POLICE ASSOCIATION OF NEW SOUTH WALES

POLICE ASSOCIATION OF NEW SOUTH WALES SUBMISSION TO SENTENCING COUNCIL

RESPONSE TO
SENTENCING SERIOUS VIOLENT OFFENDERS
CONSULTATION PAPER
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INTRODUCTION

The NSW Sentencing Council's review of the most appropriate way to respond to the risks posed by serious violent offenders presents a plethora of issues in its consultation paper. In order to assist the Council in this complex and considerable task, the Police Association's submission attempts to address some of these issues and provoke further debate. Through the analysis of the various methodologies and findings of literature works (both from Australia and internationally), the Police Association's submission provides a commentary on the empirical evidence available to date regarding the common characteristics of serious violent offenders and the means of assessing the risks they pose. The comments are taken primarily (but by no means restricted to) from research conducted by Monash University in Victoria and funded by the Criminology Research Council in which part of their findings were the result of an analysis of a series of focus group discussions carried out in Brisbane, Adelaide and Melbourne. The comments in the Police Association's submission are to be taken as example only when dealing with the most appropriate way to responding to the risks posed by serious violent offenders.

This submission therefore attempts to address (in no particular order) the three key issues as presented in the Sentencing Council's consultation paper. These being;

1. Which offenders comprise the cohort of 'serious violent offenders' who pose a significant high risk of re-offending upon expiration of their sentences?
2. Are current sentencing and management strategies in NSW for serious violent offenders inadequate, and if so, in what respects?
3. If current sentencing options or management strategies in NSW for serious violent offenders are inadequate, how should this be addressed consistently within accepted principles?
    a. What are the sentencing principles that should guide any reforms?
    b. Should the current legislation applicable to serious violent offenders be amended and / or supplemented by additional legislation?

c. Should current therapeutic and management options for serious violent offenders be amended and / or should new rehabilitation programs be introduced?

In order to tackle the questions outlined above, the Police Association submission;

- Examines and reports on existing treatment options for and risk assessment of serious violent offenders,
- Examines and reports on the adequacy of existing post custody management including parole and services available on release,
- Examines and reports on options for sentencing violent offenders,
- Examines and reports on the characteristics and predictors of recidivism,
- Examines and reports on Australian sentencing trends,
- Examines and reports on a number of "good practice" principles for rehabilitation,
- Examines and reports on overseas models and
- Examines and reports on preventive detention schemes and indefinite detention and supervision schemes.

DEFINING SERIOUS OFFENDER

Firstly, according to the Serious Offenders Review Council Annual Report for the year ended December 2008, a Serious Offender may be defined as an inmate serving a sentence of life imprisonment or having been convicted of murder; or who must serve a sentence of at least 12 years before becoming eligible to be released on parole. The Annual Report states that at 31 December 2008, there were 706 Serious Offenders in custody (an increase of 5.2% over the previous year), representing approximately 7% of the total inmate population at that time. Included in the total of 706 are 29 female serious offenders.

THE CONCEPT "DANGEROUSNESS"

In a parliamentary research report authored by Figgis and Simpson (1997) states there are relatively few offenders who are "dangerous" in the sense that they pose a continuing real danger of serious harm to members of the public. They refer to the concept of dangerousness as being ambiguous and subjective – what is dangerous depends on what one is prepared to put up with. Although "dangerousness" can be

said to involve the likelihood that a person will inflict serious harm on another, it is difficult to define exactly what the elements of “dangerousness” are (Figgis and Simpson 1997).

The concept and its implication for the criminal law were discussed in detail in a United Kingdom report called the Floud Report in 1981 as cited by Figgis and Simpson (1997). The report says that Danger, “*is a thoroughly ambiguous concept, and we may well ask whether it has any place in the administration of criminal justice, and, if it be conceded that it has, how are we to define and identify “dangerous” offenders for legal purposes*. Floud goes on to observe that: *“the question of penalties for serious offences – even for the worst cases of such offences – must not be confused with the question of protecting the public from the few serious offenders who do present a continuing risk and who are likely to cause further serious harm”*. This was based on the observation that few serious offenders repeat their serious offences, so that there is no reason, in most cases, to keep them out of circulation on that account for very long periods of time.

The Floud Report, having cited the problems of definition and prediction, commented, *It is worth noting that no-one dismisses the practical problem. That is, no-one denies the existence of a minority of serious offenders who present a continuing risk. The argument is all about degrees of risk, perceptions of danger and justifiable public alarm, the difficulty of deciding whether or not someone is “dangerous” and the legitimacy of confining people for what they might do as well as for what they have actually done.*

Attempts to determine if a person is “dangerous” raises a number of difficult questions, including:

- What constitutes “serious harm”?
- How likely must it be that the offender will cause serious harm?
- How can the likelihood of the offender causing serious harm be predicted?

On the question of what constitutes “serious harm”, there is no doubt that a person who is likely to kill another, or commit a serious physical injury or sexual assault is a danger to members of the public. Beyond these basic offences, however, it becomes less clear what potential harms make an offender “dangerous”. Not all activities resulting in serious physical harm attract similar levels of community concern. Floud asks, “*Why is it that when someone mentions “dangerous offender” we do not immediately think of drunken drivers, keepers of unsafe factories, tippers of toxic waste, vendors of unsafe cars or harmful pharmaceutical products?”*

Among the crimes included in various categories of “serious offences” or “serious harms” have been those resulting in:

- Death;

- Serious bodily injury;
- Serious sexual assault;
- Severe or prolonged pain or mental stress;
- Lasting psychological damage;
- Loss or damage to property which causes severe personal hardship;
- Damage to the environment which has a severely adverse effect on public health or safety;
- Serious damage to the security of the state.

It would be difficult to find a consensus that all these harms justify special incapacitating measures beyond those provided by the general criminal law. For example, the Social Development Committee of the Victorian Parliament considered that a risk of causing psychological damage should not be sufficient to classify an offender as dangerous.

Figgis and Simpson (1997) commented that although dangerous offender legislation contains lists of crimes which qualify for precautionary sentencing, there have been very few attempts to state the principles upon which these selections are based. The elasticity and subjectivity of terms such as "dangerous", "violent" and "serious" allow them to be applied to a wide range of acts. For example, in Queensland the category of "serious violent offenders" was recently expanded to include (among other offences) unlawful assembly, bomb houses, some burglaries, and carrying on the business of trafficking in a dangerous drug.1

NANCY LOUCKS (2002)

In terms of recidivism amongst serious violent and sexual offenders, a report, authored by Nancy Loucks (2002) states there is little comprehensive information available regarding characteristics of serious violent and sexual offenders and their risk of reoffending. To fill this gap, Loucks reviews the literature internationally on recidivism and its predictors. She then assesses information regarding the numbers of serious violent and sexual offenders in Scotland, based on the characteristics and predictors identified in the literature. The combination of the review and the practical exercise provides a comprehensive view of the characteristics and risk of serious violent offenders and some of the issues which arise in identifying these offenders.

[1] NSW Parliamentary Library Research Service, *Dangerous Offenders Legislation: An Overview*, Honor Figgis and Rachel Simpson, Briefing Paper No 14/97

Loucks (2002) findings showed varying rates of reconviction of sex offenders, depending on the nature of the offence. Most of the rates are fairly low compared to other types of offending, though the rate increases over longer periods. Recidivism for violent offences is higher than for sexual offences, but again is generally lower than for other types of crime. For both violent and sexual offenders, recidivism is not usually for a further sexual or violent offence. The statistics clearly show that violent and sexual offenders do not necessarily specialize in one type of offence. Rather, a large proportion may commit other types of offences, both before and after their first conviction for a sexual or violent crime. However, the highest risk for further sexual or violent offences was from people who had committed such offences in the past with greater recidivism associated with more extensive offending histories and with more serious offences. Some types of programmes have shown small but robust improvements in rates of recidivism for both violent and sexual offenders compared to untreated samples.

Loucks (2002) states the prediction of recidivism amongst sexual offenders is clearly complex, to the extent that some authors argue that an attempt to understand why recidivism takes place may be more constructive in developing methods of prevention. However, the literature showed a number of consistent patterns which may provide useful indicators of risk.

The characteristics of serious violent and sexual offenders are more similar to offenders generally – even those who have never committed a sexual or violent offence – than to non-offenders. For both violent and sexual offenders, early onset of offending indicated an increased likelihood of future offending. Probably the most important predictors in both cases were a history of similar types of offences and the (high) rate of offending. The relevance of an offender's previous offence history was repeated throughout the literature. While offenders did not necessarily specialize, those who had committed a sexual or violent offence in the past were more likely to do so again. For both sexual and violent offences, virtually all offenders were male.

Loucks (2002) states sex offenders specifically, sexual deviancy was often a good indicator of risk. Choice of male victims in particular, but also a mixture of male and female victims, multiple victims, and unrelated victims consistently indicated higher risk. People convicted of rape were more likely to offend again, while incest offenders were the least likely to reoffend; however, the type of sexual offences committed were not necessarily static.

A substantial proportion of sexual offenders in every jurisdiction have been described as suffering from personality disorders or severe personality disorders, though the definition of this is not always clear. Arguably this is also the case for many violent offenders. However, most violent and sexual offenders show no evidence of mental illness. While mental disorder amongst violent and sexual offenders may be more prevalent compared to other groups, serious offending amongst people with mental disorders is rare.

Misuse of drugs and alcohol is common amongst many types of offenders, but may exacerbate antisocial behavior. Early anti-social behavior was amongst the top-ranked predictors of future violent offending.

ASSESSMENT TOOLS

In terms of assessment tools, Loucks (2002) explains that some risk assessment tools have shown improved rates of prediction of violent and sexual offences. However, risk factors for serious offenders are largely similar to those for other types of offenders; those showing more risk factors are at increased risk of offending. The prediction specifically of future sexual or violent offending is more difficult. Studies of recidivism which use reconviction or even rearrest as a measure are however, very likely to underestimate the actual rate of sexual and violent recidivism.

NUMBERS OF SERIOUS VIOLENT AND SEXUAL OFFENDERS IN SCOTLAND

Loucks (2002) research included a small-scale exploration into files of people in custody. In total, files were available for only 19 sexual and 19 violent offenders out of a sample of 80. The assessment placed six of each in the category of "definite risk", four sexual and three violent offenders in the "unlikely risk" category, and seven sexual and eight violent offenders in the "uncertain" group. Files for two sexual and two violent offenders did not contain enough information to make an assessment. The division of risk was therefore roughly equal for the two groups of offenders.

