82 of the Mental Health Act at least once every six months.

Where the Chief Health Officer orders transfer, but it is not effected within a period of two weeks, the MHRT must informally review the prisoner's case each month until such time as the person is transferred to a mental hospital or until such time as the MHRT recommends that the person not be so transferred. The MHRT must also make a recommendation to the Minister as to the person's detention, care or treatment (s. 87 Mental Health Act).

The MHRT may have a role in the release of mentally ill ordinary prisoners where they have been transferred to a hospital and may even impose community counselling orders upon prisoners with psychiatric problems but who are not in a hospital. It should be noted that the MHRT's role with forensic patients, and in making determinations for the courts in relation to fitness to be tried, represents only two of its eleven broad heads of jurisdiction (Mental Health Review Tribunal 1990, 1991a).

Approach of the Mental Health Review Tribunal to Its Role

The MHRT's forensic role is a curious one, in so far as it is largely recommendatory. The MHRT has no determinative role in any significant areas, such as transfer from prison to hospital, transfer to open ward, movement from detention to conditional release in the community, discharge from conditional to unconditional release.

The MHRT is enjoined by the Mental Health Act to be as informal as possible. In the pursuit of its review functions in relation to forensic patients, and indeed in relation to its full jurisdiction under the forensic review legislation, the MHRT is not bound by the rules of evidence, but may inform itself of any matter in such manner as it thinks appropriate, as the proper consideration of the matter before it permits (s. 267 Mental Health Act). In performing its functions relating to forensic patients, the MHRT must be chaired by the President or Deputy President, and as with its jurisdiction generally, the legal member sits with a psychiatrist and other suitably qualified member, in a panel of three. The MHRT can set its own procedure for the conduct of its business. The forensic patient whose case is being reviewed must be represented by a barrister or a solicitor, unless the forensic patient declines to be represented. The MHRT may approve representation by another person of the forensic patient's choice (s. 274 Mental Health Act).

The MHRT does not sit as a judge between two adversarial parties. The Mental Health Advocacy Service, established to advocate the rights of mentally ill people and forensic patients, generally argues at each review for a reduction in the existing restrictions on the forensic patient in question. This encourages the patient's gradual progress from prison, through to hospital, and out into the community on conditional, and ultimately unconditional release. The Advocacy Service may produce evidence in the form of prison or hospital staff reports, and if appropriate, independent psychiatric reports supporting a reduction in the currently prevailing restraint on the liberty of the patient under review. But there is never a clearly defined opposing party, producing contrary material, with the resulting conflict being adjudicated upon by the MHRT. The Advocacy Service advocates to the MHRT the case for less restrictive restraints, on a set of medical, social work, nursing, prison officer (if the forensic patient is being detained in a prison), and other reports and evidence, and the MHRT, using material, including that supplied by the Advocacy Service, then takes up the case, analyses it, asks questions of the witnesses, incorporates its own and other especially commissioned expertise, and presents it in writing to the Minister. There is never a party in forensic patient proceedings before the MHRT who is duty-bound to carry the burden of justifying the continuance of the currently prevailing restraint on the liberty of the forensic patient, much less, advocating a further tightening of that restraint.

The MHRT has appointed a Liaison Officer to assist it with its review of forensic patients, and in particular cases, it has directed the Liaison Officer to make detailed investigations and reports about the patients. The work of the Liaison Officer is aimed at finding something better for patients, within the prison, health, and community health or probation and parole systems, than

those systems, on their own initiatives seem able to produce. The investigative process is not secret and is conducted with the knowledge of the Mental Health Advocacy Service. The results are made available to the Advocacy Service for comment, and alternative suggestions and criticisms are actively sought.

The MHRT indeed actively supports the development, by the Advocacy Service, by the hospital where the forensic patient is being detained, or by any other responsible organisation which should or might have an interest, of conditional release programs for forensic patients. In one recent case, the Aboriginal community of a particular area offered to take an Aboriginal forensic patient under its wing. The MHRT seized upon, and developed the offer into a coherent conditional release plan, using supplementary governmental supports.

Conditional release, monitored community treatment, and the availability of ongoing review with a prospect of gradual de-escalation of restraints upon the patient's liberty, on the one hand, and in appropriate circumstances, revocation of existing liberties on the other, provides an appropriate balance between the public interest in protection of society, and individual rights and freedom. The approach of the MHRT to its forensic review function indeed reflects the approach of the Supreme Court of New Jersey, in *State v. Fields* (390A 2d 584 [1978]). In that case the court said:

> If at any periodic review proceeding the State is unable to meet its burden of justifying the continuance of the currently prevailing restraint on the liberty of the patient, it becomes the task of the reviewing judge again to 'mould' an appropriate order. The new order should provide for the least restrictive restraints which are found by the judge to be consistent with the well-being of the community and the individual. However, even where the [patient's] condition shows marked improvement, only the most extraordinary case would justify modification in any manner other than by a gradual de-escalation of the restraints upon the [patient's] liberty.

The difference between the system for forensic review currently prevailing in New South Wales and that which apparently prevails in some jurisdictions in the USA is immediately apparent from the above judicial extract. The court referred to the 'State' meeting its 'burden of justifying' the continuance of the current prevailing restraint on the liberty of the patient. As already emphasised, the state of New South Wales does not undertake this burden.

As the MHRT is both an advocate of, and adjudicator upon, the case of each forensic patient for a progressively less restrictive environment, it has actively involved itself in liaison and other representative committees concerned with advancing the welfare of forensic patients in New South Wales. The main inhibitors on the welfare and progress of forensic patients have been bureaucratic practices and procedures in the mental health and prisons systems. Two of such committees have a highly significant potential for improving the lot of forensic patients. The first committee to be mentioned is a standing liaison committee, comprising a representative from the Department of Corrective Services, a representative of the Mental Health

Branch of the Department of Health which, amongst other things, is responsible for the welfare of forensic patients, a representative of the Mental Health Advocacy Service, and representatives from the MHRT. The MHRT, through its representatives on this standing liaison committee, is actively promoting the following developments:

- initial assessment of new forensic patients at Long Bay Prison Hospital by an expert team, to formulate and implement an appropriate rehabilitation program;

- modification of existing Corrective Services classifications systems when they are applied to forensic patients, allowing forensic patients hospital-style leave outside the prison, hospital-style day and weekend leave outside the prison, and immediate movement in appropriate cases to work release programs;

- involvement of both Corrective Services and Department of Health representatives in assessment processes for forensic patients; and

- initial placement of female forensic patients in the Long Bay Prison Hospital.

The psychiatrist, medical, nursing, custodial and other staff of the Long Bay Prison Hospital in 1991, and the planners of this unit, are to be commended for the improvement in the condition of forensic patients transferred to this unit—most now show a readiness for conditional release which was not apparent before.

The other committee which has relevance to this area is the Mental Health Act Implementation Monitoring Committee set up by the Minister for Health. This committee, as the name suggests, is monitoring all provisions of the new legislation and is particularly looking at any problems that arise with the forensic patient provisions.

The MHRT has also actively pursued the innovation of preliminary case conferences which take place prior to the hearing by the Tribunal of forensic cases, to determine the progress of each patient, and to ensure that the patient's case is not left to lie dormant in the six-month period between s. 82 reviews.

The preliminary case conferences are chaired by the Registrar of the MHRT but do not involve the President, Deputy President, and other Members who sit on forensic case reviews. Any reports produced at these conferences are made available to the Mental Health Advocacy Service and are tendered to the Tribunal at each review for its consideration. The Mental Health Advocacy Service has a representative present at each preliminary case conference. The MHRT, through its processes, becomes a mixture of advocate, counsel assisting, investigator, expert witness, and finally, Royal Commissioner, in ultimately making periodical recommendations to the Minister about each forensic patient. At least each six months it has to form a fresh view about the appropriate next step for each forensic patient, which is

then articulated, in the form of recommendations with accompanying reasons, and it proceeds to advocate that view, both formally, and sometimes informally, to the Minister, and to the departmental officers who provide ministerial advice.

Twists in the Release Path for Patients

Mandating treatment for people who remain dangerously ill

How might a forensic patient attain release? The answer to this question can be very complicated, sometimes desirably, sometimes not. Many obstacles can be placed in the release path.

An ordinary prisoner who became a forensic patient on becoming mentally ill or otherwise disordered, and was transferred to a mental hospital, must be released from hospital at the end of his or her prison sentence, unless classified as a continued treatment patient by the MHRT within the final six months of that sentence (s. 89 Mental Health Act). To receive this status, the person must of course be a 'mentally ill person' under the civilian patient provisions of the Mental Health Act. The MHRT can, at the end of prisoner's term make that person the subject of a community treatment or counselling order, depending on the prisoner's location, such orders mandating medication, treatment, and appropriate support facilities. This feature of the Mental Health Act is much too complex a subject to allow discussion here (for more details *see* Mental Health Review Tribunal 1991b).

A person who was found unfit to be tried and who received a limiting term of imprisonment following a special hearing, must also be released at the expiry of that limiting term, again, *unless* classified as a continued treatment patient by the MHRT in the sixth months prior to the expiry of the limiting term. Again, the person, who was unfit to be tried must be a 'mentally ill person' under the Act for this civilian continued treatment status to be conferred. As most recipients of limiting terms are developmentally disabled, not mentally ill, this means of continuing their detention after the expiry of their terms will seldom be available, notwithstanding that in some cases they might be highly dangerous people.

The New South Wales Attorney-General recently set up a committee to identify areas of concern in the operation of the criminal justice system. One of the issues placed by the Attorney before the committee was that of the release of persons with a developmental disability after the expiry of their limiting terms imposed in special hearings, notwithstanding the fact that such developmentally disabled people, in individual cases, might possess antisocial traits which make them potentially dangerous to others. The committee, which included a representative from the Department of Community Services, and from other governmental and non-governmental areas, finalised its recommendations, which went to the Attorney early in 1991. The whole area has now been referred to the New South Wales Law Reform Commission.

Any prisoner or forensic patient, close to the expiry of the prison sentence or limiting term, may be made the subject of a Guardianship Order by the

Guardianship Board where the applicant for an order (who may be a Corrective Services or Health Department official with a genuine concern for the welfare of the person) believes that the prisoner or patient would be incapable of managing his or her own affairs without supervision. These orders also provide a mechanism for indirect control in appropriate circumstances.

Guardianship orders, of course, cannot be made against a person about to be discharged from prison or hospital simply because that person is potentially dangerous. The person must meet the legal requirements of the *Disability Services and Guardianship Act 1987* (NSW) for a guardianship order, and the practical guidelines that the Guardianship Board imposes on itself in determining those persons for whom it will assume a guardianship review responsibility. The combined effect of these legal rules and practical guidelines mean that potentially dangerous forensic patients and ordinary prisoners with one of the following kinds of disabilities could be made the subject of Guardianship Orders under the Disability Services and Guardianship Act 1987 on the expiry of their terms: intellectual disability; psychiatric disability; dementia; brain damage from an accident or from the abuse of alcohol or drugs; disability from advanced age; and physical or sensory disability. The disability must be severe enough to mean that the person requires 'supervision or social habilitation' in 'one or more major life activities'. The person must be 'totally or partially incapable of managing his or her person' and must need the order.

Releasing patients who are unfit to be tried

We have already noted that a person found to be unfit to be tried and given a special hearing with the consequent limiting term may, immediately after the imposition of the limiting term, be considered by the MHRT to be fit to be tried (under s. 80 of the Mental Health Act) and may be either exposed to a further court hearing about unfitness, or released by the Minister for Health on the advice of the Attorney-General (s. 29 Mental Health (Criminal Procedure) Act).

The cases of persons found unfit to be tried, and who have subsequently been found by the MHRT to be unlikely within twelve months after the finding of unfitness to become fit to be tried, are referred to the Attorney-General who on advice from the Director of Public Prosecutions, may direct that a special hearing be conducted or may decide that no further proceedings will be taken (s. 18(b) Mental Health (Criminal Procedure) Act).

In the case of an unfit person with a limiting term, who is found by the MHRT during one of its six-monthly s. 82 reviews to have become fit to be tried, the Attorney-General on being notified of this (under s. 82(3) of the Mental Health Act), may direct the trial of that person. The trial may lead to a finding of not guilty, with the result that the forensic patient is discharged.

