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 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
Serious Violent Offenders: Sentencing, Psychiatry and Law Reform

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.

Select Bibliography


Davies, E. 1954, 'Innocent prisoners', Sun Herald, 23 May.