Applying the proportions in each category to the overall numbers in custody for a serious sexual or violent offence, the breakdown is 814 who post a definite risk, 476 who appear unlikely to pose a risk, and 1019 who pose an uncertain risk. How accurate this assessment is or how representative this small number of case files is compared to the entire population of violent and sexual offenders is highly doubtful. The assessment did however show the difficulty in drawing conclusions about risk and a clear need for more readily accessible information of this group.

Thus the current assessment of a very small sample of files of people in custody for a serious sexual or violent offence in Scotland suggested that just over a third showed features associated with high risk of further violent or sexual offences. Almost half also showed evidence of risk, though the extent of this risk was less clear. Consistent, though, and accessible information about violent and sexual offenders, particularly regarding past offending and the nature of the offences, is crucial for the management and prevention of further serious crimes.2 This fact is particularly important to note when it comes to assessing the issue of the management of serious crimes in current day New South Wales.

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[2] Scottish Executive Social Research, Recidivism amongst serious violent and sexual offenders, Nancy Loucks, 2002

IMPORTANCE OF INFORMATION REGARDING NATURE OF OFFENCE-PAST AND PRESENT

Loucks (2002) considers the analysis of her research files was useful in a number of ways, not least because it highlighted a number of difficulties in obtaining information on risk of further offending. Full files did not exist in over half the cases involving people who had committed relatively serious sexual or violent offences. Even where files existed, the amount and quality of information in them varied enormously. Most helpful in the assessment of risk were the descriptions of the offences written for the court and parole board; these usually contained information about the nature of the offence, the victims involved and the offenders' relation to them, motivations and circumstances. Also helpful, but less frequently available, were records of past offences from the Scottish Criminal Records Office. Occasionally the court records commented upon past offending, at least where it related to the current offence. Also helpful, where included, were Social Enquiry Reports, which often gave the only information about early history such as contact with the Children's Hearing System.

REOFFENDING – AUSTRALIAN RESEARCH

In terms of Australian research regarding the risks of re-offending, a joint project by the NSW Bureau of Crime Statistics & Research, and Corporate Research, Evaluation & Statistics, NSW Department of Corrective Services explored patterns of re-offending among NSW offenders released to parole supervision in the 2001-2002 year. The study found that by September 2004 approximately two-thirds of the cohort had reappeared in court, 64 percent had been convicted for a new offence and 41 per cent of the cohort had received a further custodial sentence for re-offending. Survival analyses revealed that the following groups re-offended more quickly: offenders who had a greater number of prior custodial sentences, offenders who had one or more prior drug convictions (ie for use of possession of heroin, cocaine or amphetamine), younger offenders, indigenous offenders, those who had been released with a parole order issued by a court (as opposed to the NSW Parole Authority), offenders who had spent less time in custody during their index custody episode and those who had been serving sentences for violence, property crimes or for breaching justice orders.

The likelihood that an inmate will reoffend is usually one of the Parole Authority's primary concerns when it comes to making parole decisions. If an offender is considered to be at particularly high risk of re-offending their parole may be either refused, deferred, or conditions may be adapted to address specific risk factors. This involves careful consideration of all available re-offending risk and protective factors. This information is usually collated and presented to the Parole Authority by NSW Department of Corrective Services Probation and Parole officers in the forms a Pre-Release Report. Pre-Release Reports canvas factors that could be related to an offender's suitability for parole, including significant social and

family history factors, previous parole successes or failures, activities undertaken while in custody, drug and alcohol treatment, psychological assessments, attitudinal information, and post-release accommodation and employment plans. Based on a qualitative assessment of these factors, Probation and Parole officers make a parole recommendation. The Parole Authority takes this recommendation into account – among other information – in coming to its decision.

Jones, Hua, Donnelly, McHutchison and Heggie's (2006) states little is known about offending among parolees in the NSW state. For example there is currently little statistical information relating to the proportion of offenders who go on to reoffend, how quickly they re-offend, or what factors relate to their re-offending risk. Most NSW –based studies have addressed factors that predict successful completion of probation or successful completion of parole. These studies don't directly address reoffending because many people who fail on probation or parole do so because they have breached the technical conditions of their parole orders and not because they have committed a criminal offence. Furthermore, many people who are on probation or parole go on to offend once that order has expired. Early work that specifically addressed recidivism in NSW tended to look at convictions among all offenders, not only those who were released to parole. Both of these studies suggest that re-offending is more common among some sub-populations of offenders.

PAROLE AUTHORITY –ISSUED PAROLEES VS COURT-ISSUED PAROLEES

An interesting finding to emerge from the Jones, Hua, Donnelly, McHutchison and Heggie's (2006) research is the fact Parole Authority-issued parolees re-offended more slowly than court-issued parolees, even after controlling for a wide range of other extraneous variables (ie age, gender, indigenous status, offence type, time spent in custody and prior custodial history). While this is by no means an exhaustive set of controls, prima facie it could appear that the Parole Authority is better placed than sentencing courts to assess re-offending risk. This makes intuitive sense given that the Parole Authority is placed more proximately to the end of an offender's non-parole period and is therefore privy to more information about factors that might relate to the parole candidate's risk of re-offending. There could be something about the nature of Parole Authority issued parole orders that makes them more effective in preventing recidivism than court-issued parole orders. For example, the length and intensity of parole supervision is likely to be much greater among parolees who receive their parole orders from the Parole Authority, given that their crimes were sufficient seriousness to result in prison sentences greater than three years in length. This supervision intensity, then, might be causing these delays in offending rather than the Parole Authority's superior ability to predict who is likely to go on to commit further offences.

FURTHER RESEARCH REQUIRED

Further research is necessary before the relationship between parole type and time to re-offend can be confirmed. This research should aim to control for a greater number of potential confounders of this relationship and in particular to include risk factors for re-offending, such as levels of parole supervision, drug and alcohol dependence, financial management skills and post-release housing availability. Not only would these risk factors provide important statistical controls, they would also aid in the development of re-offending risk prediction instruments.

MORE RIGOROUS EVALUATION OF CRIMINAL JUSTICE INTERVENTIONS

Also important for future research is an exploration of the reasons why certain offenders fail on parole. Answers to these questions would help in designing policies and programs to reduce the risk of reoffending on parole. If it turns out that the Parole Authority is more adept at setting conditions to minimize the risk of further offending, for example, the knowledge that it has on this issue might be able to be made available to the courts. Even if this is not true, however, a better understanding of the conditions or experiences that lead to parole failure would assist the Parole Authority, the courts and the Government in selecting parole procedures that minimize the risk of further offending. Therefore continued investment in more rigorous evaluation of criminal justice interventions needs to be done.3

WARE, CIEPLUCHA AND MATSUO (2008)

According to the findings from Ware, Cieplucha and Matsuo (2008) research, and similar to Loucks finding (2002), there is a relatively small group of violent offenders who can be characterized as repeat offenders – they tend to have more frequent and more violent offending than other offenders. It is these serious violent offenders who are likely to commit further serious violent crimes unless appropriate treatment and management is provided. It is these types of offenders that are targeted into the Violent Offenders Therapeutic Programme (VOTP). There a varied approaches to the treatment of violence;

ANGER MANAGEMENT (AM)

One of the most common types of programmes used with violent offenders has been Anger Management (Novaco, 1975). They typically focus on increasing the offender's awareness of anger and its triggers, and then providing a range of skills including social skills and relaxation training to assist the offender to

[3] Crime and Justice Bulletin, Contemporary Issues in Crime and Justice, Risk of re-offending among parolees, Craig Jones, Jiuzhao Hua, Neil Donnelly, Judy McHutchison and Kyleigh Heggie, Number 91, January 2006.

degrease anger arousal and strengthen anger control. This approach assumes that the violence was caused by, or as a consequence, of the individual's anger.

COGNITIVE SKILLS PROGRAMMES (CSP)

These programmes are based on the notion that (violent) offending is caused by antisocial cognitions and are focused towards helping offenders recognize their thought patterns that are conducive to crime and to acquire new ways of thinking about and solving their problems.

MULTI-MODAL PROGRAMMES

More recently developed multi-modal treatment programs for high risk violent offenders tend to be of a greater intensity and target a larger and broader range of issues than to AM or CS programmes. These programmes, at least in theory, allow for a greater level of individualization of therapeutic targets within the treatment programme and longer period of time in which to achieve these. These programmes also operate on the assumption that violence may have been caused by multiple issues and therefore, all of these issues need to be targeted in treatment (Polaschek, 2006).

OFFENDER READINESS

There are a number of issues identified that may contribute to a lack of offender readiness for treatment.

- Learning difficulties
- Lack of verbal skills and literacy deficits
- Cultural factor (the therapist is of a different culture)
- Genuine lack of motivation to change
- Denial of the violent offences

All have been highlighted as important issues to address before an individual commences violent offender treatment (Howells 2007, Serin & Preston, 2000). Any of these issues may result in a violent offender being "resistant" to therapeutic efforts. This is a critically important issue given that violent offenders who drop out of treatment are almost always found to have higher violence recidivism rates than offenders who did not receive any treatment (e.g. 40% v 17%, Dowden & Serin, 2001).

ENGAGEMENT ISSUES WITH VIOLENT OFFENDERS

The treatment of violent offenders is often described as a complex and challenging task. By their very nature, violent offenders are suspicious, distrustful and apparently resistant to engaging with therapeutic work (Chambers, 2008). Given that violent offenders often present as aggressive, hostile, and combative

– this can impact on their ability to establish rapport with therapeutic staff and impede their treatment progress (Polaschek, 2005). Further, given that the origin of violent offending is typically in childhood and has continued throughout adolescence and adulthood (Moffit, 1993); these behaviors are entrenched and difficult to change.

THE VIOLENT OFFENDERS THERAPEUTIC PROGRAM (VOTP)

The VOTP is a residential therapy programme for men with a history of serious violent behavior and is located at Parklea Correctional Centre. Violent offenders assessed as being of higher risk of recidivism and who have a prior history of committing one or more violent offences are prioritized into the VOTP.

EFFECTIVENESS OF VIOLENT OFFENDER TREATMENT

There is a surprising lack of empirical evidence from which to draw conclusions as to the effectiveness of violent offender treatment. This probably reflects the fact that most jurisdictions have focused their resources on the treatment of other offenders – most notably on sexual offenders (Howells, Watt, Hall &Baldwin, 1997; Polaschek, 2006).