Where the MHRT makes a determination that a person previously found unfit to be tried has now become fit, regardless of when that determination is made, the MHRT must notify its determination to the Attorney-General (ss. 80(3), 82(3) Mental Health Act). Such notification may result in an order for the person's release (s. 29(3) Mental Health (Criminal Procedure) Act). Alternatively, the

finding may result in a further inquiry as to the person's unfitness (s. 29(1)(a) Mental Health (Criminal Procedure) Act), a finding by the court that the person is now fit (s. 30(1) Mental Health (Criminal Procedure) Act), and a recommencement of the proceedings against the person. The former forensic patient may, of course, be found not guilty in these proceedings.

The MHRT must recommend to the Minister the release of a person who has not become fit to be tried, where the safety of the person or any member of the public would not be seriously endangered by the person's release. These recommendations are made after reviews conducted by the Tribunal under s. 80 of the Mental Health Act, of persons recently ordered by a court to be detained, following proceedings arising from their unfitness (s. 80(4) Mental Health Act).

Releasing forensic patients who were (and possibly remain) mentally ill

Forensic patients who were found not guilty by reason of mental illness, whether in special hearings or after ordinary trials, may only be conditionally or unconditionally released on recommendations of the MHRT after a s. 81 or a s. 82 review. The MHRT may not recommend the release of a forensic patient unless it is satisfied:

> that the safety of the person/patient or any member of the public will not be seriously endangered by the person's release (s. 81(2)(b), 82(4) Mental Health Act).

Notices of recommended releases are referred to the Minister for Health, who must then notify the Attorney-General of the recommendation, and at the same time furnish a copy to the Director of Public Prosecutions. The Director of Public Prosecutions must, within twenty-one days after the date of any such notification, indicate to the Attorney-General whether the Director intends to proceed with criminal charges against the person concerned (s. 83(2) Mental Health Act).

Recommendations for conditional or unconditional release made immediately following verdicts of not guilty by reason of mental illness are referred to the Minister for Health under s. 81 of the Mental Health Act. However, unlike recommendations under s. 80 or 82 for conditional or unconditional release, the Minister does not have an obligation to notify the Attorney-General, under s. 83 of the Mental Health Act, of such a recommendation.

Attorney-General's role

When the Attorney-General receives a release recommendation, under s. 80 or s. 82 of the Act, whether unfit to be tried, not guilty on the grounds of mental illness, or a mentally disturbed prisoner in a mental hospital, the Attorney-General has thirty days to indicate an objection to the person's release (s. 84 Mental Health Act). The Attorney's objection to conditional or unconditional release may be on the ground that:

- the person has served insufficient time in custody or under detention; or,
- the Attorney-General or the Director of Public Prosecutions intends to proceed with criminal charges against the person.

If such an objection is made, then the person may not be released.

Facts and Fantasies About Forensic Patients

There is a view abroad that the MHRT is unnecessarily conservative in its approach, inhibiting the return of forensic patients, from prison, through mental hospital, back into the community.

The forensic review legislation *requires* that forensic patients be legally represented. Generally, they are represented by the Mental Health Advocacy Service, an experienced and well-qualified group of mental health lawyers. Since the re-establishment of the MHRT under the 1990 Act, in September 1990, the Mental Health Advocacy Service has advocated conditional release of eleven forensic patients. One of the patients was recommended twice for release, having been rejected on one occasion, and the case is again under consideration by the Minister. In relation to all eleven forensic patients, the MHRT has found itself persuaded by the evidence that monitored conditional release of the patient was appropriate. The MHRT has submitted to the Minister, in respect of each of the eleven patients, a comprehensive program for the patient's safe treatment in a monitored community treatment program. The Minister has rejected the MHRT recommendations in one of the cases, but accepted them at a subsequent review, and has accepted the recommendations in relation to six of the other patients in question, and these six have been conditionally released at the time of writing. One of the patients is awaiting repatriation to his country of birth when his affairs are settled in Australia. The MHRT is now monitoring the progress of those patients released into the community. Each has been provided with a comprehensive community program which effectively mandates the provision of appropriate counselling, treatment, and other support. In relation to the four outstanding patients, their cases only went to the Minister recently and are still under review.

Prisoner A: diminished responsibility and guilty of manslaughter

The progress of the eleven forensic patients who have been or might soon be, conditionally released, and indeed, of the bulk of the forensic patients detained in New South Wales prisons and hospitals, is in marked contrast to that of a prisoner sentenced recently by Justice Matthews in the Supreme Court. In Her Honour's judgment (No. 70419/90, Friday 21 June 1991), she explained why she felt it necessary to sentence a man, Prisoner A, clearly 'most disturbed at the time of the killing', who pleaded not guilty of murder but guilty of manslaughter, on the basis of diminished responsibility. The plea was accepted by the Crown in full discharge of the indictment, however, Her Honour sentenced the prisoner to a minimum term of imprisonment of five-and-a-half years, and an additional term, to commence on the expiry of the minimum term, of a further eleven-and-a-half years. Her Honour said:

> [One] of the primary considerations when sentencing a disturbed offender who has committed an indiscriminate killing such as this is the protection of the community, so long as the ultimate punishment is not excessive to the offence. But how can a sentencing judge predict when an offender might cease to be a danger to the public, and reflect this in a determinate sentence . . . ?
>
> . . .[The] only course available to me is to ignore the proportions envisaged by [s. 5 of the Sentencing Act], and to impose a sentence in which the minimum term will bear roughly the same proportion to the total sentence as did many non-parole periods in the pre-Sentencing Act days. In other words, I propose to impose a relatively short minimum term and a very substantial additional period. This will give the prison and medical authorities a large area of discretion as to when the prisoner should be released according to his mental state at the time. In the interests of the community the total sentence will have to be a long one. For there will be no discretion as to his release when it expires. He will have to be released, no matter what his mental condition is at the time and this is a matter of considerable concern to me. However, it is very much to be hoped that the prisoner will have shown himself to be safe for release well before the expiration of his sentence. I repeat that the length of the sentence is attributable only to my concern that the prisoner might continue to present a danger to the public for a considerable time to come. Following a killing as serious as this the sentence I am about to impose is, I believe, well within a sentencing judge's discretion.

Justice Matthews found that had the matter proceeded to trial on issues other than sentence, there would have been a real possibility that the prisoner might have been acquitted on the ground of mental illness.

Prisoner A was charged in mid-1990. He was sentenced in mid-1991. At this time he is being detained in the Reception Centre of Malabar Correctional Centre. He is not a forensic patient and is not within the jurisdiction of the Tribunal. Accordingly, the authors do not know whether he is showing symptoms of mental illness, and whether he is receiving appropriate treatment. Prisoner A has a long history of schizophrenia, and has been receiving specialist treatment since 1984. His condition remained under control until late 1987, when a bizarre incident occurred. He had multiple admissions to mental hospitals, and at the time of the offence, was regularly attending hospital to receive modecate injections. We venture the opinion that the Reception Centre is an inappropriate place for the maintenance of a mentally ill person like Prisoner A.

Patient B: mentally ill and not guilty of wound with intent to murder

Prisoner A's case is in marked contrast to that of Patient B. Patient B was acquitted on the ground of mental illness of the offence of wound with intent to murder, in late November 1989. He was conditionally released in mid-1991. The conditions for his conditional release mandate the services of a qualified psychiatrist, Patient B's local medical practitioner, a community nurse, and a local community health centre. Following this acquittal on the ground of mental illness, Patient B was detained in the Long Bay Prison

Hospital for only some three weeks before being transferred to a cottage in the grounds of a mental hospital.

While both Prisoner A and Patient B have been given diagnoses of paranoid schizophrenia, it is inappropriate and unfair to compare their respective situations, because, in the words of one of the expert psychiatrists who gave evidence before the MHRT in patient B's case:

> Paranoid schizophrenia anyway is simply a description of symptoms, it is not a diseased state as such.

Dr. X said:

> Single isolated psychotic episodes [such as that experienced by Patient B] which recovers [sic] very well with medication and rehabilitation are unusual. I would question the diagnosis of paranoid schizophrenia and discard it.

Notwithstanding this obvious difference between Prisoner A and Patient B, a comparison between their respective fates must be salutary for those who are apparently still saying that forensic patient status should be avoided at all costs, by the defence seeking to hide mental illness behind a plea of guilty to a lesser offence than that for which the client was charged.

Legal and ethical problems in hiding mental illness

There are two other matters that need to be mentioned in this context. First of all, the ethics of such an approach from the defence would in some circumstances be questionable. Secondly, the High Court recently held in *R v. Falconer* ([1990] 171 CLR 30), that *the prosecution* may raise the issue of mental illness. In the words of Justices Deane and Dawson:

> Nowadays it is often in the interests of the prosecution (or, at all events, the community) to raise the question of insanity, rather than in the interests of the accused. It used to be said that it was for the defence to raise a plea of insanity and not for the prosecution. That is probably still the case, but we think that the position has now been reached where it is only realistic to recognise that, if there is evidence of insanity, the prosecution is entitled to rely upon it even if it is resisted by the defence . . . It may be anomalous for the prosecution to raise the matter initially because the prosecution should not commence proceedings if it is seeking an acquittal, even on the grounds of insanity. The responsibility for the protection of the community in those circumstances lies elsewhere than in the criminal law. But we can see no reason why, if there is evidence which would support a verdict on the grounds of insanity, the prosecution should not be able to rely upon it in asking for a qualified acquittal as an alternative to conviction.

It is reported from Victoria that prosecuting authorities there are now commissioning independent psychiatric assessments of accused persons prior to their trials with a view to bringing the issue of mental illness before the court.

In this context, we again emphasise our opinion that the development of conditional release programs for persons acquitted on the ground of mental illness is to be encouraged and supported.

Assessment of the Forensic Release System

The current system for release of forensic patients is working well. But it will work well only while there is a Minister for Health who is prepared to review MHRT recommendations for release within the boundaries of the evidentiary and legal framework within which they were made. Consideration within this framework will mean that most recommendations for conditional release will be automatically approved, with some being sent back to the MHRT for its further consideration, based on queries or concerns which the Minister might hold about gaps in the evidence, relevant unresolved issues, and relevant issues which the MHRT has missed but which ought to be addressed before a recommendation for release could safely be implemented. The Tribunal has, in the year ending September 1990 under the 1990 Act, made 167 recommendations for relaxation in the prevailing restraints on the eighty-six patients reviewed: 119 have been approved, thirty rejected, and eighteen are still under consideration (*see* Table 9). The system also relies on the Minister promptly attending to the MHRT's recommendations. The MHRT recommendations are currently being quickly expedited. The system, nevertheless, has the inbuilt flaw of being vulnerable to ministerial abuse of discretion, and denial by a Minister of natural justice.

Table 9

Outcome of Recommendations for Relaxation* in Prevailing Restraints made by Tribunal During the Period 3 September 1990- 2 September 1991

Number of recommendations	Number approved by Minister	Number rejected by Minister*	Number still under consideration
167	119	30	18

* Some of these recommendations were subsequently approved on re-submission.

There is as well the overlay of discretion in the Attorney-General to determine that a forensic patient found to be no longer dangerous by the MHRT has 'served insufficient time in custody'. There is nothing in the legislation to guide an Attorney-General, acting bona fide, and determined to accord natural justice, as to the factors which are appropriately taken into account in determining whether a forensic patient has served 'sufficient time in custody'. The wide and unfettered discretion afforded an Attorney-General

by this legislation gives scope for mala fides on the part of an Attorney. There may one day in New South Wales be an Attorney who allows political factors to influence his or her discretion. There may one day in New South Wales be an Attorney who is fearful and ignorant about mental illness, and who allows his or her emotions to predominate in the exercise of his discretions. So broad and ill-defined is the Attorney's veto power, that an improper decision to refuse release might well conceal its impropriety, and prove unchallengeable before a court.

These mechanisms for ministerial veto, which in our view, make the forensic system inherently flawed, were obviously politically inspired. It is important to note that, through the entire course of the protracted and vigorous community and parliamentary debate over the draft mental health bill prior to its passage, with little amendment and assent, through both Houses of State Parliament, hardly a breath was spent or a drop of ink spilt on the forensic review provisions, even by those lawyers and psychiatrists who have, over the past decade, been intimately involved with the care, treatment, and disposition of forensic patients. Those in the community who, with us, see the forensic review system as fundamentally flawed, seem muted by the thought that the public, and politicians, are not yet ready to allow decisions about release back into the community of mentally ill people who have done dangerous, bizarre and frightening things, to be left to a body which cannot be voted out of office if it makes a mistake.

There is a discernible trend, derived from constitutional, United Nations, or European Community bills, covenants or charters of human rights, towards requiring access by persons who are unfit to be tried or who have been found not guilty on the ground of mental illness, to a decision-making body which is independent from the executive, and with determinative powers. The Law Reform Commission of Victoria has recommended that the rights of such detainees should be determined by an independent tribunal, rather than by executive decision-making. Jurisdictions in the USA have relied on guarantees in the Bill of Rights to afford access by forensic patients detained in prisons or institutions for the criminally insane to a definitive judicial determination of their right to be released. Expressing the trend in broad terms, it is viewed as unacceptable that a person who has never proved mentally fit to be tried, or who was found not guilty on the ground of mental illness, should be held for some indeterminate period, at the whim of a political figure. The growing mood in the Human Rights arena is well expressed in the case of *Thynne, Wilson and Gunnell v. The United Kingdom* (25 October 1990) when the European Court of Human Rights held that the United Kingdom had breached the European Convention of 1950 by reason of the absence of a judicial procedure for testing the continued lawfulness of their detention.

While highlighting the fundamental flaw in the New South Wales forensic review system, we must, nevertheless, chauvinistically point out that New South Wales is light years ahead of most other Australian jurisdictions, and indeed, most other common law jurisdictions throughout the English speaking world, in its approach to the release of people who have committed violent and dangerous acts while mentally ill. Some other Australian jurisdictions will be doing very

well, over the next ten years, to bring their systems for forensic review up to anything like the bench mark set by this State.

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REVIEW FOR RELEASE: THE USE AND MISUSE OF PSYCHIATRIC OPINION

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FREQUENT AND EXTENSIVE USE IS MADE OF PSYCHIATRIC OPINION DURING the process of reviewing serious violent offenders for release, setting determinate periods for those indeterminately detained and in considering extensions to minimum sentences. This paper will consider the use made of psychiatric opinion in the cases of two prisoners whose non-parole periods were extended by the Supreme Court of South Australia after applications by the Crown.

Prisoners serving substantial terms for serious offences of violence may be subject to various forms of review prior to release. The reviewing body, the type of review and the effect on the length of imprisonment and conditions of release depend not only on the original sentence but also on the legislative and bureaucratic framework of the criminal justice system in a particular state or territory. For example, since 1983 parole legislation in South Australia has made sentencing more determinate (South Australia. Attorney-General's Department, Office of Crime Statistics 1989). 'Truth in sentencing' is having its day in New South Wales, where a 'natural life' sentence recently was imposed. Life sentences are no longer mandatory for murder in some Australian jurisdictions (for example, New South Wales, Victoria and Australian Capital Territory) so with non-parole periods from which remissions are deducted being attached to life sentences in South Australia indeterminate sentencing is to some degree in retreat. At the same time, prisoners now on life sentences in South Australia can expect to serve actual sentences 50 per cent longer than did their predecessors despite the very low recidivism rates for released murderers (South Australia. Attorney-General's Department, Office of Crime Statistics 1989).

The release of some persons convicted of murder may create public and political concern especially in notorious cases and ones for which the media

has a persisting fascination. This in turn affects the chances of release for others who could return unnoticed and uneventfully to the community.

Prisoners with lengthy or indeterminate sentences are acutely aware of the effects of such concerns on prerelease programs, day leave and prospects for release. Shah (1986) has commented on the relationship between 'newsworthy cases involving mentally disordered offenders who may have raised an insanity defence', and 'inaccurate perceptions, attitudes and beliefs' perhaps resulting in speedy but poorly based proposals for law reform.

In contrast, the release of offenders with lengthy records for violence, armed robbery and aggressive sexual offences, who thus have a high chance of re-offending in actuarial if not individual terms, rarely provokes political comment or sustained public reaction.

Newsworthiness, public concern and political sensitivity perhaps contribute to the special attention homicide offenders receive from reviewing bodies and the professionals from whom psychiatric and other assessments are sought. The seriousness of homicide, perceptions of abnormality in offenders, uncertainty about their future conduct and possibility that error will bring public criticism of responsible individuals and agencies must all play a part in the frequency with which psychiatric opinion on the question of release is sought, and the uses and misuses to which such opinion is put.

Misuse of opinion does not necessarily imply wrongdoing as it can include misunderstanding, giving the opinion undue weight or applying it in attempts to solve problems and issues it did not address. Of more concern are partial quotation, or misquotation, the transforming of professional speculations into bureaucratic certainties and the use of opinion to support actions which would have been advised against by the psychiatrist. Psychiatric opinion on serious offenders who have been long in custody is frequently inconclusive with regard to crucial issues such as individual dangerousness. This inconclusiveness at times appears to stimulate rather than inhibit further referral for assessment.

The two recent judgments of the Supreme Court of South Australia which will be examined followed applications by the Crown to extend the non-parole periods of convicted murderers. Both applications were made only shortly before the projected release dates, this timing being considered appropriate by the court as it enabled proper assessment of those matters relevant to release. Both the prisoners were men who had killed women previously unknown to them. Psychiatric assessments were carried out prior to trial and sentencing and also during imprisonment. In the first case for consideration, the prisoner had a prior record of offending and of psychiatric assessment and treatment. The other prisoner had no such record. Apart from convictions for murder and their behaviour problems in prison, what the two men had in common was the ability to cause in their custodians and others fear of what might be their conduct after release. Both had non-parole periods making release mandatory with the Parole Board's discretion being restricted to the setting of conditions for post-release supervision, a highly problematic undertaking in each case.

The judgments will be examined from a psychiatric and not a legal viewpoint although the legislative background needs to be described. The

examinations will provide a focus for discussion on the ethical implications of psychiatric participation in both assessments for review and related court proceedings; the use made by courts of psychiatric evidence when dangerousness is a central issue; the way a correctional administration interprets and uses psychiatric opinion; how administrative concerns and psychiatric opinion on dangerousness issues may originate and, in combination, produce a 'dangerous person', perhaps impeding rehabilitation and reducing the validity of predictions of future conduct.

Conduct of the Cases

Some mention of the conduct of each case is required as this paper draws little, if at all, on material not available in evidence during the proceedings. Also, the discussion will centre on issues raised by the cases and not enter into argument about evidence or the opinions of individual psychiatrists. The judgments are clearly reasoned with the interpretation of the law, including its intentions, appearing in the first case *R v. Addabbo* ([1990] 53 SASR 449) being confirmed by the Court of Criminal Appeal ([1990] 157 LSJS 480). These judgments were used as the basis for *R v. Wheatman* (Supreme Court SA, Olssen J, 27 March 1991, Jud No. 2787, unreported). The handling of oral and documentary psychiatric evidence at the trials and in the judgments was fair and thoughtful.

In *R v. Addabbo,* only one psychiatrist gave evidence, being called by the Crown. He was the treating psychiatrist. The court did not order independent psychiatric assessment. The documentary evidence included previous psychiatric assessments, clinical files, schedules detailing the prisoner's misbehaviour over the years and his account of each alleged incident.

In *R v. Wheatman* the respondent's representatives retained a psychiatrist and the court, at the commencement of proceedings, ordered an independent assessment. After negotiation between both parties, a psychiatrist and the prisoner, the assessment was undertaken by the psychiatrist who nine years previously had carried out the pre-trial examination and had also some knowledge of the prisoner's institutional career. The decision to undertake the task meant resolving a number of ethical issues. Documents about the murder were not extensive as a plea of guilty had been entered to the charge. The voluminous documentary evidence presented at the hearing included, among other items, previous psychiatric assessments, clinical files, departmental documents including reports of misbehaviour and, significantly, numerous letters written by the prisoner over many years.

In this case, there was much sharing of information between participants and counsel conferred with both psychiatrists. The respondent dismissed his first legal advisers after much work was done, did the same with subsequent advisers and then represented himself at trial, a daunting task. His doing so imposed additional responsibilities and burdens on not only the judge and the Crown but also the psychiatrists whom he cross-examined at length. A review of the proceedings suggests that all relevant material came to the notice of the court although if he had been legally represented some matters may have been pursued further and additional witnesses called.

Both offenders remain in custody subject to routine review by the Parole Board, with no guarantee that future applications for extension of their non-parole periods will not be made. There are therefore some constraints on what should be included in this paper so the concentration will be on the content of the judgments themselves with only limited reference to documentary evidence other than psychiatric reports.

Legislative Background

A brief consideration of the parole legislation in South Australia will not only assist in understanding the two cases but also may give them a broader relevance.

In 1970 South Australia's first parole laws became effective. They were embodied in s. 42 of the *Prisons Act 1936–76*.

> [They] exemplified the indeterminate approach: assigning all responsibility for deciding prisoner release dates and conditions to a five member Parole Board chaired by a person with 'extensive knowledge of, and experience in, the science of criminology, penology or any other related science'. Under these provisions, unless the court had specified a minimum 'non parole' term—which in practice it rarely did—most prisoners become eligible to be considered for parole immediately they were sentenced (South Australia. Attorney-General's Department, Office of Crime Statistics 1989).

From March 1981, new legislation obliged courts to set a minimum term when imposing sentences of three months or more, including life sentences, with the Parole Board having discretion to release after the expiration of this term. This discretion was removed in legislation proclaimed in December 1983. Under this legislation the prisoners were to serve a non-parole period less remissions earned; the Parole Board was to set parole conditions and act on breaches.

> Proclamation of the 1983 legislation meant that, in just fourteen years, South Australia's parole system had run the cycle from one of the most indeterminate to the most determinate in Australia. The rapidity of these changes perhaps made it inevitable that, in their wake, there would be questioning and confusion (South Australia. Attorney-General's Department, Office of Crime Statistics 1989).

Confusion there certainly was, and concern that some prisoners sentenced to fixed terms with non-parole periods would be released years before the date envisaged by the sentencing court. Also, life sentenced prisoners now formed three categories: ones sentenced before 1981 who had no minimum sentence and required one to be determined; those sentenced between 1981 and 1983 who had non-parole periods which were now determinate and would be foreshortened by remissions; and those sentenced after December 1983, the setting of whose non-parole periods became a source of much argument because of determinacy and the developing trend for the actual sentences to be served to be longer.

The two cases for discussion fell into the 1981-1983 category, resulting in legal argument about the interpretation and intent of the legislation.

These problems were dealt with in *R v. Addabbo* where the judge set out the history of the legislation and interpreted the provisions. By the time this case was heard the provisions for extending non-parole periods had moved from the Prisons Act, later the *Correctional Services Act 1982*, to the *Criminal Law (Sentencing) Act 1988*, which became effective on 1 January 1989, where it appeared as ss. 32(6) and (7). In 1986 there had been a significant provision inserted which now appeared as s. 32(7)(b)(ii). The provisions of the Criminal Law Sentencing Act were:

> 32. (6) The Crown may apply to the sentencing court for an order extending a non-parole period fixed in respect of the sentence, or sentences, of a prisoner, whether the non-parole period was fixed before or after the commencement of this Act.
>
> (7) In fixing or extending a non-parole period, the court—
>
> (a) must, if the person in respect of whom the non-parole period is to be fixed or extended is in prison serving a sentence of imprisonment, take into account the period already served;
>
> and
>
> (b) in the case of an application by the Crown under subsection (6), must have regard to:
>
> (i) the likely behaviour of the prisoner should the prisoner be released on parole;
>
> (ii) the necessity (if any) to protect some other person or persons generally from the prisoner should the prisoner be released on parole;
>
> (iii) the behaviour of the prisoner while in prison but only insofar as it may assist the court to determine how the prisoner is likely to behave should the prisoner be released on parole;
>
> and
>
> (iv) such other matters as the court thinks relevant.