AM programmes have produced mixed results:

Dowden, Blanchette & Serin (1999) reported 86% reduction in violent reoffending for 110 AM programme participants over a 3 year follow up.

Conversely, AM programmes evaluated in Australia appear to have produced only small effects (Howells, 2002) but these programmes appear to have been shorter and less intense than those reported by Dowden.

CS programmes have also produced somewhat mixed outcomes.

A large scale Canadian study, Robinson (1995) reported reductions in recidivism of up to 36%. Offenders with a variety of convictions completed these 36-session prison-based Reasoning and Rehabilitation CS programmes and, of interest, violent offenders were more likely to benefit from the programme than offenders convicted of theft offences.

A similarly large evaluation in England and Wales, (Falshaw, 2004) found no differences between the 2 year recidivism rates of offenders who completed CS programmes and a matched control group.

There have been a number of evaluations of multi-modal (intensive) violent offender programmes. These have also produced inconsistent results:

Polaschek (2005) reported on the New Zealand prison based intensive Violence Prevention Unit (VPU). This is an intensive group based programme which is facilitated for four sessions per week over 28 weeks. Polaschek compared the first 22 completers of the programme with a matched control group for a

minimum 2 year period. 32% of the treated sample had re-offended compared to 63% of the control group. It also took twice as long for the treated offenders to re-offend compared to the matched controls.

Cortoni, Nunes & Latendresse (2006) compared 500 violent offenders who completed the 94 session prison based Violence Prevention programme (VPP) in Canada with 466 matched, un-treated offenders. They found that untreated offenders were more than twice as likely to be re-convicted for a violent offence over a 12 month period.

Serin, Gobeil & Preston (2009) evaluated the Canadian Persistently Violent Offender Program with less positive results. They found that violent offenders who had completed this 144 hour programme were as likely to re-offend as offenders who completed an AM programme or no programme at all.

Given the high proportion of violent offenders in the NSW correctional system and the high rates of violent re-offending, treatment programs to address the needs of these offenders are a critical part of Corrective Services NSW's goal to reduce recidivism.

As violence can take many forms, violent offenders are a diverse group with numerous criminogenic needs. This area is the subject of continued investigation both within CSNSW and around the world. There are promising results from preliminary research into the VOTP's capacity to effect change in the violent offender population. CSNSW is committed to continued research and evaluation of the VOTP in making it a program meeting international standards of best practice.

REPORT TO THE CRIMINOLOGY RESEARCH COUNCIL

An Australian report (authored by Bernadette McSherry, Patrick Keyzer and Arie Freiber) and compiled by the Monash University to the Criminology Research Council in 2006 focuses on key debates concerning the policy and legal issues raised by post-sentence preventive detention that are worth noting. The report analyses focus group discussions carried out in Brisbane, Adelaide and Melbourne concerning three different management regimes for high risk sex offenders; post-sentence continued detention in prison, indefinite detention, and extended supervision orders in the community. McSherry, Keyzer and Freiber (2006) state there are different ways of assessing risks of reoffending, including clinical assessments of risk and statistical or "actuarial" approaches that focus on assessing the particular offender against a range of factors that are known to be associated with future offending. Currently risk assessment involves examining three main areas for each individual: the person's risk factors, the potential harm that he/she might cause in the future, and the likelihood that the person will eventually offend. Risk factors that are currently used in actuarial risk assessments include;

- Past violence

- Pre-existing vulnerabilities (such as childhood history of abuse)
- Social and interpersonal factors (such as poor social networks)
- Symptoms of mental illness (in particular, failure to take medication)
- Substance abuse (especially in addition to mental illness)
- State of mind (such as anger or fear)
- Situational triggers (such as the availability of weapons) and
- Personality constructs (such as psychopathy)

While the actuarial method of risk assessment is thought to be more accurate than the clinical method, there has been some suggestion that a combination of the two approaches may produce better results. However, the study explains, "adjusted actuarial assessments rely on (i) methods that are trivially correlated with recidivism (clinical judgement) (ii) to identify factors that bear a small correlation with recidivism, (iii) in order to adjust actuarial estimates that are moderately correlated with recidivism. This procedure obviously creates ample opportunities for error." The report highlights the fact that actuarial risk assessments alone do not consider protective factors, such as stable employment, that may mediate the effects of risk factors. By adjusting the actuarial assessment to consider such factors, risk assessments can be better tailored to the individual offender.

THE CONCERNS WITH ACTUARIAL METHODS

McSherry, Keyzer and Freiberg (2006) note the difficulty with actuarial methods alone is that they are based on determining whether an individual offender has the same characteristics or risk factors as a "typical" kind of offender. Risk assessments can classify an individual within a group – as "high risk", "medium risk" or "low risk" – but they cannot say where in this group a given person lies and therefore cannot identify the precise risk an individual poses. Assigning risk to an individual offender based on the characteristics of a group can therefore lead to inaccurate assessments.

The report goes further onto state actuarial risk assessment tools may also pose difficulties when used with particular groups of offenders. For example, indigenous offenders as a group have higher rates of childhood abuse victimization and early substance abuse, both of which are included in the assessment questionnaires as factors associated with high-risk status. Indigenous offenders may therefore be more likely to be classified as high risk than are non-indigenous offenders.

Further concerns with actuarial risk assessments have been raised about the types of factors that are included in the questionnaires. The main focus of current assessment tools is on static risk factors that

cannot change over time, such as the age of first offending and childhood abuse. But these are not the only kinds of risk factors that may affect future offending. By including dynamic factors as well – ones that can change over time, such as coping strategies – not only may risk assessments become more accurate but useful treatment targets may also be identified.

Preventive detention schemes rely on assessments of risk. While mental health professionals who give evidence in court about offenders' risk are often cross-examined, there is some question about whether such evidence should be admitted at all, the report explains. These assessments of risk tend to be taken out of their primary context, which is one of treatment and intervention. There is also the potential for judges and juries to misunderstand and misuse risk assessments, assigning greater accuracy and inevitability to predicted behaviours than is warranted. In addition there are issues as to what level of risk (low/medium/high) should be required by such schemes and what level of offending the risk should relate to (any offending/serious offending/serious 'relevent' offending).

Regarding the predictions of risk, McSherry, Keyzer and Freiber (2206) state -as well as having difficulties with accuracy- predictions of risk may be seen as providing a veil of science over what is essentially a social and moral decision about the kind of offender who creates the greatest fear within the community. Asking mental health professionals to assess the risk of future harm shifts the burden of deciding what to do with such offenders from the community to clinicians whose primary role lies within the medical model of treatment, rather than within the criminal justice model of punishment and community protection.4

According to Figgis and Simpson (1997) the "dangerous" person with a career of seriously injuring others is relatively rare, and virtually impossible to identify in advance. Research studies have pointed consistently to the conclusions that individual assessments of dangerousness are more likely to be wrong than right, and that errors largely result from the exercise of excessive caution. The Floud Report's survey of the available studies into dangerousness and recidivism revealed that no method of prediction had managed to do better than a 50 per cent success rate in predicting "dangerousness". A fifty per cent success rate represents one false positive for every true positive predicted. Indeed, many of the prediction methods have only a one-third success rate.

[4] Monash University, Preventive Detention for "Dangerous" Offenders in Australia: A Critical Analysis and Proposals for Policy Development, Report to the Criminology Research Council, Bernadette McSherry, Patrick Keyzer, Arie Freiber, December 2006

UNABLE TO DEMONSTRATE AN EFFECTIVE TECHNOLOGY FOR DISTINGUISHING VIOLENT OFFENDERS

The point is made in an Australian context that the mental health and behavioural science professions have as yet been unable to demonstrate an effective technology for distinguishing violent offenders who will recidivate from those who will not. The issues of definition and prediction were reviewed in great detail in the 1992 inquiry of the Victorian Parliament's Social Development Committee on the Draft Community Protection (Violent Offenders) Bill. It found, among other things, that criminological and psychiatric research and literature did not support the provisions and premises of the Draft Bill. The Committee concluded that the criterion of two prior violent offences is an indicator of the increased likelihood of committing further violent offences, but professionals have only a one in three chance of accurately predicting who will reoffend.

There remains considerable debate about the efficacy of predictions of dangerousness. While no-one claims that it is possible to identify with certainty offenders who will commit serious acts of violence, it has been argued that: "if one is dealing with an individual who has committed violent crimes in the past and he indicates he will commit violent crimes when he next gets a chance and is regarded by experienced psychiatrists as being very likely to carry out his threats, the probabilities are that one's hands an individual who is likely to be dangerous". It has been observed that a "review of the more responsible literature on the subject would make it clear that dangerousness cannot be predicted but rather that people can be assigned to probability groups on the basis of their present behavior, its antecedents and if relevant, a psychiatric diagnosis.5

SENTENCING

The following purposes and principles of sentencing should apply to all forms of punishment that sentencers may impose;

Firstly, the objectives and aims of punishment are traditionally stated as retribution, deterrence, rehabilitation and incapacitation and denunciation. According to a Law Reform Commission Report, retribution is the notion that the guilty ought to suffer the punishment which they deserve. As such, it is an important aim of sentencing. There are two kinds of deterrence: first, specific deterrence, which aims to dissuade the offender from committing further crime; and secondly, general deterrence, which aims to dissuade others, who have been made aware of the punishment inflicted upon the offender, from committing crime.

[5] NSW Parliamentary Library Research Service, *Dangerous Offenders Legislation: An Overview*, Honor Figgis and Rachel Simpson, Briefing Paper No 14/97

One of the main purposes of punishment is the protection of the community from crime by making it clear to the offender and others that they will be appropriately punished if they behave in like fashion. Denunciation, in the context of sentencing, is achieved by the imposition of a sentence the severity of which makes a statement that the offence in question is not to be tolerated by society either in general or in a specific instance. The statement made may be directed at any combination of the public at large, victims, potential offenders and individual offenders. In part its aims are similar to that of deterrence. It has also been seen to be associated with retribution.

Rehabilitation refers to the rehabilitative approaches to punishment emphasizing the changes that can and should be brought about in offenders' behavior in the interests of society and of offenders themselves. Rehabilitative theories rely heavily on the idea that social, psychological, psychiatric or other factors outside a person's direct control wholly or partly determine or influence that person's actions, including the commission of crimes. Rehabilitative approaches tend to assume that the factors leading to the commission of crime can be accurately identified, and that treatment or assistance can be prescribed to remove the causes of the undesirable behavior.