Although life sentences in South Australia are no longer indeterminate there is still indeterminate detention available for certain juvenile offenders, habitual criminals and those found to be incapable of their sexual instincts. Persons found not guilty on the grounds of mental illness are detained on the Governor's Pleasure. Section 32 does not apply in such cases. Those to whom it applies could, if successive applications were granted, face what would amount to a sentence of incremental indeterminacy.

The Cases

Each case will be dealt with by outlining the grounds of the application, the nature of the murder, the offender's history and the evidence given in relation to the issue of extending the non-parole period.

Case 1

In *R v. Addabbo* the Crown's application was on the following grounds:

- the Respondent is likely to continue to offend should he be released on parole;
- there is a need to protect the public from the Respondent should he be released on parole; and
- legislative changes with respect to the effect and operation of non-parole periods have rendered inadequate the Respondent's non-parole period.

The third ground was rejected by the trial judge who considered the effect of a change in the provisions:

> was to give a wider discretion to the court but not so wide as to include the concept of resentencing. The intention of Parliament in all of these enactments seems to be clear, and that is, that a non-parole period could only be extended where there was a necessity to protect another person or the community generally.

In supporting this interpretation, the Court of Criminal Appeal said of the relevant provision, s. 32(7)(b)(iv):

> It cannot stand alone to give an unfettered discretion to resentence the prisoner by extending the non-parole period, simply to bring it into closer conformity with the present sentencing regime.

The trial judge's decision therefore was based on the remaining two grounds which, after hearing evidence, he accepted.

The evidence with regard to the murder was, in summary, as follows. In 1982 the respondent *Mr A.* had observed premises with a view to breaking in and stealing and had then gained entry to the victim's home by requesting to use the lavatory. Her family were out and she was alone. *Mr A.*'s ruse was discovered and in the confrontation he took a knife. In defending herself the victim injured him. She received multiple stab wounds but before she died he dragged her to a bedroom where an attempt at sexual intercourse failed. He was interrupted by the return of her husband and children, whereupon he left. Two days later he surrendered to police.

The information available at the time of sentencing was outlined in the judgment. In summary, at the time of sentence *Mr A.* was a thirty-three year old man who had migrated to Australia with his family when he was nine. He had borderline intellectual retardation with an intelligence quotient of about seventy-four, had a long history of severe mental illness and was considered to have an antisocial personality disorder. His extensive criminal record for predominantly property offences had begun in 1965. There had been short periods of imprisonment during which he had received psychiatric treatment. His diagnosis at various times had been of schizo-affective

psychosis or manic depressive psychosis. *Mr A.* had been treated in hospitals. Even when psychiatrically well his offending continued.

In his sentencing remarks, quoted in the judgment on the application to extend the non-parole period, the judge drew attention to the terrible nature of the crime, the experience of the victim, relatives and the community and the reasons why a lengthy non-parole could be considered. The threat to the community if *Mr A.* was at large and in his then condition made it seem that 'this is one of the rare cases where preventive detention must be seriously considered as a factor in the sentencing process'. The judge went on to express concern about factors important at the time of eventual release and for the need for treatment, *Mr A.*'s non-compliance with medication and the fact that there was no suitable institution outside prison for the care of *Mr A.* or persons like him. (The lack of such institution was again remarked on in the judgment being examined).

After balancing these considerations against *Mr A.*'s personal and psychiatric history, the judge imposed a life sentence with a non-parole period of ten years.

At the hearing on the application, evidence concentrated on *Mr A.*'s psychiatric diagnosis and treatment, prison behaviour, which included threats to kill, and the possibility that after release he might reoffend in a manner putting others at serious risk.

The treating psychiatrist was quoted as saying in evidence that he tended to have 'strong and increasing doubts about the earlier diagnosis of psychotic illness' and that the prisoner's behaviour in custody was likely to be due to his antisocial personality disorder and attempts to get his own way. It was this psychiatrist's opinion that on release Mr A. was unlikely to commit other than 'nuisance offences', minor ones against property. His personality disorder was not treatable and as he was not psychotic, no treatment was required. Under examination the psychiatrist granted that 'nuisance offences' could result in confrontation with the public. He thought Mr A.'s threats to kill doctors, prison staff, a family member and others were not to be taken seriously.

The judgment reviewed the extensive evidence of violence, property damage, abusive behaviour and threats, at times involving weapons, and *Mr A.*'s refusal of medication during his custody in prison and an associated secure hospital. The judge, after considering all the evidence stated:

> I have concluded that it is likely that the respondent would not observe conditions of parole unless it suited him, which is confirmed by his manipulation of the system in prison. His anti-social personality disorder, and his low intelligence, to say nothing of a psychotic disorder if he in fact has such a disorder, indicate that it would be well nigh impossible to design conditions which would ensure the protection to the public which I regard as necessary.

Addressing the psychiatrist's general view that predictions of future violent conduct were usually over-predictions, he said:

> In the end it is for the court to decide, on all of the material available, whether by reason of the matters set out in Sec.32(7)(b) of the Criminal

> Law (Sentencing) Act there is a need to extend the non-parole period. The very decision which the court has to make requires an attempt to predict future behaviour.

And further:

> The psychiatrist's predictions as to the future conduct of the respondent, including his opinion that the respondent's threat to kill should not be taken seriously, are necessarily speculative and can be no more than his opinion as to matters which I must decide. They cannot be decisive.

These statements emphasise the nature of the proceedings, that is predicting future conduct which might put the public at risk, and the place of psychiatric opinion. After consideration of the issue of proportionality—expressing an opinion that protection of the community 'cannot lead to a sentence disproportionate to the crime'—and being unable to discern any intention that a non-parole period should not be extended because of the lack of treatment facilities, or the probability that the prisoner would not respond to treatment, the judgment was that the non-parole period be increased by three years. The judgment was upheld on appeal.

Case 2

R v. Addabbo established the principles to be applied a year later in *R v. Wheatman*. The thrust of the legislative provisions was the protection of the public, resentencing was not the object and proportionality was to be preserved. The second case underlined the problems of predicting future dangerous conduct in a man who had committed a single serious offence, had no established diagnosis other than of a personality disorder and whose worrying conduct in prison was open to many interpretations.

In its application to extend *Mr W.*'s non-parole period the Crown argued that legislative changes had rendered inadequate the period set and, in any event, it should be extended having regard to:

(i) the gravity of the offence;

(ii) the mandatory sentence of life imprisonment;

(iii) the personal circumstances and the antecedents of the respondent; and

(iv) the behaviour of the respondent whilst in prison.

The judge ruled all grounds other than (iii) and (iv) irrelevant.

The victim of this 1981 murder was a married woman aged twenty-two years who did part-time work as a demonstrator making sales to small private gatherings. On the night of the murder she left such a gathering after 10 p.m. and thirty minutes later telephoned her husband saying her motor vehicle had a puncture and a man was helping her change the tyre. The telephone went dead. When she failed to return home, family and friends

unsuccessfully searched for her. Early the next morning her body was found. It bore five stab wounds.

In the judgment on the application is an outline of the facts largely drawn from *Mr W.*'s statement to the police and to some extent from accounts given to psychiatrists. The salient points were that on the night of the murder a collision occurred between the vehicles of the victim and the offender. He had planned this in order to initiate a robbery. They exchanged identification particulars after which she was threatened with the knife, made to sit in her car and empty her purse. The offender said he would take some rings after he had driven her elsewhere and tied her up so he could make his escape. During the journey he made her telephone her husband. On reaching an isolated area her hands were tied, she was gagged and taken from the vehicle. It was after this that he twice saw headlights of vehicles moving on an adjacent road. The victim was made to kneel; the offender later explained that persons in a nearby farmhouse may have heard him drive past. The story was that for no accountable reason he stabbed her in the back. Believing this to be a fatal injury and wanting to spare her a slow and painful death, he turned her over and deliberately stabbed her in the region of the heart.

After a psychiatric assessment was provided counsel acted on written instructions to enter a plea of guilty to murder.

Mr W. was aged twenty-one at the time of murder, had no record of prior offences or psychiatric treatment. He worked full-time in a factory and for recreation was much involved in ten-pin bowling and chess. Little objective information is known of his background as access to his family was largely denied by him. What contact was achieved was early in his custody. However, his history and presentation have always been consistent with a schizotypal personality disorder. No major psychiatric disorder has ever been diagnosed, no psychotic symptoms complained of and there have been no conclusive signs or reports of delusional thinking despite suspicions aroused by his correspondence and general demeanour.

On remand for trial he was seen by two psychiatrists. The following quotation from one report describes him in a way still relevant:

> In the ward he was generally aloof, and distant, he formed no close relationships with any other staff or patients and participated in generally solitary pursuits such as reading and chess.
>
> His mood was usually cold, flat, and strangely distant but on occasions he would become extremely angry with minimum provocation indicating that he had difficulties in relating, and would swing from being distant and uninvolved, to becoming enraged and angry without any of the usual intermediate steps. His personal history was one of leading a generally isolated, solitary life, he had no close male or female friends, and had not established any normal heterosexual relationship.

Mr W.'s account of the crime to the psychiatrists during the pre-trial assessment suggested the original motive was robbery but as he took steps to avoid detection and spent more time with his victim tension built between them until, frightened by vehicle headlights, he stabbed her initially without

thought and then again to spare her suffering. There was no suggestion the killing was premeditated. In the period preceding the offence *Mr W.* was dissatisfied, depressed and had suffered important personal rejection.

Neither examining psychiatrist found any evidence whatsoever that mental illness was a possible defence or that *Mr W.* had ever suffered from schizophrenia. He was sentenced to life imprisonment with a non-parole period of twelve years.

The evidence presented at the application hearing covered four main areas. These were his psychiatric history and diagnosis, prison conduct, the content and nature of his correspondence to officials and members of the public and his management by the correctional authorities. There was emphasis on the offence, his motivation and mental state. Psychiatric evidence was important in each area.

Assessing the evidence on diagnosis the judge concluded the psychiatrists agreed on the general nature of his personality with the psychiatrist assessing him for the court (hereafter, court psychiatrist), being more conservative on the question of the likelihood of delusional episodes and an underlying schizophrenia. Evidence was given that *Mr W.*'s history did not satisfy the criteria for diagnosis of schizophrenia and that transient psychotic episodes could occur in a person with a schizotypal personality disorder. At no time in his imprisonment had *Mr W.* been given a proper trial of medication to clarify diagnostic and treatment issues. After the initial stages of imprisonment *Mr W.* normally refused psychiatric assessment and so such a trial probably could not have been done. It seemed a number of chances for psychiatric intervention had been lost in the first few years and could not be retrieved.

The respondent's psychiatrist, who had not assessed him before, received an account of the offence suggestive of delusional beliefs. This was new material and difficult to assess. As the court psychiatrist, and a colleague, had found no evidence for this before trial he thought it possible the information had been concealed but perhaps more probable that the offence had been subject to elaboration, delusional or otherwise over the years.

On the question of predicting *Mr W.*'s future conduct the judgment noted that the psychiatrists:

> were utterly frank in their conclusion that it was quite impossible to give any reliable indication of the likely behaviour of (*Mr W.*) if released.

Evidence regarding his prison conduct indicated no real violence but in the judge's assessment:

> His conduct has been most bizarre and unsatisfactory over a long period of time. It has been notable for its associated threats of serious injury to both prison staff and others who have no direct connection with him.

With regard to his extensive correspondence, and the equally extensive evidence and submissions on it, the judgment said:

> Not only is his correspondence generally written in a strange and almost patently irrational style, but, at times, it directly or impliedly threatened serious bodily harm to others.

Mr W.'s explanation that his correspondence was aimed at 'stirring others' and that the threats had not been serious was not accepted. The view taken of his conduct during imprisonment led to the conclusion that:

> His whole pattern of behaviour has simply been that of a person who, prima facie, displays a disordered mind—at times seemingly divorced from reality—and who would, indeed, present a very poor parole risk.

The court psychiatrist's report and evidence dealt in some detail with *Mr W.*'s management by the correctional authorities. This issue received lengthy comment in the judgment which supported the psychiatrist's views.