Incapacitation is the notion of rendering an offender incapable of committing further offences while he or she is incarcerated. It is listed in some of the recent Australian sentencing legislation as one of the purpose of punishment. Incapacitation is closely associated with the notion of criminal propensity, that is, the likelihood of an offender committing further crime (often of a particular type). It therefore relies upon techniques of prediction. All the mentioned approaches identified above remain potentially relevant in determining sentence, their force in the circumstances necessarily deriving from the facts of the particular case.6

Colvin (2003) states that sentencing guidelines seek to strike a balance between discretionary considerations in the sentencing process and the need for reasonable consistency in the administration of criminal justice. The aim is to increase consistency by providing some structure for the process, while retaining discretion over the final result in the individual case. Guidelines can take several different forms, constraining sentencing discretion to greater or lesser degrees.7

MANAGING DANGEROUS OFFENDERS

According to McSherry, Keyzeer and Freiberg's (2006) findings, there are a number of options for managing dangerous offenders currently in place across Australia. These options include:

[6] Law Reform Commission NSW, Discussion Paper 33 (1996) - Sentencing

[7] Eric Colvin, Sentencing principles in the High Court and the PSA, ePublications@bond, Law Papers, Faculty of Law, Bond University 2003.

- Sentencing options such as indefinite terms of imprisonment and longer sentences for serious offenders.

- Management during sentence through the parole system and treatment programs (including sex offender treatment programs) provided while the offender is either in prison or on parole in the community.

- Post-sentence supervision in the community such as extended supervision orders and other schemes for monitoring offenders in the community, including the registration of sex offenders. Extended supervision orders involve the court ordering certain offenders who are reaching the end of their prison sentence to be subject to ongoing supervision in the community after their sentence has expired. Schemes for the registration of sex offenders require offenders to register their details with police and prohibit registered offenders from applying for, or engaging in, child-related employment or voluntary activities.

- Post-sentence preventive detention, which involves the court ordering certain offenders who are reaching the end of their prison sentence to be detained in custody for a further period after their sentence has expired. Queensland, New South Wales and Western Australia have both a preventive detention and a community supervision scheme.

Laws that detain offenders beyond the term of their sentence for the purpose of community protection involve balancing the risk of future harm to the public with the restriction of liberty for offenders whose future offending can only be estimated. According to McSherry, Keyzer and Freiberg (2006), difficult practical questions arise, such as:

- Which offenders should be treated as 'dangerous'?

- How can the risk that an offender will commit a further serious offence be assessed?

Current schemes dealing with high-risk offenders at different stages in the criminal justice process have adopted different approaches to determining which group of offenders should fall within the scheme.8

According to McSherry, keyzeer and Freiberg (2006) recent legislation in Australian jurisdictions has focused on the post-sentence supervision and detention of serious sex offenders, whereas legislation providing for indefinite sentences to be imposed at the point of sentencing typically apply to both sex offenders and to high-risk violent offenders. These legislative provisions generally define the target group of offenders by

[8] Monash University, Preventive Detention for "Dangerous" Offenders in Australia: A Critical Analysis and Proposals for Policy Development, Report to the Criminology Research Council, Bernadette McSherry, Patrick Keyzer, Arie Freiber, December 2006

reference to a list of 'serious' sexual offences and a list of 'serious' violent offences. Categorising high-risk offenders solely by reference to the type of crime committed may result in people who pose no continued threat to the community being captured by a particular scheme. Offences against the person differ in their severity according to the circumstances of the case. In addition, many people who commit the most serious offences such as murder do not necessarily pose a high risk of reoffending. It has been cautioned by Floud (1982) that the "question of penalties for serious offences – even for the worst cases of such offences – must not be confused with the question of protecting the public from the few serious offenders who do present a continuing risk and who are likely to cause further serious harm." With the exception of sex offender registers, most of the measures for 'dangerous' offenders require certain criteria to be met before one of these orders can be made. However, identifying which offenders are at high risk of causing serious physical harm in the future is a notoriously difficult task (Mullen 2001).9

AUSTRALIAN SENTENCING TRENDS

It is probably worth noting a brief account of the sentencing trends in current day Australia and whether, if any, there exists any relationship between trends in the levels of recorded violent crime and the trends in sentencing outcomes. A report released by the Crime Research Centre in Western Australia by Neil Morgan (2002) states that there is trends towards tougher sentencing; overall, the prisons data provide evidence that, particularly during the 1990's, all jurisdictions adopted a tougher approach to the sentencing of violent offenders. This conclusion is based on two main indicators: first, the growth in the overall imprisonment rate as measured by census data coupled with the concomitant increase in the proportion of violent prisoners in the prison populations of each jurisdiction, and, secondly, the overall increase in the median actual expected sentence lengths for violent offences as a group. However, the growth in the imprisonment rate varied markedly between jurisdictions, as did the increase in the proportion of violent prisoners. Similarly, there was variation between jurisdictions in the extent to which median actual expected sentence lengths for violent offences, taken as a group, had increased. Increased sentence lengths for homicide resulting from increased statutory penalties nationally, although the actual incidence of homicide remained fairly stable, the median actual expected sentence for homicide offenders increased very substantially, leveling off towards the end of the period. This trend towards large increases in sentence lengths for homicide occurred in all jurisdictions with the exception of the Northern Territory where sentences remained relatively stable. The increases would seem to reflect

[9] Monash University, Preventive Detention for "Dangerous" Offenders in Australia: A Critical Analysis and Proposals for Policy Development, Report to the Criminology Research Council, Bernadette McSherry, Patrick Keyzer, Arie Freiber, December 2006

changes in legislation; in several jurisdictions the statutory maxima and minima for offences in this category were increased. It is of interest that in the Northern Territory, where sentences did not increase, the incidence of homicide was more than double the national incidence, and between 1993 and 2000 the homicide rate in the Northern Territory declined.

TRENDS TOWARDS LONGER SENTENCES FOR SEXUAL OFFENCES AND ROBBERY

National trends towards longer actual expected sentences were also observed for sexual offences, and robbery but not in all jurisdictions.

INCREASED EMPHASIS ON PAROLE TYPE SENTENCES IN MOST JURISDICTIONS

There was an increase in the proportion of parole type sentences and a decrease in the proportion of finite sentences for all offences. This trend would seem to reflect changes in legislation. These changes are not open to simple explanation. Indeed, they might appear to be out of line with increasing populist punitiveness and the clarion call for greater truth in sentencing. However, the emphasis on parole type sentences does seem to fit with the greater focus in corrections on 'integrated offender management', 'risk assessment' and 'throughcare'. After a period in the 1980's when researchers felt that 'nothing works', there is now a growing belief (supported by the evaluations of some – but not all - programmes) of the benefits of engaging offenders in treatment and training programmes. Parole provides a framework which is supportive of such aims. Equally important, it provides a means for monitoring offenders upon their release.

INCREASED PRISONER RECEIVALS

In most jurisdictions there was evidence of a significant increase in the rate of receival of sentenced prisoners (for any offence). It is possible that the increase reflects an increase in the rate at which courts imposed custodial sentences or an increase in the rate at which offenders on parole or sentenced to non-custodial penalties breached their orders. Where the overall rate of receivals decreased but the imprisonment rate (census) increased, as occurred in South Australia, it is apparent that average sentence lengths increased. Analysis of prison receivals data in respect of violent offenders in Western Australia shows an increase in the rate of receivals for robbery but not for homicide, assault or sexual offences. While it is not possible to conclude that this necessarily is evidence of an increased tendency towards the use of imprisonment as a penalty for the offence of robbery, it would seem that the probability of a sentence of imprisonment for homicide, assault and sexual offences in Western Australia did not change significantly over the period.

RELATIONSHIP OF RECORDED VIOLENT CRIME AND IMPRISONMENT WITH THE EXCEPTION OF HOMICIDE TYPE OFFENCES THE NATIONAL DATA SHOW AN INCREASE IN THE RATE OF RECORDED CRIME FOR ALL OF THE OFFENCES STUDIED.

At the level of individual offences, increases in the recorded crime rates for the violent offences, assault, sexual offences and robbery, were generally greater than those for the control offences, burglary and motor vehicle theft. The proportion of violent offenders in the prison population also increased. At face value this could be interpreted as suggesting a relationship between recorded crime rates and imprisonment rates. However, the strength of this association falls away when the data are disaggregated at the jurisdictional level. As noted already, it is not possible from these data to draw any firm conclusions about the relationship between the rate of imprisonment, growth in the general population and recorded violent crime trends. However, there is no evidence to suggest that increases in the rate of imprisonment of violent offenders are associated with decreases in the incidence of violent crime, or that decreases in the rate of imprisonment, such as those experienced by Queensland and Western Australia in the late 1980's and early 1990's, are associated with increases in the incidence of violent crime.

IMPACT OF CHANGES IN MAXIMUM STATUTORY PENALTIES

Apart from the increased usage of parole type sentences, there is other evidence of a relationship between legislative change and change in sentencing outcomes.

RELATIONSHIP OF REMAND IN CUSTODY TO SENTENCES OF IMPRISONMENT

The census of prisoners on remand evidences an increasing trend between 1994 and 2000 in all jurisdictions. Consistent with the findings of studies of the prison population in England and Wales, at an unsophisticated level of analysis, there is evidence suggestive of a possible relationship between these higher remand rates and higher imprisonment rates. The Morgan report states that however, the strength of any such relationship, particularly in respect of violent prisoners, cannot be answered on the basis of the data examined in the report. This question is important and deserving of further investigation, particularly in view of the very high rates of remand of indigenous offenders for assault-type offences.

RELATIONSHIP BETWEEN TRENDS IN THE LEVELS OF RECORDED VIOLENT CRIME AND TRENDS IN SENTENCING OUTCOMES

In his concluding remarks regarding his findings, Morgan states that in general, the data are characterised by considerable variability between jurisdictions, between offences, and between jurisdictions and offence types. However, the general trends appear to be towards tougher sentencing for violent offenders and an increased emphasis on parole. There is no evidence to suggest that changing levels of sentencing have any correlation with crime rates in the sense that increased sentences reduce crime rates or that softer sentencing sees higher crime rates. In essence, crime rates and punishment rates appear to have an

independent existence. While there are similarities, the patterns of change over time are not the same in any two jurisdictions.

It is possible that some of the differences may, in part, be ascribed to demographic differences between the jurisdictions (for example the higher proportion of males in the population of the Northern Territory relative to the States, and others, not measured, such as degree of urbanisation) and differences in recorded crime trends. However, these clearly do not provide a complete explanation of trends of the extent which have been identified. In part, legislative differences between the different jurisdictions may contribute to the answer, as may court practice, but the precise elements which might contribute to this are not readily discernible and do not lend themselves to empirical analysis.

While there are numerous differences in sentencing legislation between jurisdictions, disentangling the effects of these differences is a very difficult task. Overall, it seems very likely that largely unquantifiable factors such as socio-political pressures and differences in the 'penal culture' between the jurisdictions played an important role over and above trends in crime rates, demographic factors and so on. Morgan goes on to report it is difficult to draw firm conclusions about the relationship between trends in the levels of recorded violent crime and trends in sentencing outcomes. However, there is no evidence to suggest that, as penalties for violent offences increase in severity, there is any corresponding decrease in the incidence of violent crime. Nor is there evidence to support a conclusion that the incidence of violent crime was any greater during periods when less severe penalties were imposed.

THE NEED FOR FURTHER DEVELOPMENT OF RIGOROUS RESEARCH

The Morgan report advocates for the development of several research projects (given the lack of systematic, high quality courts data) in addition to continuing with the task of understanding sentencing trends. The noted proposals could be considered appropriate for exploration in the Sentencing Council's task concerning the management of serious violent offenders. These include;

- further examination of the extent to which sentencing outcomes are responsive to changes in penalties, and especially to amendments to statutory maxima and minima;.
- research into the relationship between remand in custody and custodial sentencing outcomes, particularly in view of the high rate of remand in custody of Indigenous defendants;
- consideration of the extent to which breaches of community orders have contributed to the increase in short prison sentences and the extent to which the use of conditions in community orders is assisting in the achievement of the aims of sentencing;
- reviewing the extent to which reduction of the risk of re -offending is properly reflected in sentencing policy and legislation;

- analysis of interactions between factors affecting sentencing outcomes through the application of statistical techniques such as multivariate analysis or structured linear modelling;
- research into the effects of the gender of the offender and closer examination of the effects of ethnicity on sentencing trends (for example, the possible increase in the number of female violent offenders and their involvement in certain types of crime such as robbery) ;
- more systematic analysis of the impact of the guilty plea, by reference to factors such as age, gender and ethnicity (for example, what are the guilty plea rates for Aboriginal versus non Aboriginal offenders and how does this impact on sentencing)
- analysis of prior record as a factor at all stages of sentencing (in court and in the administration of penalties)
- analysis of the extent to which the increasing focus on 'Victims' Rights' may be affecting sentencing practices;
- research into the role played by public perceptions and the influence of the print, broadcast and electronic media on the determination of criminal justice and sentencing policy in particular;
- an attempt to assess and evaluate the factual circumstances surrounding certain crimes of violence (such as assaults) in order to determine whether there is any significant change in the objective seriousness of offences coming before the courts; and
- a continuing focus on alternative strategies to address Indigenous over-representation and issues of violence within Indigenous communities

AUSTRALIAN SENTENCING LEGISLATION

As previously mentioned, most sentencing legislation in Australia refers to purposes such as ensuring that the offender is adequately punished for the offence, the promotion of the rehabilitation of the offender and the prevention of crime through deterring the offender and other persons from committing similar offences. There is a general legal principle that the type and extent of punishment should match the seriousness of the harm caused and the degree of responsibility of the offender. This is referred to as the principle of proportionality. The rationale for this principle is to ensure sentences remain commensurate to the seriousness of the offence, even where the court takes into account the protection of society. However, some sentencing options such as serious offender and indefinite detention provisions ignore this principle of proportionality. Three Australian states — Victoria, New South Wales and South Australia — have laws that enable a court to impose a longer sentence than would otherwise be

appropriate in the case of serious repeat offenders. These provisions place priority on protection of the community as a sentencing principle.

Some of the issues regarding the above, according to McSherry, Keyzer and Freiberg (2006) findings include;

Serious offender provisions aim to 'incapacitate' repeat offenders convicted of serious crimes in order to protect the community from harm. In tipping the balance in favour of community protection, these laws override the principle that a sentence should be proportionate to the seriousness of the offence. Also, Judges have been sparing in their use of serious offender provisions. Research has found a considerable disparity between the intention of the legislature and judicial practice in relation to the use of the Victorian serious offender provisions. For example, a study by Elizabeth Richardson and Arie Freiberg (2004) examined 553 relevant cases from the County and Supreme Courts of Victoria for the period 1994 – 2002. A longer than proportionate sentence was imposed in only 11 of these cases. Six of these cases were overturned on appeal, three of them specifically because of the lack of proportionality in the sentence. There has been similar reluctance displayed in other Australian jurisdictions, the United Kingdom and New Zealand (Ashworth 1995).

INDEFINITE SENTENCES

In general, laws enabling indefinite detention come into play at the time of sentencing and allow the judge to take into account the risk the offender poses to the community when setting the offender's sentence. The appropriateness of an indefinite sentence can be reviewed at various stages. The offences to which indefinite sentences apply vary between jurisdictions, but most apply to both serious violent and sexual offences. Before passing an indefinite sentence, the judge must be satisfied to a high degree of probability that the offender is a serious danger to the community because of:

- his/her character, past history, age, health or mental condition,
- the nature and gravity of the crime committed, and
- any special circumstances (s 18B(1)).

The judge must consider a number of matters in deciding whether the offender poses a serious danger to the community. He or she must have regard to:

- whether the nature of the offence is exceptional
- relevant material from the transcript of earlier court cases against the offender involving serious crimes
- medical, psychiatric and other relevant reports
- the risk of serious danger to members of the community if an indefinite sentence were not imposed
- the need to protect members of the community from that risk (s 18B(2)).

According to the McSherry, Keyzer and Freiberg (2006), while indefinite detention provisions have been held to involve a valid exercise of sentencing powers, the High Court has also signalled that a cautious approach should be taken to the evidence upon which orders of indefinite detention are based. The High Court in McGarry v The Queen (2001) 207 CLR 121, held that there must be more evidence presented to the sentencing judge than simply a risk that the offender will reoffend before an order for indefinite detention can be made. The court discussed the difficulties in determining whether an offender was 'a danger to society or part of it', concluding that more was needed than a risk —even a significant risk— that an offender will reoffend before indefinite detention can be ordered. The effect of this and other High Court decisions is that before an offender can be reckoned 'a danger to society', there must be comprehensive evidence from mental health professionals at the sentencing hearing of a risk of future offences that are grave or serious for society as a whole, or for some part of it.

McSherry, Keyzer and Freiberg (2006), cite one of the perceived benefits of indefinite sentencing over post-sentence detention is that it is more transparent. The offender knows at the time of sentencing that he or she is being placed on an indefinite sentence and a nominal term is set which triggers the system of periodic review. In comparison, preventive detention orders are made at the point when an offender has almost completed his or her original prison sentence. The difficulty is that, without a proper risk assessment at the point of sentencing, the sentencing judge may not be in a position to assess the risk that an offender might pose upon his or her release. Many states that have indefinite sentencing regimes have also introduced preventive detention and extended supervision schemes.

Ideally, indefinite sentencing should allow for the early assessment of risk so that measures can be taken to treat the offender in prison in the hope of working toward rehabilitation. However this is dependent on whether any initial risk assessment is followed up by the provision of appropriate programs in prison. This may not be occurring because indefinite sentences have a nominal period, rather than a non-parole period. It appears that in practice, while a non-parole period in a conventional sentence 'triggers' the provision of the sex offenders' program, the nominal period set as part of an indefinite sentence does not always do so.10

[10] Monash University, Preventive Detention for "Dangerous" Offenders in Australia: A Critical Analysis and Proposals for Policy Development, Report to the Criminology Research Council, Bernadette McSherry, Patrick Keyzer, Arie Freiber, December 2006

ISSUES IN THE MANAGEMENT DURING SENTENCE ACCORDING TO MCSHERRY, KEYZER AND FREIBERG (2006)

PAROLE

All Australian jurisdictions have legislation dealing with parole. As mentioned already, the main purpose of parole is to supervise the reintegration of offenders into the community. The main advantage of the parole system is that it ensures offenders are supervised and supported during reintegration into the community. It is based on the notion that supervision in the community is conducive to rehabilitation and that this is preferable to releasing an offender unconditionally and without any support when the full sentence of imprisonment has been served. However, there is ultimately an unpredictable risk of reoffending by any particular offender.

SEX OFFENDER TREATMENT PROGRAMS

Most Australian jurisdictions have some form of prison-based sex offender treatment program (Lievore 2004; Lievore 2005). And again, as already mentioned, ‚many programs reflect a cognitive-behavioural treatment approach delivered by individual and/or group therapy. This approach focuses on changing sexual behaviours, modifying any cognitive distortions and assisting offenders to overcome social difficulties (Marshall & Barbaree 1990). Participation is open to all eligible offenders and, while treatment is voluntary, many offenders participate with the aim of obtaining parole. In general, the programs are greater than 100 hours in length, are facilitated by psychologists and are delivered over an extended period of time (Howells et al. 2004). According to McSherry, Keyzer and Freiberg (2006), there has been little research that systematically evaluates treatment programs and no definitive results regarding the efficacy of them (Lievore 2005: 296). However the prevailing view, supported by meta-analyses (see for example Hall 1995), support their continued refinement, development and implementation.

MEDIA ARTICLE REGARDING OFFENDER TREATMENT

In terms of offender treatment programs a recent newspaper article titled, “Working with Monsters”, documents the effectiveness of the treatment programs in Australia. The article traces 1280 sex offenders within the NSW prison system. The article details the role played by sex offender psychologists working for the Department of Corrective Services who are required to determine which of the inmates in the jail system are ready for treatment and, once the inmates have served their time, which ones will be released. According to the comments given by the psychologists they would attest that some of the sexual predator inmates who have spent their entire adult lives behind bars, with the aid of treatment, have a shot at rehabilitation.