After nine years of imprisonment *Mr W.* was still in maximum security and due to a health problem was not employed. From the secure psychiatric hospital where he began his custody he quite fearfully had entered the normal prison regime after time in a segregation unit. His personality was ill-suited for prison life. From the outset his conduct had been considered by some as his way of making for himself psychological and physical space, particularly after a serious assault in which he was knocked unconscious. Worries about his correspondence began early but it was never controlled by interception, censorship or his being charged with a breach of any regulation and he was not counselled either to discontinue it or change its nature. For some years it had been assiduously collected for future use in the anticipated application for extending his non-parole period.

Evidence contained an example of the use of psychiatric opinion in rejecting a classification committee recommendation for *Mr W.*'s transfer to a lower security institution so that a pre-release program could commence. Documents showed that the court psychiatrist's name had become linked to a statement that *Mr W.* was 'highly dangerous'. The court psychiatrist had in fact rejected the idea that *Mr W.*'s future conduct could be predicted or that psychiatric opinion could justify detention past his release date. As to whether the link was deliberately made or resulted from paraphrasing a legal officer's report was difficult to decide from the document. *Mr W.* had been sent, without warning, to see another psychiatrist for an examination about his proposed transfer but had angrily refused examination. The psychiatrist reported the refusal but also stated that there were ongoing concerns about the risk the prisoner might pose to women. He had never examined *Mr W.* and the opinion probably arose as will be described shortly. This psychiatrist suggested there was no psychiatric reason against transfer to a lesser security. The official document quoted him about the risk to women but did not cite the opinion about transfer. Neither was there mention of a report by the court psychiatrist which explicitly stated his opinions on the role of psychiatry with regard to issues of dangerousness and further detention. He too would have supported the proposed transfer.

The oral and documentary evidence in this case afforded some insight into the development of psychiatric opinion. Except pre-trial, *Mr W.*'s contact

with psychiatrists had been slight throughout his custody. While he was being assessed for the application hearing more psychiatric effort was expended than in the previous nine years.

However, opinions expressed early in his imprisonment were important. At no stage was he thought psychotic. He had disclosed, perhaps in general terms as no detailed record was available, fantasies of a sexual nature to a psychiatric registrar. It could not be established during the application hearing whether these fantasies preceded or followed the offence but the concern in the registrar's clinical note echoed through the clinical file and written reports. This was despite a referral for assessment to a psychologist interested in sexual disorders coming to nothing and no additional information being discovered. The clinical note and referral letter influenced clinical notes, psychiatric reports and, one may think, affected official and psychiatric opinion without the issues ever being clarified. The registrar, now a consulting psychiatrist, had no recollection or notes shedding further light on this important information. *Mr W.* had contact with another psychiatrist, before he began refusing assessments, and he too recorded misgivings, certainly based on the earlier remarks of his colleague.

Mr W.'s progress towards becoming 'dangerous' thus may to some extent be charted by examining clinical and departmental documents. The decision that he was dangerous, even inherently so, appears to have been bureaucratic rather than clinical. The first efforts to identify him as a dangerous individual falling within the province of psychiatry perhaps began with concern about his correspondence and the realisation that with the 1983 changes in parole legislation not only would his release be mandatory but would occur before the minimum period set by the sentencing judge. His march to becoming identified as dangerous—despite the lack of any adequate assessment or clear grounds supporting that conclusion—was well under way after four or five years of imprisonment. It proceeded unimpeded by any specific attempts to control his behaviour or to implement a pre-release program.

The final two paragraphs of the judgment indicate that court psychiatrist's views on *Mr W.*'s management were considered relevant. In supporting them and dealing with related legal and correctional issues the judge stated:

> However, like (the court psychiatrist), I strongly condemn any attitude which is simply based upon maintaining Wheatman in a high security area and permitting him to have opportunities to behave in an unacceptable manner without appropriate counselling and positive attempts to rehabilitate him. In particular, it seems to me, that simply to permit him, as has apparently been done, to write all manner of bizarre and threatening letters to a variety of recipients without let or hindrance, is to encourage him to continue to do so.
>
> It must be pointed out that, short of there being a positive and unequivocal diagnosis of a psychiatric condition in relation to Wheatman which justifies his continued detention, there must, in any event, come a time at which it is inappropriate to grant additional extensions of his non-parole period, simply as a means of keeping him out of circulation.

> To ultimately release him without proper pre-release programs could be disastrous to the community interest.

The non-parole period was extended by three years. There was no appeal.

Discussion

The cases described were chosen because they are recent examinations of how psychiatric opinion was used in relation to release, and have relevance outside the jurisdiction in which they were decided. As indicated earlier direct comment on the cases needs to be limited as the two offenders remain in custody and subject to further assessment. Readers with particular interest in psychiatry and law can draw their own conclusions about the use of psychiatric opinion and how legal issues were resolved in each case.

In *R v. Addabbo* psychiatric opinion on key issues had much to offer because of the prisoner's history, his intellectual disability and psychiatric disorders. His history of offending and disturbed behaviour in itself provided grounds for predicting that his conduct could put others at risk whenever he returned to the community. The nature of the proceedings necessarily involved a prediction of future conduct; psychiatric opinion given in evidence was not decisive.

In *R v. Wheatman* there was comparatively little information of predictive value, no diagnosis of a major psychiatric disorder and no history of treatment. In some ways *Mr A.*'s institutional career, continuation in maximum security and the administrative responses to his conduct and his perceived dangerousness, confused the picture, making prediction difficult not only in terms of his conduct or should he be released but also how he would manage in a prison of lower security. His letter writing introduced further confusion and it can be wondered whether if it had been stopped or controlled instead of being tacitly encouraged there would have been sufficient grounds for an application to extension of his non-parole period.

Mr W. became, by virtue of the way his personality and behaviour was responded to by the administration, a prisoner best described as 'dangerous to the administration'. During the remainder of his imprisonment and for a long time after his release, any unfortunate action on his part is likely to result in criticism of the responsible politician and administrators. It is important to avoid having prisoners enter this particular category of dangerousness as their management henceforth is unduly difficult.

The assessment of prisoners with personality disorder is difficult within the correctional system. Briscoe (1970) considered this problem from the point of view of a forensic psychiatrist dealing with personality disorder. Kropp et al. (1989) studied the perceptions of correctional officers towards mentally disordered offenders. The comparison groups were prisoners and mentally ill patients. Patients were perceived more favourably than mentally disordered offenders with the only item contributing significantly to this difference being dangerousness. Mentally disordered prisoners in comparison to ordinary prisoners were rated as less predictable, rational and understandable and thus 'more mysterious'. That mentally disordered offenders were perceived in

the least favourable light provides some explanation for the particular problems met in their assessment and management within prison. The lack of facilities for dealing with this particular group in Australian correctional systems has been commented on for many years, for example, Potas (1982), and there is little reason to believe that there has been substantial change in services for this particularly disadvantaged group.

Although the psychiatrists in *R v. Wheatman* did not express particular attitudes or beliefs in relation to dangerousness as such, it needs to be remembered that psychiatric attitudes on the subject and about the disposition of offenders are important (Brooks 1984). Both cases illustrated the long-term influence of psychiatric opinion on the management and eventual release of serious violent offenders. Influence arises not only from lengthy assessments and reports but also brief clinical notes which may include little support for opinions there expressed. Great reliance may be placed on opinion but also on details of personal and psychiatric history and on descriptions and explanations of particular incidents. The future use of particular opinions and pieces of information cannot be predicted and a heavy responsibility, not always recognised, rests on any psychiatrist or medical officer making assessments or recording personal or medical information.

Although much has been written which will assist with assessment and report writing, little mention is made in the literature of the long term influence of assessment and opinions. Even the mere fact of having been assessed may label an offender, so influencing some prisoners to avoid assessment and treatment. Also, there seems to have been little analysis of the scope and content of reports as compared to their usefulness. Campbell (1981) reviewed the use and efficiency of psychiatric pre-sentence reports and, in New Zealand, Hall (1984) examined how psychiatric reports were used in the sentencing of mentally disturbed offenders, making some analysis of report contents while concentrating on their influence. Pfäfflin (1979) in a paper provocatively entitled 'The contempt of psychiatric experts for sexual convicts', quotes examples of psychiatric opinions so prejudicial one would prefer they were works of fiction.

The central issue in *R v. Addabbo* and *R v. Wheatman* was determination of the likelihood of future behaviour which would put the public at risk. Psychiatrists gave evidence in each case and previous reports and clinical notes were used in evidence. For a number of reasons such use of psychiatric opinion may be controversial. The remainder of this discussion reviews the important issues and the conclusion will suggest ways of reducing professional difficulties and ethical conflicts, and how to improve the use of psychiatric opinion by administrations and courts while protecting the rights of offenders. By ensuring assessments are soundly based and properly used the interests of justice, the rights of individual offenders and the community should be better served.

In writing on the question of defining the dangerousness of the mentally ill, in the context of civil commitment, Brooks (1984) noted that 'the legal determination that a mentally ill person is dangerous may have drastic consequences'. The consequences to the mentally ill offender of a similar finding is likely to be harsher, including the conditions of confinement and

the possibility of an indeterminate period of detention. His review of legal and psychiatric issues in the defining of dangerousness includes the following comment relevant to this discussion.

> Because legislatures and courts, during the early years of dangerousness jurisprudence, abdicated their responsibility, the burden devolved upon psychiatrists and other mental health professionals to give meaning to the terms dangerousness, harm, and injury. Since in psychiatry and in other mental health circles there is no generally accepted legal, psychiatric, or medical meaning of such terms and since it is not a part of psychiatric training to evaluate dangerousness, each expert provided his own personal, subjective definition. These definitions tended to implement the expert's idiosyncratic legal views, his personal set of values about the protection of persons and society, and his hidden agenda about appropriate dispositions for the mentally ill (Brooks 1984).

In proposing his seven factor model for defining dangerousness Brooks suggested the components were often explicitly used but seldom articulated. The factors were:

- the nature of the harm involved;
- its magnitude;
- its imminence;
- its frequency;
- the likelihood or unlikelihood that it will occur;
- situational circumstances and conditions that affect the likelihood of harm occurring; and
- the substantive due process interest balancing between the alleged harm on one hand and the nature of society's intervention on the other.

The seventh brings together the preceding six, balancing them against the question of societal intervention.

The now extensive and growing literature on dangerousness, particularly in relation to the mentally disordered, is readily accessible and does not require review here. Almost any publication on major aspects of the subject leads one to important studies and commentaries. Brooks (1984), Bowden (1985), Craft and Craft (1984), and Pollock and Webster (1990) all review matters relevant to the assessment of dangerousness in the mental health and criminal justice systems. Verdun-Jones (1989) and Freeman and Roesch (1989) in a special journal issue concentrate on mentally disordered offenders, sentencing and the criminal justice system. The contents of this issue are reviewed by Shah (1989). All these authors provide guidance to the forensic psychiatrist undertaking the clinical assessment of dangerousness.

For a psychiatrist requested to participate in proceedings involving the determination of dangerousness, the crucial decision is whether to do so. The question then is in what role and on what basis. The criminal justice system offers not only a wide range of issues on which psychiatric opinion may be important but also a number of roles such as independent assessor, treating psychiatrist, administrator or adviser all of which can generate professional and ethical conflicts, particularly if a number of issues are addressed and several roles played out at the same time or in sequence. True independence in any one role is hard to achieve due to the structure of services, the relatively few psychiatrists available and limited funds. There are few guidelines to assist with the resolution of conflicts in roles and interests.

Taking as a starting point the withdrawal of a colleague from forensic psychiatric practice following an unpleasant experience of what was, in retrospect, an ethical misjudgment, Appelbaum (1990) addresses a central issue for forensic psychiatrists, the possibility of doing harm and not being able to abide by the established medical ethical principles of doing good and avoiding harm. Appelbaum concludes examination of the problem by deciding that in forensic psychiatry the normal medical ethics cannot always apply. He acknowledges the rarity of ethical guidelines for forensic psychiatry, and the inadequacy of most, before stating:

> What then of the psychiatrists who agonize over the harms their testimony may cause the persons they have evaluated? Although their anguish is understandable, particularly when the harms are severe, it cannot justifiably be ascribed to a failure to conform to ethical norms. For psychiatrists operate outside the medical framework when they enter the forensic realm, and the ethical principles by which their behaviour is justified are simply not the same . . . But the possibility of failing to do good and of contributing to harm—while serving other, valid ends—is an inherent and justifiable element of forensic work.