The treatment programs have run with enormous success, according to the article, and recidivism rates are now trending around 6 per cent. In 2007 premier Morris Iemma awarded NSW Corrective Services with a Gold Public Sector Award for its Sex Offender Programs. According to the article also, "*cures for heart disease and other diseases are nowhere near that good*." The head of inmate programs is Assistant Commissioner Luke Grant who believes that even the most hopeless sex offender cases, can be treated if the will is there. *"Historically sex offenders have a distorted rationale about their thinking*, Assistant Commissioner Grant states. "*People have to be ready for treatment. There are people who are very, very difficult to work with –generally it's just about taking more time." Most sex offenders don't know how to help themselves. Many don't even know there are treatments available until they commit a crime and go to jail. Some are spurred on by a mental disability. Others grew up when homosexuality was illegal, giving them a warped view of sex in their adult years.* But, according to the sex offender psychologists, the two biggest problems fuelling sex offenders today are depression and alcohol.
According to the views of the psychologists in the article, these sexual predators drink to quell their depression, and their anger. When they're drunk, committing a sex offence suddenly becomes much more viable. Anything is possible. It's why jail can be a turning point for so many inmates. According to one of the comments made by the more experienced of the sex offender psychologists, Graham Rendell, states, *"Ever since I started I've thought jail is nothing more than a very large rehab – it offers that potential*", he says. *"It's the one place where the "pause" button gets pushed. Whatever you've been doing comes to account. You have to sit there and think about it."*

BARNETT AND HAYES (2008)

In terms of some of the issues posed by rehabilitation and treatment programs, Barnett and Hayes (2008) present some interesting findings from their research. They reveal concerns with procedural fairness, concerns about the availability and effectiveness of rehabilitation programs both in prison and in the community, the problematic nature of risk assessment and confusion about the standard of proof. They also raise issues about the ethical and legal responsibility of Government to ensure that adequate programs are available for rehabilitation. Regarding the laws that detain certain criminal offenders for a further period of detention after their sentence has expired, on the grounds that they are likely to commit a further offence if they were released, Barnett and Hayes (2008) state such laws have been subject to extensive criticism because they allow detention and other punitive consequences, without trial according to basic tenets offered to those accused of criminal offences such as proof beyond reasonable doubt, proportionality, restricting punishment only in relation to past conduct, having finality of sentence, and strict evidentiary rules.

THE INHERENT POWER IMBALANCE BETWEEN THE STATE AND THE OFFENDER

Civil detention in effect makes the process an administrative or civil matter. However, administrative law offers no remedy that can properly address any imbalance of power as between citizen and state. In the case of the about-to-be-released sex offender the power imbalance strongly reduces the effect of any protection that administrative law can offer. The applicant for civil commitment, the state, has available to it the full resources of the prison and forensic mental health services which have had the responsibility for the control and management of the sex offender over what will almost inevitably have been a sustained and lengthy period of time in preparing and prosecuting its case of "risk". The cases demonstrate this imbalance. The state in many cases engages three psychiatrists to give evidence about the level of risk and also evidence from correctional authorities. In contrast, the respondent is likely to have limited resources in terms of legal representation and in obtaining independent psychiatric assessment and evidence on the risk posed and its management. Offenders may be unable to obtain their own expert evidence because of costs and be met by three experts on behalf of the State. Director of Public Prosecutions for Western Australia v Williams (28) was one case where the offender had a psychiatrist give evidence on his behalf, which included trenchant criticism of the reliability of risk assessments. This evidence appeared to play a role in the dismissal of an application for detention or supervision order.

There are also concerns about the impartiality or at least perceptions about impartiality, as under the schemes in each state the same psychiatrists tend to give evidence. Moreover, on some occasions, employees or consultants engaged by Corrective Service Departments may prepare reports or give evidence, for example, in relation to participation in sex offender programs and psychological profiles which may mean that they feel constrained in giving objective evidence that may involve criticism of the Department's performance or handling of an offender.

NOTIFICATION AND TIME TO PREPARE

There can also be problems of a lack of procedural fairness through the prosecution not allowing the offender sufficient notice of the impending action. There is clearly a pressing need for a reasonable time for offenders to consider their position and obtain adequate advice and properly prepare a case, particularly given that such orders may increase the length of their detention and thus concern their fundamental liberties. Moreover, rushed applications and hearings can lead to significant deficiencies in evidence which make it difficult for courts to make appropriate decisions. This was commented on by Mackenzie J in Director of Public Prosecutions v Foy.

REHABILITATION IN DETENTION

A perceived failure to participate in programs is clearly a strong factor in making orders for continuing detention, with the Courts apparently concluding that such resistance or hostility increases the risks of re-

offending. However, Barnett and Hayes (2008) say the cases reveal very significant inadequacies in the availability, quality and range of services. Overall there is a lack of programs tailored for the needs of particular offenders some offenders will miss out on treatment programs simply because they may fail administrative protocols for some programs such as time remaining in prison or meeting the appropriate classification requirements. There may be long waiting lists or delays for programs, which may prejudice an offender's claim for release. In Attorney General for New South Wales v Cornwall, there was a continuing failure to treat the offender's long standing personality disorder with medication while in prison even after the need for treatment had been identified in earlier court proceedings. In Attorney-General for New South Wales v Jamieson, the offender in gaol was delayed being placed in CUBIT (Custody-Based Intensive Treatment--a NSW sex offenders program) for about 3 years.

Some non-child sex offenders may be unwilling to participate because of their feelings about child sex offenders who are in such programs or fears for their safety. Other may feel great discomfort in confronting their past in the presence of other prisoners. Some offenders may be reluctant to participate in sex offender courses because of physical ailments and language difficulties or lack of verbal intelligence. Others may fear a lack of confidentiality. Some prisoners may be unlikely to benefit from prison-based programs with the real prospect that they will not receive appropriate therapeutic treatment. Some courses may not be available at all prisons. There may be no courses and strategies devoted to dealing with drug and alcohol abuse, which may be crucial factors in offending and re-offending. Another potential problem is that the denial of guilt will mean that an offender is denied entry into many sexual offender rehabilitation programs even if the offender wants to participate in such schemes. The reasons for such decisions are not always principled. One reason is a concern that the inclusion of prisoners who deny their guilt will undermine the group counselling sessions. Another reason is that in prison there are no sufficient resources for one on one counselling that might be appropriate for offenders who deny their guilt.

There are also concerns about the effectiveness of prison programs for sexual offenders. For example, the CUBIT program has operated in New South Wales since 1999. Suggested benefits according to those who coordinate or manage such programs are that the group dynamics reduces deficits in interpersonal relationships and increases 'new ways of thinking' and reduces alienation. However, as acknowledged, studies have only indicated small treatment benefits in terms of reducing sexual reoffending and there are concerns about the reliability of such studies because of the limitations of sample sizes and lack of longitudinal studies and it being based on re-incarceration rates rather than re-conviction rates. Moreover, there is no solid evidence that a CUBIT style program as adopted in around Australian jurisdictions is more effective than other styles including individual counselling.

POST DETENTION REHABILITATION: THE LACK OF ADEQUATE POST PRISON SERVICES AND PROGRAMS

The reported cases reveal the chronic lack of proper, secure facilities that do not unduly restrict the rights of the offender and appropriate care and treatment including rehabilitation programs and services. A number of judges have commented on the lack of resources and effective treatment available for serious sex offenders released into the community. Across the three jurisdictions (ie Queensland, New South Wales and Western Australia) there is no dedicated sex offenders program available in the community. In Attorney General v Jamieson the Court noted that there were no community-based treatment programs of sufficient intensity to meet the high-risk needs of the offender in that case and that 'was a matter for concern'. One particular problem identified by the courts, is the lack of appropriate temporary accommodation for offenders under the schemes who have been released but have not yet found their own suitable accommodation and employment. There is also a general absence of intensive courses such as CUBIT, which can mean that prisoners who otherwise might be released must stay in prison. There are also concerns about the lack of post prison services in rural areas. There is a lack of resources to support the legislation which on occasions has been conceded by counsel for the State. There also may be a lack of crucial substance abuse programs in the community, particularly in rural areas.

A LACK OF PROPER CO-ORDINATION AND PLANNING

Courts have commented on the need for adequate planning and preparation for the release of prisoners into the community including a need for a properly funded system that allows for closely supervised reintegration of this special class of prisoner into the community. There is often a need for one experienced person to be in charge of supervising the planning and reintegration of an offender into the community. This does not always happen and often there can be gaps in service or poor liaison between various services that might have an input into the person's experiences in the schemes and rehabilitation such as Corrective Services and the Attorney General's departments.

Planning for a person's release needs to commence well before the person is due to be released. Many will need a coordinated and integrated rehabilitation program involving corrective service officers and community organizations with a reintegration support officer to provide ongoing support. Barnett and Hayes (2008) state many prisoners have had dysfunctional and traumatic family backgrounds and have been the victims of abuse including in many cases violence and sexual abuse, poor educational opportunities, learning disabilities, poor employment histories. Many offenders will have led unstructured lives, often in prison, with few resources and will therefore need intense and practical support in the community including help with accommodation, transport, introductions to suitable employment, graduated work entry and assistance with budgeting and the activities of daily living,

together with a buddy system or mentoring. More than ever they need intensive assistance and programs in gaol and within the community.

THE PROBLEMATIC NATURE OF RISK ASSESSMENT

Barnett and Hayes (2008) state that in each of the three pieces of legislation (ie Queensland, New South Wales, Western Australia) there are broad and value-laden tests to assess whether the risk of a person re-offending justifies further detention or continuing supervision within the community. The Western Australian and Queensland legislation require the Court to a find that a person is a 'serious danger to the community' which means that it must be satisfied that there is an 'unacceptable risk that the person would commit a serious sex offence'. The Court must be satisfied of those matters 'by 'acceptable and cogent evidence' and 'to a high degree of probability'. In New South Wales, the Court must be satisfied to a high degree of probability that the offender is likely to commit a further serious offence and that adequate supervision will not be provided by an extended supervision order. None of these key terms are defined under the legislation. As discussed already, risk assessment of danger and of re-offending are notoriously unreliable. The use of 'unacceptable risk' raises many questions: what are the factors to take into account in assessing 'unacceptable' and what is the range of unacceptable risk--does it mean a mere risk of reoffending, a likelihood of re-offending, a strong probability of reoffending or a higher degree of probability? The Queensland, New South Wales and Western Australian legislation each provides a non exhaustive list of factors that the court must have regard to in assessing risk including psychiatric and psychological reports, criminal antecedents, patterns or histories of offending, efforts of the prisoner in attempting rehabilitation and the need to protect the community. According to Barnett and Hayes (2008) this is not a particularly helpful list as it essentially provides for static factors in risk assessment such as the offender's criminal record and means that courts must place primary reliance on the reports of psychiatrists and psychologists which for the reasons set out below are inherently problematic. The references to efforts at rehabilitation or prisoner compliance with obligations and programs are also extremely problematic.

First, there is no evidence that efforts at rehabilitation in prison are a significant or reliable factor in assessing risks of re-offending. The available evidence about such prison programs as CUBIT is problematic and such programs may at best have only modest effects on preventing re-offending moreover, as discussed above, there may be a wide range of factors or circumstances that affect an individual's efforts at rehabilitation in prison. Programs may not be available or there may be delays in availability, or available programs may not be suitable to individual needs or some prisoners may have legitimate reasons to avoid or not fully participate in available programs. Further, it is not clear what 'acceptable and cogent evidence' means. Does 'acceptable' refer only to the content of the evidence or also to the manner of its presentation and to issues of evidentiary rules? Thus, for example, what should

be made of hearsay evidence or evidence that is based on conjecture or opinion? In addition, it is not clear where 'high degree of probability fits on the scale of proof--is it very close to proof beyond reasonable doubt and can, and should, the courts attempt to apply percentages to the risk?

As a result Barnett and Hayes (2008) report the problematic nature of risk assessment for individual offenders and the vexed question of measuring adequate protection of the community. In particular, it leaves at large complex issues such as assessing, predicting and balancing protection of the community, protection of the human rights of the offender and the prospects of rehabilitation and supervision. And again, in particular, as discussed further below, risk assessment is fraught with difficulties.

ADEQUATE SUPERVISION

Another key principle in the legislation from Barnett and Hayes (2008) analysis is whether releasing an offender into the community under a supervision order could adequately protect the community. There is no clear or settled explanation of what 'adequate supervision' means. In Attorney-General (NSW) v Hayter, (92) Hislop J referred to the 'uncertainty' as to the meaning of 'adequate supervision' with their being three major possibilities, although it was not necessary to determine in the instant case which should be preferred: (a) Bell J appeared to accept in Attorney-General (NSW) v Tillman (94) that adequate supervision means supervision adequate to eliminate, or at the very least, substantially reduce, the likelihood that the defendant will re-offend; (b) In Attorney-General (NSW) v Winters, (96) McClellan CJ accepted that 'adequate supervision' was supervision that reduces the risk below either a high degree of likelihood of re-offending or making it less probable than not; (c) In Attorney General (NSW) v Cornwall, Hall J suggested that adequate meant it would reduce the risk of the defendant committing a further serious sex crime so that it is less likely than not that the person will reoffend in that regard. The Queensland Court of Appeal in Attorney-General (Qld) v Francis in relation to the Qld Act said that such arrangements did not have to be 'watertight' to be 'adequate' otherwise no such orders would be made.

THE DYNAMICS OF RISK ASSESSMENT

In a more detailed account of the issue of clinical versus actuarial assessments, Barnett and Hayes (2008) state that the Courts essentially rely on the reports and evidence of psychiatrists to assess the risk of re-offending. Psychiatrists tend to use actuarial scales to assess risk combined with clinical assessments. However, there are a number of serious doubts about the reliability of such evidence in assessing the risk of re-offending.

Scales for the prediction of further sexual offending are particularly hard to establish because of the low base rates of the outcome being measured and the dependence on re-conviction to measure outcome. As previously mentioned in this report, there are two main types of risk assessment, clinical and actuarial (and to recap) the former involves an assessment by a clinician, usually a psychiatrist, of an individual's

history and mental state, while the latter scores the offender according to the presence of characteristics that are associated with a likelihood of re-offending derived from studies of populations of offenders. The most commonly used actuarial instrument, the Static-99, is a 12-point scale that rates risk of further offending as low, moderate or high.

The main criticism of actuarial instruments, particularly the Static-99, is their reliance on historical or 'static' factors that cannot change over time, and the high rates of false positives generated by scales in which even those found to be at high risk only have a 45% probability of any further offence of any kind within 10 years. Other criticisms include their inability to distinguish between offenders who have very different patterns of behaviour and risk factors and their inability to distinguish between the prediction of sexual and other offences.

Notwithstanding the persistently expressed doubts by experts in evidence about the validity of the Static-99 as a predictor of risk, it is consistently used by the courts to justify detention. Again, as previously mentioned in this report, while a combination of actuarial and clinical approaches might produce more accurate results, there are still significant concerns about estimating risk and predicting behaviour. The fact remains that all current forms of assessment, whether based on actuarial or clinical findings will have an unacceptable false positive rate for almost all offenders and cannot predict offences that may occur in previously unanticipated circumstances. The research undertaken thus far indicates that the false positive rate may be as high as two out of every three offenders who are assessed for their level of dangerousness. Despite the inability of psychiatrists or any other behavioural scientist to accurately predict who will re-offend, the State schemes all include the requirement for psychiatric risk assessment.

Barnett and Hayes (2008) indicate how Australian judges on a number of occasions have commented on the inherent difficulties in predicting the risk of re-offending. In Fardon, Kirby J said that 'experts in law, psychology and criminology have long recognized the unreliability of predictions of criminal dangerousness'. Kirby J referred to expert evidence that psychiatrists notoriously over-predict. His Honour suggested that predictions of dangerousness have been shown to only have a one-third to 50% success rate.

The Australian Law Reform Commission in its discussion paper, Sentencing of Federal Offenders also noted the widespread view that predictions of future criminality are inherently unreliable and more often than not result in erroneous predictions that an offender is likely to re-offend. A further problem with risk assessment in civil commitment laws is that mental health experts, particularly psychiatrists, are making judgments which are outside their area of expertise, that being the diagnosis and treatment of mental illness, as many of the subjects of civil commitment laws do not have any psychiatric diagnosis. Moreover, judges and juries can misconstrue risk assessments that are put in figures and place greater

reliance on their accuracy than is warranted. And as already mentioned previously in this report, this was also affirmed in the findings from Bernadette McSherry et al. (2006).

The classifications of risk may vary from low light, moderate or high or combinations of these categories such as 'moderate to high'. These broad classifications can become even more complex and difficult to evaluate including assessments that a person might be at the 'low end of a moderate risk'. These actuarial findings are usually not the equivalent of levels of risk used in the legislation such as 'high degree of probability' or 'acceptable risk'. Thus, according to Barnett and Hayes (2008), inevitably some form of 'conversion' of these risk classifications into the risk levels used in the legislation is necessary by the courts. There also can be almost a bewildering battery of psychological actuarial tests, which may use different types of classifications and factors and weightings and may lead to different conclusions.

Another possible form of evaluation is Stable-2000, which is designed to act as a companion measure to the Static-99 and is used to assist in identifying stable criminogenic needs and treatment targets for sex offender programs. While personalized assessments may be necessary to make any sense of the risk assessment task they make these judgments even more subjective and removed from any empirical basis. Thus the task of risk assessment is made even more complex by the fact that psychiatrists will also on occasions rely on clinical assessments, 'overall clinical judgments' or 'dynamic assessments' as well as the actuarial methods to take into account more subjective factors or the particular histories and presentations of the individual offender. Clinical assessment might include developmental, environmental, neurobiological and intrapsychic factors; other common sense factors are likely to include attitudes to the offences and rehabilitation programs, level of social skills, literacy, work experience, family and peer support. The evidence of psychiatrist can at best be professional rather than scientific. Psychiatrists will then make assessments about sexual disorders, personality disorders, sociopathy and psychopathy which in themselves may be difficult or controversial. These problems are compounded on occasions by the fact that reports relevant to risk may rely on unproven hearsay evidence.

Another issue canvassed by the courts is that actuarial tests including the Static-99 have not been validated for use in relation to Australian indigenous people. A number of judges have commented on the problems of risk assessment including the lack of independent evidence indicating reliability. Hislop J in Attorney-General for New South Wales v Hayter stated that Static-99 estimates did not directly correspond to the recidivism risk of an individual offender and that while it was a useful tool it had limitations. Blaxell J in DPP v Allen (124) noted some of the limitations of Static 99 and stated that the method, *"[i]s not based upon any clinical examination but upon actuarial factors such as age, number of offences, number of appearances in court, characteristics of victims, and the like. The only one of these*

factors which can ever change is the offender's age, and accordingly such as assessment will always remain the same regardless of the progress or lack of progress made in treatment."

THE COMPLEXITIES OF THE STANDARD OF PROOF

According to Barnett and Hayes (2008) civil commitment schemes are likely to create difficulties in developing a consistent approach to the standard of proof because the proceedings themselves are artificially hybrid. Their aim is to generally require a standard of proof lower than the criminal standard of beyond reasonable doubt but to require, on at least issues directly bearing on continuing detention, a standard higher than merely on the balance of probabilities because detention involves the loss of liberty. The standard of proof guiding corrections personnel making decisions about whether to put an offender up for civil incarceration under the schemes, through to the judges making the final decision about risk, varies from State to State, from 'a high probability' down to tests that require a 'likelihood' or 'reasonable satisfaction'. There are in the schemes conflicting and confusing indicators about the standard of proof. The schemes clearly have ambiguities in their provisions on the standard of proof.

The situation according to Barnett and Hayes (2008) is confusing in NSW. Under s 17(2) of the NSW Act an extended supervision order may be made if and only if the Supreme Court is satisfied to a high degree of probability that the offender is likely to commit a further serious sex offence if he or she is not kept under supervision. Under s 17(3) a continuing detention order may be made if and only if the Supreme Court is satisfied to a high degree of probability that the offender is likely to commit a further serious sex offence if he or she is not kept under supervision and that adequate supervision will not be provided by an extended supervision order. The standard of proof as set forth under s 17 in NSW has caused confusion and ambiguity and is yet to be determined conclusively. Mason P in Tillman v Attorney-General for New South Wales (131) said that 'likely' was 'chameleon like' and that the provisions really required the Court to address 'a cascading set of predictions' and noted that the legislation was 'opaque'. Giles and Ipp JJA said in Tillman that 'likely' in s 17(3) denotes a high degree of probability, but not necessarily involving a degree of probability in excess of 50%; that is, such likelihood need not be more probable than not. However, Mason P in Tillman said that the term 'likely' should be given the meaning of 'more probable than not'. The meaning of the words was made more complex not only by other attempts at defining likelihood and probability but also because the common law's presumption in favour of the liberty of the subject should mean that a tighter more difficult standard of proof should be adopted if there is an ambiguity.