The American Psychiatric Association's Task Force on the Role of Psychiatry in the Sentencing Process (Halleck 1984) made comments relevant to this discussion:

> We recognize that one legal and medical value must be given primacy in pre-sentencing evaluations—the need to determine the truth. Agreeing to participate in the sentencing process therefore obligates the psychiatrist to make a good faith effort to conduct a thorough examination. It also precludes withholding any relevant information. Having thereby satisfied the obligation to society, however, the remainder of the psychiatrist's behaviour should adhere to an individual-centred orientation.

Even with these guidelines individual decisions to participate in proceedings where dangerousness is the issue may be difficult. Non-participation may disadvantage an offender by excluding relevant information and opinion, permitting misuse or misinterpretation of earlier and perhaps no longer relevant opinions. Courts and review bodies may lack the time, skills and advice to evaluate clinical information and diagnostic opinions properly. Participation on the other hand may legitimise proceedings allowing use of psychiatric information even if the opinion is that the offender is not

dangerous or that prediction is not only impossible but clinically and scientifically illegitimate. Pollock (1990) considers this last issue, dealing with the problems of clinical and actuarial approaches to prediction.

There may be other advantages in participating as even if the psychiatrist cannot resolve the central issue there is the opportunity to influence judicial or other comments or recommendations which themselves may affect a prisoner's classification and management, so aiding future evaluation and rehabilitation. The final comments in the judgment in *R v. Wheatman* may be a case in point.

Without a good knowledge of the context in which the psychiatrist and the offender to be assessed are placed, it is difficult to predict the usefulness and effect of psychiatric involvement; it may be hard to prevent the gratuitous harm which can flow from apparently innocuous opinions and discussion. Where there is uncertainty about diagnosis, for example, it is best to be conservative as bodies charged with making final decisions may find it useful to turn possibilities into probabilities and speculation into certainty. The commentaries of Bowden (1985), Brooks (1984) and Shah (1989) concentrate attention on context of evaluations. Uncertainties about diagnosis in *R v. Wheatman* may point the way to future argument about release.

The question arises as to what is misuse of psychiatric opinion. Some of the uses to which opinion is put are simply inappropriate in that it is used out of context, when out of date, is given undue weight or is not fully understood. Lack of knowledge about how opinion should be used can result in distortion by partial quotation or paraphrasing; these along with misattribution of opinion shade into deliberate misuse, perhaps with the intention to support a particular opinion or decision. The repeating of an opinion over the years can contribute to the creation of myths about particular individuals and play a part in the manufacture of a 'dangerous person'. Perceptions of correct use, inappropriate use and misuse depend on one's perspective. The two cases discussed illustrate the use of opinion in ways which would be regarded differently by the prisoners, the courts, the psychiatrists and the correctional administration.

Conclusion

There is a need to avoid some of the difficulties which have been illustrated and discussed. Psychiatric opinion will continue to be sought and used in determination of dangerousness in the criminal justice system and mental health services. It is important for all parties to understand the difficulties, ensure that justice is done, protect the public, and avoid untoward and perhaps unanticipated harm to those about whom hard decisions must, of necessity, be made. There are a number of levels where steps can be taken. They can perhaps be listed as personal, professional, procedural and judicial, structural or administrative and legislative.

At the personal level the psychiatrists must make individual decisions about their approach to the issues. The ethical basis for participation will always be to some extent personal; most forensic psychiatrists probably feel that in undertaking endeavours which are not therapeutic but serve legal ends they are

engaged in something differing importantly from normal medical practice. Independence is needed to avoid actual or perceived bias or conflicts of interest. A principle espoused by the American Public Health Association Jails and Prisons Task Force (1986) may be difficult for some to practise but it emphasises the importance of professional independence and the separation of functions. The essence of the Task Force's position is as follows:

> Mental health professionals who participate in administrative decision-making processes such as, but not limited to, parole and furlough relating to inmates, should be other than those mental health professionals providing direct therapeutic services to those inmates.
>
> . . . when any administrative board is addressing the affairs of an individual inmate who is in therapy, the treating mental health professional must not sit on that board. Whenever such a board requires that appropriate mental health input be provided, it shall be provided by an independent mental health professional who is not treating the individual.

At the professional level, bodies such as the Royal Australian and New Zealand College of Psychiatrists should where possible move to the setting of standards, as specifically as can be achieved, for forensic psychiatry practice. In addition, advice should be available about procedures appropriate to various tasks, such as the preparation of pre-sentence and other assessments. Allowances would have to be made for the different legislation, criminal justice systems and mental health services operating across Australia.

At the administrative and structural level, adequate services need to be provided to offenders, in particular prisoners, and proper standards set and followed for assessment, treatment and the provision of opinions. Adequate funding or other arrangements must be in place so independent psychiatric opinion can be obtained for purposes such as pre-trial examination, sentencing, transfer to hospital and assessment for release or continued detention. There must be appropriate legislative provisions to facilitate the psychiatric assessment and treatment of remand and sentenced prisoners.

The practices and procedures of review bodies should be as open to examination as those of the courts. The procedures of the Serious Offenders Review Board in New South Wales are a good example. The Board prepares detailed, carefully documented reports when applications are made to the Supreme Court for the setting of minimum or additional sentences. The Board's reports quote extensively from psychiatric reports, complete copies of which are attached for examination. Many of the tasks the Board undertakes are most difficult but its activities and procedures have a commendable degree of visibility. Its recommendations on sentence can be contested in court.

There is much to commend the use of the courts to determine the issue of dangerousness, especially where such a determination will have a direct effect on a person's liberty or long-term prospects for release. Verdun-Jones (1989) cites the contention of Dickins that if dangerousness continues as the basis for prolonged detention then, 'like insanity, it should be considered a legal status that should be determined by the court in accordance with due process of law'.

The last level for consideration is legislative. Many psychiatrists in this country have lengthy experience with laws which place upon them, should they deliberately or inadvertently allow themselves to become involved, the task of forming an opinion on questions which may go beyond the difficult almost to the absurd. 'Sexual psychopath' legislation still exists in this country. For example, in South Australia psychiatrists may be asked to determine whether, under s. 23 of the *Criminal Law (Sentencing) Act 1988*, an offender is 'incapable of controlling his sexual instincts'. New South Wales once had the *Mental Defectives (Convicted Persons) Act 1939*; and the *Inebriates Act 1912–49* is still in operation. In Victoria, the *Community Protection Act 1990*, which provides solely for Garry David, is a matter of intense controversy. In a recent article Parker (1991) treads carefully when discussing the continuing case of this prisoner, referring to the various political, law reform and legal manoeuvres and discussing the use made of psychiatric opinion.

Psychiatry and the community can well do without legislation which, even if originally well-intended, ends up being imprecise and discriminatory in its application and anti-therapeutic if not frankly harmful to individuals. Some legislation is illusory when it comes to protection of the community. Forensic psychiatrists giving evidence on poorly formulated issues and questions sometimes end up as the unwilling de facto gaolers of offenders who receive no treatment and may require none.

The Garry David case is a current focus of political public, legal and psychiatric concern. Dangerous offender legislation is already available in some Australian jurisdictions; further legislation, more open and specific in intent, if uncertain in likely costs and benefits, is expected. Its use will seriously test not only our legal institutions but the professions of law and psychiatry.

The history of preventive detention and other attempts to identify and isolate offenders dangerous to the public give no cause for optimism and no comfort to those psychiatrists upon whom unwanted responsibilities inevitably will fall.

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ASSESSING THE DANGEROUSNESS AND TREATABILITY OF SEX OFFENDERS IN THE COMMUNITY

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IF IT IS DIFFICULT TO GIVE A COHERENT MEANING TO 'DANGEROUSNESS', THE combination of this term and the term 'sexual offender' produces a semantic impossibility. Dangerousness in sex offenders is equated with incurable evil by the courts, unspeakable terror by the community and therapeutic nihilism by professionals. The silver gun rapist and Mr Baldy (the child molester) incite images of despair and fear which no amount of statistical analysis or criminological wisdom will overcome.

Yet the current community concern about sexual violence is itself a sign of hope for the future. There appears to have been a huge expansion in society's knowledge-base about sexual offending: hopefully folk-myths such as those of sick offenders and 'stranger danger' have now been replaced by the reality that normal males perpetrate most sexual violence and that most offenders are known to their victims. With increasing knowledge has also come a range of attempts to do something other than simply incapacitate the offender: they may be crudely positivist hybrids of treatment and punishment approaches and their efficacy may be doubtful but at least they seek to address the very real problem of recidivism in this group.

The attitudes of the law and the community to such interventions is ambivalent. The 'sickness' of sex offenders, particularly child molesters, has been used to justify both indeterminate detention and the development of non-custodial alternatives for them, often on dubious clinical or

criminological grounds (Glaser 1988). Yet, as two recent Victorian cases show, treatability remains an issue (Fox 1991a; 1991b).

In *R v. McCracken*, the appeal by the Crown against a non-custodial sentence for an obviously recidivist paedophile, inspired by outrage in the mass media about the decision, was dismissed because the Full Supreme Court did not believe that the treatment plan contained in the original community-based order had been properly implemented, despite the offender himself having helped to sabotage it by hiding his medication in a shoe-box. In *R v. Roadley*, an appeal against a prison sentence for an intellectually disabled paedophile was upheld, the court noting that the lack of community resources (and hence the possible danger to the community) for the offender did not justify imprisonment where this was disproportionate to the crime.

These developments reflect a belief that treatability and dangerousness are quite distinct concepts. Specifically, treatability is as much a function of the legal and community response to the offender as it is of the offender's own characteristics. There is a requirement that the courts, parole boards, correctional agencies and service providers go beyond the crude assessment of suitability for treatment of an offender and consider such factors as resource allocation, efficacy of individual treatments, community attitudes and society's moral responsibilities to the offender.

The distinction between dangerousness and treatability implies that a classification of offenders more sophisticated than the current 'dangerous/ non-dangerous' dichotomy needs to be developed. At the very least, a scheme such as the following needs to be considered:

(a) treatable and not dangerous;

(b) not treatable and not dangerous;

(c) treatable and dangerous; or

(d) not treatable and dangerous.

In (a) and (b) treatment may not be necessary from the point of view of society and may well impose an added (if unintended) punitive component to the offender's sentence. In (c) both ethical and practical considerations would dictate that society make treatment facilities available to the offender. And in (d) society has an obligation to make sure that 'non-treatability' is not due to a lack of resources (as in *R v. Roadley*) or community prejudices.

Clearly, the knowledge-base to enable us to assign an offender to any one of these four categories is still rather slender. Nevertheless, an attempt is made in the rest of this paper to outline the factors which need to be considered when making such judgments. It is important to emphasise that such factors include social and political responses to the problem as well as the 'scientific' characterisation of the offender himself.

The Offences

There is no way of predicting the risk of future re-offending on the basis of the type and circumstances of the index offence, no matter how heinous the crime.

The problems of calculating recidivism rates in offenders, and sex offenders in particular, are well known: they include the low rate of reporting, laying of charges inappropriate to the circumstances of the offence, changes in legislative definition of the offence, and the 'attrition' between charging and sentencing (Cashmore & Horsky 1988; Furby et al. 1989; National Committee on Violence 1990, p. 29; Broadhurst & Maller 1991). Despite a clinical impression that many offenders (for example, homosexual paedophiles, exhibitionists) tend to 'specialise' in their offending preference, this is not borne out by sophisticated offender self-report studies (Abel et al. 1988) nor by recent Australian research on imprisoned offenders (Broadhurst & Maller 1991). It is possible that exhibitionists tend to sexually re-offend more than assaulters or paedophiles (Romero & Williams 1985) and incest offenders less than other sub-groups of sex offenders (but only after they are discovered) (Gibbens et al. 1978).

The extent of the harm done by sex offenders to their victims is only now being recognised. Admittedly, at one extreme, one-third of all sex offences (including rapes) reported to the police in Victoria in 1989–90 involved indecent exposure (Victoria Police 1990), a crime which, arguably, is more of a social nuisance than anything else. At the other end of the spectrum, although most rapists and child molesters inflict little physical damage on their victims, the psychological suffering caused can be immense. (National Committee on Violence 1990; a review of effects on child victims is contained in Finkelhor 1986).

Indeed, where child victims are involved, an ideology of minimal intervention in adult-child sexual contacts based on a 'children's rights' approach (*see* the readings edited by Constantine & Martinson 1981) or on the outrage of one populist criminologist at society's hypocrisy (Wilson 1981) no longer appears to be tenable.

The Offenders

There is broad agreement that the recidivist sex offender, whether serious or not, tends to be young and have an extensive prior criminal record (Furby et al. 1989). In Australia, Aboriginality is a risk factor for re-imprisonment of serious sex offenders (Broadhurst & Maller 1991) although clearly social and cultural factors result in a higher imprisonment rate generally for this group.

Other predictive factors for serious recidivism, although less well validated statistically, are based on clinical experience. These include the presence of antisocial personality features and substance abuse (Walker et al. 1984) and of aggressive or sadistic fantasies (Bluglass 1982).

There have been repeated attempts to elucidate predictors for response to treatment. A recent careful study of child molesters confirmed long-standing clinical hunches that heterosexual 'stranger' molesters benefit most, while those engaging in genital-genital contact with their victims do poorly.

Interestingly enough, penile strain gauge measurement of deviant sexual preference did not predict outcome (Marshall & Barbaree 1988). This last observation may arise from the unreliability of penile circumference measurement as compared to the measurement of penile volume (McConaghy et al. 1989).

Adolescents often are 'resistant' to treatment although, because patterns of serious later re-offending are often first noticed in this age-group, they deserve a trial of intensive interventions (McConaghy 1989). Other groups such as the intellectually disabled which have traditionally been thought to be unsuitable for the usual therapeutic techniques can now be helped with interventions especially tailored for them (Griffiths et al. 1989; Clarke 1989).

The Response by Professionals

Current facilities in Australia can offer treatment to only a small proportion of sex offenders: less than fifty offenders have passed through the Victorian Health Department's pilot treatment program in the last two years and only a handful of private practitioners have any interest in the area. Hopefully, however, even this tiny effort could have an appreciable impact on victimisation rates if the 'patients' are carefully selected: it is known that a small proportion of offenders may account for a disproportionate number of victims (Abel et al. 1987).

Treatment regimes used in Australia have slavishly followed North American trends in that they consist mainly of behaviour modification techniques and/or the use of libido-reducing medication, particularly anti-androgens. As well, incest offenders often undergo family therapy or counselling. The rationale for using such treatments is that they have been more extensively evaluated than others (*see* Berlin & Meinecke 1981). But there is also a realistic need to use these more intrusive and mechanistic treatments in offenders who are usually in treatment under compulsion (for example, court orders) and who usually attempt to deny or minimise their offences (Salter 1988).

Unfortunately this has meant that the mainstream literature has ignored techniques which possibly are more cognisant of the meaning of the offender's behaviour and the preservation of his dignity, such as group analytic therapy (Weldon 1991, pers. comm.). Since all treatment regimes have high drop-out rates (Furby at al. 1989) there needs to be a continuing awareness of alternatives which are more palatable to offenders.

Whether treatment, of whatever variety, works at all is still an open question. Caution needs to be exercised when reading the gloomy conclusions of the comprehensive review by Furby et al., cited above. Their study might have found no evidence for treatment efficacy but this opinion was based on a group of studies selected according to methodological criteria which could be considered as overly strict. For example, many valuable studies based on self-report or physiological outcomes were excluded because these measures have not been shown to correlate with recidivism rates; clearly, however, there may be good clinical reasons to believe such a correlation exists (and this is in fact the basis for many measures of treatment progress). Reasonably

well-designed studies showing decreased recidivism in a treated group compared with comparable non-treated controls have been published since this review (for example, Marshall & Barbaree 1988) and one recent Australian study has produced surprisingly good results using only modest interventions (McConaghy 1990).

One problem is that sex offenders are notorious long-term recidivists and any benefit from treatment may only be apparent after a lengthy period. Conversely, a really effective treatment program will have to emphasise long-term follow-up: the clinical impression is that it is this, rather than any specific treatment technique, which keeps offenders out of trouble (Bluglass 1982).

Finally, what must be stressed is that any treatment program is only as good as its staff and facilities will allow it to be. The response to the problem by Australian governments can be described as half-hearted at best. In Victoria, the pilot sex offenders treatment program is run by a community forensic psychiatric service which has an enormous range of other responsibilities including the provision of psychiatric and psychological reports to the courts, clinical support for community corrections staff, direct treatment responsibilities for a range of difficult and demanding clients (not just sex offenders), teaching in professional courses and consultation and liaison with other clinics, hospitals and service providers. The service is located in a dirty run-down building surrounded by scaffolding to make sure that its rotting concrete cladding does not fall onto passers-by; the antique lifts have minds of their own; the toilet facilities are inadequate and medical treatments (including injections) are administered in unsafe and unhygienic conditions.

Despite the chronic shortage of staff, there is not enough office-space and the security and privacy of both staff and clients suffer as a result. A lot of professional staff time is spent operating the switchboard, doing receptionist duties and filling out incomprehensible forms for the Health Department because of the paucity of secretarial assistance. It is indeed a tribute to the dedication of the staff that, while they are enduring these conditions, they do not think too often of their colleagues in private practice, only a couple of city blocks away, who earn large fees for compiling court reports which enthusiastically recommend 'treatment' for which they do not have to take responsibility.

The point of this dreary description is not that the Victorian government has neglected public forensic psychiatry: millions of dollars have been spent on refurbishing and staffing Victoria's two in-patient security units and the prison psychiatric service. Rather, it is a demonstration of state, community and professional ambivalence towards the issue of treatment. We are prepared to spend millions on patients who are safely locked up but become miserly over services located in the community where most offenders (including many dangerous ones) live. This ambivalence must eventually reflect on the standards of care in the community facilities which are resourced so grudgingly.

The Response by the Law

As the other papers at this conference have demonstrated, there is a continuing tension between an offender's civil liberties and the need to protect the

community. It may be impossible to both preserve individual legal rights and prevent at least a few dangerous offenders from being at large in the community.

In the case of rapists and child molesters, however, doubts have been raised recently as to what respect for their 'rights' really means. The evidence of woman and child victims has always been restricted by special legal rules (for example, the requirement for corroboration, the admissibility of the victim's previous sexual history) which reflect a fundamental mistrust of the reliability of such evidence. Thus the right of an accused sex offender to discount the evidence of his accusers may be no more than an expression of legal misogyny and paedophobia, fostered by the prejudices of male judges and legal commentators and hallowed by centuries of precedent. Indeed this prejudice may extend to 'protective' jurisdictions such as the family court and the children's jurisdiction (Scutt 1990). The law has only recently started to recognise these problems (Law Reform Commission of Victoria 1987; Brereton & McKelvie 1991).

Even if a conviction or a plea of guilty is obtained, the court often has too little information to guide it. The adverse psychiatric report prepared for a defendant's legal advisers rarely is put in evidence and the process of plea-bargaining inevitably reduces the number and severity of the charges. The tariff imposed thus may not reflect the seriousness of the original offence or offences. Yet on the other hand, the law's potential harshness may well prevent offenders from seeking appropriate help (McNiff 1987; Scott 1989). This is particularly so for those whom the law punishes severely because of their position of trust with their victims—these offenders include teachers, health care providers and others in situations of high risk.

The Response by the Community

The 1980s have witnessed an era of moral panic focused on issues such as sexual violence and child sexual abuse. No fewer than four Australian states have issued comprehensive reports on the problems of child sexual abuse within the space of a couple of years (Hewett 1986). However, it is still too early for us to take our fingers off the panic-button. Community and professional myths about sex offenders die hard. Rape is still seen as what is said to occur if the girl's parents come home too early (Bluglass 1982) and only twenty-five years ago, a leading Australian psychiatrist felt quite comfortable about blaming the victim for many cases of child sexual abuse:

> Can a man be entirely blamed for his relationship with a powdered and painted thirteen-year-old who looked at least eighteen and haunted low-class hotels to pick up drunks and offer them her favours for a small reward; or the garageman who was visited by a ten-year old eleven times for sexual purposes before she decided the recompense was inadequate and informed the police? (McGeorge 1966, p. 113).

Nevertheless, there needs to be some recognition that many of today's offenders were also yesterday's victims: a recent paper has provided an elegant and sophisticated explanation for the observation that those experiencing sexual abuse as children become offenders in adulthood (Marshall 1989). As well, certain offender groups, such as the intellectually

disabled, are more likely to have experienced significant levels of abuse, particularly while in institutional care (Glaser 1991). Where the state has been responsible for institutions in which abuse is known to have occurred, as has recently been discovered in Victoria (Wallace 1991), then there appears to be a moral obligation on society to provide rehabilitative and treatment-oriented dispositions for offenders from such backgrounds rather than punishment.

One of the major obstacles to developing this sort of understanding is the attitude of the media to sex offences. A study of British newspapers, both respectable and otherwise, over the last forty years, found little serious reporting of the subject and a great deal of sensationalism and titillation (Soothill & Walby 1991). An analysis of the Australian media along the same lines would, it is suggested, produce the same findings.

Some Conclusions

Although the science of sex offenders is still very crude, there is an increasing body of knowledge available which will help us to predict dangerousness. Clearly a drug-abusing psychopathic young rapist with aggressive fantasies and multiple previous convictions for violent offences is dangerous; on the other hand a first-time middle-aged exposer is probably not. The real difficulty is to think beyond the issue of dangerousness itself. Even if indeterminate detention is being seriously considered as a disposition, the fact is that most, if not all, 'dangerous' sex offenders will be released on to the streets sooner or later. Thus, it is in the interests of both society and the offender to perform the most comprehensive assessment possible of his treatment prospects.

Unfortunately, this is still not yet feasible. The outcome of treatment, even for the minority of sex offenders who might benefit from it, depends on much more than the offender's personal and clinical characteristics. The most ideal candidate for treatment is largely untreatable if the resources are not available, the treating staff are unable to provide adequate care, there are no means of evaluating treatment programs, the law deters offenders from accessing the service, judges do not have enough information to decide on appropriate dispositions, community attitudes become indiscriminately punitive or if the media fail to provide balanced and informative reporting of the issues involved.

These factors, as much as anything else, place the community at risk of harm from a particular sex offender. The use of one-dimensional models of individual dangerousness to predict such harm is not sufficient. The problem needs to be addressed not only at this level but also at the level of the social and political forces at work within our society.

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THE RELEASE OF SERIOUS VIOLENT OFFENDERS AND COMMUNITY SAFETY

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THE QUESTION OF THE RELEASE OF SERIOUS VIOLENT OFFENDERS AND community safety raises many of the same issues which have been canvassed earlier. Thus the response of a community to persons classified as serious violent offenders depends upon how a community defines dangerousness, a community's attitude to preventative detention, the resources of that community, and the effectiveness of programs to modify the behaviour of serious violent offenders in an appropriate way. In preparing this paper we came to the realisation that the same issues canvassed in the other papers were pertinent. We deliberated for a considerable time in an attempt to focus on different issues. Ultimately we abandoned this venture and decided to identify, from our perspective, the basic issues in detaining and then releasing persons who have committed and/or may commit violent offences, at the risk of being repetitive.

We have identified five issues which are relevant to the release of serious violent offenders. The first issue concerns the principle that a community has the right to protect itself and its members from serious harm from both 'outsiders' and other members of the community. The second issue involves identifying those harms which are serious. The third issue concerns the

process of identifying persons who are likely to commit those serious harms. The fourth issue deals with the effectiveness of the community's response to the perceived threat of serious harm. The fifth and final issue is the validity of criteria to be employed in assessing the suitability for release of those persons detained as 'dangerous' persons.

Protection of the Community

Social scientists have established that one reason why individuals form groups is to enable those individuals, working in cooperation with one another, to achieve goals which would not be attainable individually. One basic need of persons is the need for safety and security (for example, Lorenz 1966; Maslow 1971; Murray 1938). By joining a group, the members of that group can protect one another from harm from 'outsiders' (Moreland 1987). Indeed, the phenomenon of forming groups for protection from external threats is not restricted to the human species. Group membership, however, requires that the individual surrenders some of his or her freedoms. The activities of the individual cannot be inconsistent with the goals of the group.

To minimise the occurrence of individual activities which may threaten the existence of a community, the community creates rules and laws to regulate the activities of its members. If these rules or laws are violated, sanctions against the violator are initiated. The severity of sanctions is likely to vary with the perceived threat of the offending activity to the community. To allow community members to inflict injury on one another would negate one of the fundamental reasons for the existence of the community, namely, the protection of its members. Thus, activities which cause physical harm to members of the community are likely to be proscribed by most communities. Further, communities will invoke whatever sanctions are perceived as necessary to deter or prevent community members from committing the threatening activity. Most commonly punishment is meted out to the offender for having committed the proscribed act, particularly when it is not the first time that the offender has committed that act.

Punishment for violations of laws is seen as having a specific and general deterrent effect. The punishment deters the offender from committing the proscribed act again and others are deterred by the knowledge that they will receive similar punishment if they commit a similar act. However, for the most part, sanctions invoked by the criminal justice system have been for acts already committed rather than acts which may be attempted in the future.

It is clearly in the interest of the community, all other things being equal, to anticipate harmful acts and to prevent the occurrence of these acts. One way of endeavouring to prevent the occurrence of harmful acts is by identifying the environmental factors which may be causally linked to harmful acts and eliminating these factors. This approach may involve major restructuring of the community and tends not to be a preferred option. A second approach is to identify those individuals who are likely to engage in harmful acts and then take whatever action is necessary to ensure those persons will not be able to commit those acts. This latter approach is often the preferred option because it requires little or no effort on behalf of most members of the community. This type of

preventative action has often been achieved through civil commitment. Such a community response to persons who are believed likely to engage in harmful activities is not new. Monahan (1988) quotes Brydall, writing in 1700, as attributing civil commitment to the 'old Roman law' which provided for 'Guards or keepers (to) be appointed for madmen not only to look that they do not mischief to themselves, but also that they be not destructive to others'. The same end may be, and indeed often has been, achieved through the criminal law by 'dangerous' persons legislation.

The principle that a community has the right, and indeed the responsibility, to protect its members from harm, particularly physical harm is one which would appear to be widely accepted today. It is a principle that appears to be operative in many societies and it is one which we also accept. However, in practice its implementation is fraught with difficulties.

Classification of Harms

Harms suffered by members of the community as a result of the activities of another member of the community can vary enormously, both in type and extent. Thus, for example, the harm may be physical injury to someone's body, it may be emotional injury, it may be damage to someone's property, or it may be a violation of someone's civil liberties. The extent of harms can also vary from the trivial through to the severe, even life-threatening.

Although emotional harm and harm to one's civil liberties may often constitute graver harm than many physical harms, it is the physical harms which appear to be the focus of communities' concerns. For this reason, in the discussion which follows we shall restrict our observations to serious physical harms. Nevertheless, it is clear that not all activities which lead to serious physical harm attract ongoing community opprobrium. Until recently, our community has had a tolerant attitude to culpable driving. Even today harm caused to countless persons in many communities by industrial pollution and occupational hazards generates relatively little concern, a state of affairs which is reflected either by the absence of sanctions or the exaction of paltry penalties for breach of pollution and occupational safety laws. This differential response by communities to harms inflicted on a readily identifiable victim by a particular person or persons compared with harms suffered by masses of difficult-to-identify persons by institutions or their representatives may reflect the less obvious connection of harm suffered by individuals from pollution and occupational hazards, or it may reflect that costs to the community at large in initiating sanctions is less when an individual is the offender rather than a powerful amorphous institution.

Identification of Dangerous Persons

Persons who are perceived as likely to inflict serious injury on other persons are categorised as being dangerous persons. The identification of dangerous persons is a complex matter and is fraught with difficulties. Presently there is a dearth of theories of dangerousness to guide the identification of dangerous persons. Further, it has been shown that the accuracy of prediction of

dangerousness by mental health professionals may be even less accurate than others (Ziskin & Faust 1988, p. 413).

Studies of predictions about the occurrence of harmful behaviour of violent offenders have found predictions to be accurate 20–30 per cent of the times. Monohan (1981) in his review of the literature on prediction of dangerousness concluded that the error rate in predicting dangerousness ranged from 54 per cent to 94 per cent with the majority of cases having an error rate of 80 per cent or more. Others have found an even higher error rate. In the Baxstrom study (Steadman 1973, pp. 421–2) 967 persons had been assessed by psychiatrists as being dangerous and had been confined to maximum security mental hospitals. In 1966 the New York courts ordered a release of all these patients either into the community or into ordinary hospitals, on the basis that the civil liberties of these persons were being violated by being held in the security mental hospitals. Approximately one-third of these patients were released into the community. In the four years which followed, Steadman found that only 3 per cent of these former inmates of the maximum security mental hospitals had been detected engaging in violent behaviour. Thus, in this particular study, even allowing for the fact that some violent behaviour was undetected, the psychiatrists were wrong nearly every time in their assessment of these persons as being dangerous.

Clanon and Jew (1985) examined the claim that stress-prone persons were more likely to be violent than persons not stress-prone. Parole and arrest records of 1000 potentially violent men were followed up from two to ten years. Clanon and Jew found that reactions to stressful situations were not useful predictors of violent behaviour.

The main finding to emerge from a large number of studies is that prediction of dangerousness is little better than chance (Ziskin & Faust 1988, for review). Given the low base rate of violent behaviour, the most accurate prediction is that no one will be dangerous (Megargee 1976). Predictions about events with low base rates invariably produce large 'false positive' errors. Thus the majority of persons predicted as likely to engage in future dangerous behaviour will not display such behaviour.

Some of the sources of errors in predicting dangerous behaviour have been identified. There is a tendency to predict dangerous behaviour on the basis of available data without considering the prior probabilities and the reliability of the available data. The more easily the violent behaviour can be recalled, the less likely the base rate will be considered. Violent behaviour is often seen as a pathological trait stemming from the individual and so a stable and consistent characteristic or personality trait. Therefore this behaviour can be perceived as fairly typical of the person and so likely to occur again. Situational or interpersonal events which may have triggered off the violent behaviour are invariably overlooked. This tendency to attribute undesirable behaviours to internal dispositions rather than to situational factors has been well documented by social psychologists and has been called the fundamental attribution error (Ross 1977).

Intervention Options and Their Effectiveness

A wide range of intervention options exist and are employed by communities in their attempts to modify the behaviour of persons who have been institutionalised for their violence, either through the criminal justice system or by civil commitment. These options include restriction of the individual's liberties, perhaps indefinitely, by continued detention in prison or mental institution, either with or without other interventions such as chemotherapy, behaviour modification programs, and a range of other psychotherapy programs.

Continued detention of the individual because he or she is assessed as being dangerous without the implementation of other programs, to control the violence of the individual is tacit acknowledgment that the principal and perhaps only purpose served by detention is to keep the individual out of circulation. Aside from infirmity of old age, there can be little confidence that the person assessed as dangerous will be any less dangerous at the end of a period of preventative detention. If imprisonment for a specific term for committing a particular offence does not effectively reduce the violent behaviour of serious violent offenders the basis for continued detention beyond the specified term must be questionable. Indeed, there is good reason to believe that the person will be more dangerous.

Preventative detention is likely to result in the dangerous person placed for an extended period in a violent environment, an environment which may positively reinforce violent behaviour. Preventative detention may exacerbate any feelings of resentment towards the community or particular members of the community held by the detained person. Thus while preventative detention by itself may be less expensive money-wise and effort-wise in the short term, in the long term it may be counterproductive if its purpose is to make the community a safer place.

Chemotherapy programs have been found to be effective in reducing the incidence of violent acts such as assaults and aberrant sexual behaviours for some individuals. Putting aside considerations of the serious side-effects of some drugs and the violations of human rights when the serious violent offender may be coerced into participating in a drug program, a major problem with chemotherapy is to ensure the continued adherence to the drug regime by the serious violent offender after his or her release from detention. Unless an effective means of monitoring adherence to the prescribed regime by offenders is available there can be no assurance that offenders are taking the drug as prescribed. To the extent that chemotherapy programs depend on the self-discipline of the offender, once the offender has been released from custody they will frequently fail. Failure to comply with the prescribed regime means these offenders are likely to engage in violent behaviour again and put at risk the safety of other members of the community.

A variety of psychotherapy programs are available and have been employed to reduce the occurrence of violence by offenders. The psychotherapies available range from psychoanalysis, to rational-emotional therapy, to insight therapy, to behaviour modification. For any of these programs to be effective the offender must be willing to participate and must have the desire to change his or her behaviour. Willing participation and

desire to change would appear to rule out psychotherapy as a viable option for many serious violent offenders as many lack the motivation to change.

A survey of the literature on violence indicates a multiplicity of motivations, antecedents, and situational factors linked to violence (Geen & Donnerstein 1983). Given this state of affairs no single approach is likely to be successful for all violent offenders. Nor for that matter is one single approach likely to be successful for any one offender. Thus imprisonment and commitment are by themselves likely to be ineffective. However, imprisonment and commitment do give the opportunity to involve the offender in chemotherapy and psychotherapy programs which can be continued after the offender has been released from detention. Nonetheless, even multiple forms of intervention may have little effect on many violent offenders.

Validity of Criteria in Assessing Suitability for Release

Unless there are valid criteria for assessing the suitability of detained persons for release the community is either faced with the alternative of detaining a detained person indefinitely or releasing a detained person who may still be considered dangerous. The first alternative would be a travesty of human rights and surely repugnant to a civilised society. The second alternative would be an exercise in futility. Thus, before any preventative program of detention is introduced valid criteria for releasing detainees must be available.

An analysis of the likely scenario suggests the obtaining of valid criteria are unlikely. Given that preventative detention has been imposed on an individual based on his or her past violence, then the only additional information that is available to a tribunal assessing the suitability for release of a detainee is his or her behaviour while in detention. To base a decision about the suitability of a detainee on his or her institutional behaviour would appear to be highly dubious. On the one hand the structured environment of a prison or mental institution may remove many of the situational stresses and pressures present in everyday life which trigger off violent behaviour in some persons. On the other hand, for other persons the only way they are able to survive a violent environment such as a prison or a mental institution is to respond aggressively and violently. While their behaviour may be effective in surviving the hostile environment of the institution it will almost inevitably mean they are deemed unsuitable for release.

In essence, the community is faced with the same problems and issues when release is considered as when making a decision to detain someone on the basis that he or she is likely to be dangerous. There are no psychological tests which can be said to measure reliably and validly a detainee's suitability for release. No extensive comparisons on test profiles of dangerous and non-dangerous persons have been reported. Given that most tests are poor in discriminating between prison and non-prison populations it is hardly surprising that they are unable to distinguish between normal and the ill-defined category of dangerous persons. As has already been noted, accuracy in prediction is little better than chance.

Thus a tribunal is placed in a parlous position when it is required to determine whether or not a person deemed as a dangerous person should be released. Apart from the information that led to that person being detained the only additional information such as behavioural reports from the custodial staff, clinical reports from psychologists and psychiatrists, available to the tribunal is of questionable validity. In the absence of a clear and unambiguous assessment from the professionals that the detainee is or is not suitable for release the most appropriate decision would be to release the individual (Megargee 1976). However, it is more likely that the tribunal will err on the conservative side. In the event of a released detainee committing another act of violence the decision by the tribunal to release that person will be the subject of considerable public and political criticism and even censure. However, assessing a person who is non-dangerous as dangerous seldom if ever receives public attention, nobody but the individual, his family and the tribunal know of his plight, nobody but the individual and his family seem to care.

Conclusion

The issue which we were asked to address was the release of serious violent offenders and the community safety. We have argued that in principle a community has the right to protect its members by detaining persons who will be violent to others and that these persons should not be released until they no longer pose a threat. However, until accurate and valid measures of predicting violent behaviour are developed and unless effective treatment and management programs exist there can be no justification for preventative detention. The goal of totally eliminating all violence to members of the community can never be attained. The cost to the community of detaining anyone who is alleged to be dangerous in terms of money to build detaining institutions and in terms of violation of human rights, is a cost that no community can afford to pay.

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