Moreover, it was clear that the civil standard could vary according to the gravity of the fact to be proved. Winters v Attorney-General of New South Wales, the most recent case on the issue before the NSW Court of Appeal, has not resolved the uncertainties. Mason P in Winters referred to the divided court in

Tillman on the meaning of 'satisfied to a high degree of probability' and supported the majority view in that case which was that 'likely' under s 17(2) and (3) described a 'probability at the upper end of the scale' but did not require that re-offending be 'more probable than not'. Giles JA also referred to the different possible standards that might be required under s 17 including elimination of the likelihood of re-offending; substantial reduction of the likelihood of re-offending; or reduction of the likelihood of re-offending below the degree of probability at the upper end of the scale. His Honour said that the Court of Appeal in Winters did not need to provide a definitive answer because the trial judge in Winters had found that adequate supervision could not be provided whatever be the relevant standard.

THE DUTIES OF GOVERNMENT TO PROVIDE REASONABLE RESOURCES FOR REHABILITATION

Barnett and Hayes (2008) noted a number of cases have discussed what duties, if any, government has to provide rehabilitative resources to allow for a lower level of control or detention under the civil commitment schemes. One important issue is whether a failure by government to provide resources which if provided would mean that detention is unnecessary may result in a court refusing an application for continuing detention or the alternative of supervised release, for example, on grounds such as that the defendant could be safely managed in the community under a program, but none exists.

In Winters v Attorney-General for New South Wales before the NSW Court of Appeal, one of the grounds of appeal was that the trial judge had erred by having regard to or giving too much weight to Government policy that indicated that the offender would not be given funds for one on one treatment by a psychologist. The trial judge had stated that the absence of funding for the necessary counselling was a significant factor in his not being satisfied that adequate supervision could be provided for by an extended supervision order and hence the offender had to remain in detention. The evidence was clear that the government would not provide such funding and it was also accepted by the trial judge (and the Court of Appeal) that such counselling would have been likely to reduce the risk of re-offending to the requisite degree to enable the offender to be given supervised release. There was evidence that the Department of Corrective Services was unwilling to divert scarce resources to one on one treatment because of the limited data suggesting it was beneficial. Each of the three judges of the NSW Court of Appeal rejected the ground of appeal, stating that the failure of the government to provide services did not constitute an abuse of process and nor did it justify the Court refusing to exercise its discretion to refuse to make any order. The reasons for this view were based on a narrow statutory construction of the provisions to the effect that there was no explicit power for the Court to require the State to provide for any funding. The relevant provision s 11(d) of the Act simply referred to the Supreme Court directing an offender to 'participate in treatment and rehabilitation programs'.

The Court also considered that a failure by the government to provide funds was not unreasonable because, for example, there was nothing to suggest that it was arrived at in aid of keeping offenders such as the offender in custody pursuant to continuing detention orders. It is submitted that there are a number of strong legal, moral and practical reasons for the Court of Appeal to have determined otherwise.

First, the Court could have adopted the general approach taken by Courts in Western Australia and Queensland and recognized that such civil commitment schemes should be regarded as 'exceptional', meaning that great caution should be exercised before imposing orders under such legislation--a clear and convincing case is necessary. Other judges including NSW judges have also commented on the exceptional and drastic consequences of such legislation. Bell J in Tillman noted that 'a person subject to an extended supervision order is a prisoner in all but name'. It is submitted that such an approach is also consistent with earlier High Court decisions including Kable v Director of Public Prosecutions of New South Wales (163) and also Chester v The Queen. In Chester the High Court referred to the civil detention scheme provided for under s 662 of the Criminal Code (WA) as an 'extraordinary power'. These above cases referred to matters of general principle and the writers would argue that it is incorrect to try to limit their general utility by attempting to distinguish various schemes or particular provisions of such schemes, a methodology used by the NSW Court of Appeal in Winters, particularly when these cases make no suggestion that the general principles and comments are to be confined to the particular circumstances of the case.

It should also be borne in mind that rehabilitation is a key element of the three schemes and is specifically mentioned as an objective in the NSW Act. Hodgson PA stated that decisions about how to allocate resources for the rehabilitation of offenders and the protection of the community are decisions for Parliament and or the Executive and not the courts. This is clearly in principle correct but the circumstances in civil commitment schemes are exceptional. Under such legislation offenders face the prospect of further detention according to principles and processes that deviate significantly from the application of normal criminal law principles. The onus of proving the need for orders under such legislation must rest with the Crown and the principle of the liberty of the individual must be used to determine the lowest level of detention. If the Crown advocates for continuing detention then it ought to be under at least a prima facie obligation to provide reasonable funds for rehabilitation services that could be said to be reasonably available. It is the Crown which brings the action and which should bear the responsibility of reasonable rehabilitation services. If it does not, then it is using extraordinary powers without any corresponding duty to ensure that offenders are given at least a reasonable opportunity to avail themselves of options to avoid continuing detention.

Hodgson PA suggests that imposing a duty on the Executive to provide some funding would mean that 'the Court would be able to formulate any such program as it chooses, and to assume irrebuttably that the executive would provide such a program'. In the writers' view, that is a distortion of what the duty might involve. First, applications under the schemes are made by the Crown and the process is adversarial. It would be for the parties to raise and interrogate each other as to any forms of rehabilitation that might be appropriate. In the course of that process the availability and effectiveness of such options would be canvassed. The Court would not be in a position of its own motion to raise and investigate different rehabilitation options.

Secondly, as in Winters the court would need to be satisfied by the evidence that the suggested rehabilitation service or program would have a significant effect on the order to be made. Thirdly, the court's discretion could be limited to considering whether the Government had acted reasonably in the circumstances of the particular case to provide funding for appropriate services that would be significant in the order to be made. The court's scrutiny of Government policy would not be at large but instead confined as suggested. The court would not be determining government funding or policy but instead in a particular case deciding whether the Crown had not met its obligations under the legislation to prove that continuing detention was the order necessary to meet the objectives of community protection and rehabilitation of the offender.

Another principle supporting the development of a government duty is that in interpreting such schemes any ambiguity should be construed in favour of the liberty of the individual. Thus in Winters it was not clear on the face of the statute whether the government had or had no duty to provide reasonable or adequate funding so in those circumstances the ambiguity should have been resolved in favour of Mr Winters particularly given that the burden of proof in relation to all matters under such a scheme should lie with the Crown. Moreover, there is even more direct High Court authority to suggest that Government does have duties in relation to providing adequate rehabilitation and treatment under such civil commitment schemes for sex offenders. Mr Winters had no personal means to fund the counselling and Medicare did not extend to it. The decision by the Government discriminated personally against Mr Winters and potentially to all offenders who lack access to means to pay for such rehabilitative programs. Moreover, as Mason P noted, there was some evidence that two other serious sex offenders had been deemed worthy to receive such treatment while Mr Winters had not with no explanation proffered for this discrepancy. Nor was the government decision not to fund reasonable or rational.

There are limitations to the utility of detention that ought to be recognised and taken into account as indicated by a number of judges. Moreover, in practical terms the costs of providing the funding for counselling would have been considerably less than the costs involved in keeping Mr Winters in

detention. The latter is highly expensive. For example, the estimated cost of maximum-security imprisonment in Australia was approximately $80 000 per prisoner per year as at 1990, which given the effluxion of time and increases in inflation must now be a much higher figure, according to Barnett and Hayes (2008). The Courts have also made orders for electronic bracelets for tracking pursuant to Crown submissions which are also very expensive systems and also of very dubious benefit. A request for one-to-one counselling was not an outlandish, novel or unreasonable option--it is an orthodox part of treatment of sexual offenders recognised around the world.

The proffered reason by the Government of its failure to provide resources for the counselling is also dubious. First, it has to be remembered that the schemes were designed or intended to be used for only a small group of 'hard core offenders' and thus costs for their rehabilitation should not be excessive. Secondly, there is little evidence that group counselling or treatment in prison is any more effective than one on one counselling in the community. In the case of Winters there was uncontroverted evidence that one on one counselling would be sufficient to reduce the risk to acceptable levels. In fact, as noted above, there are serious misgivings about the effectiveness of prison schemes such as CUBIT particularly in catering for the individual needs of different offenders. From their findings, Barnett and Hayes (2008) conclude that there needs to be more of an integrated and planned response to sex offences that focuses on prevention, early detection, proportionate sentencing of offenders and a comprehensive, well resourced and integrated management and treatment system both within prison and in the community.

The interpretation thus far of the civil commitment schemes by State courts shows the range of contentious issues that they raise. Barnett and Hayes (2006) state this is not surprising because of the artificial, hybrid nature of the schemes that uncomfortably straddle civil and criminal processes and consequences. The fundamental aspects of these schemes are at best problematic if not highly dubious. Whilst it is true that the courts have on the whole made orders under the legislation and accepted the basic parameters of the risk assessment, often cautiously, there are areas of unease and continuing ambiguity and uncertainty. Various courts and various judges have commented on the limitations of risk assessment and the lack of certainty associated with the key terms of the legislation. Moreover, there is no clear or settled approach to key terms in the legislation such as 'serious risk', 'high probability', 'likely', 'adequate supervision' or 'unacceptable risk' which form the foundations of the schemes but which are inherently problematic. The courts, perhaps understandably, have shied away from attempting to provide any clear guidelines as to the meaning and effect of these terms. In addition, the courts and individual judges have commented on current inadequacies of rehabilitation services and programs both within prison and in the community. Courts and judges have also regularly commented on the lack of coordination and planning in dealing with serious sex offenders under the legislation. These comments (according to Barnett and

Hayes) provide a snapshot of a poorly planned, co-ordinated and resourced system across all three jurisdictions. Rehabilitation is expressed as a central objective of the schemes but in practice it is a poor cousin to more punitive measures. Yet it would be the establishment of an effective system of rehabilitation that would be most likely to offer the best protection against re-offending--a view which has been supported by a number of judges in interpreting the schemes as described above. Punitive measures may be counterproductive by actually exacerbating the risk of re-offending by maintaining offenders in detention or by hardening their attitudes within the community. Generally speaking, the experience of imprisonment is 'negative and destructive' for the offender and being in prison for a considerable number of individuals may develop, reinforce or exacerbate criminality, according to Barnett and Hayes. The effect of punishment is complex and in some situations may either suppress or stimulate aggressive or antisocial behaviour. The Australian National Committee on Violence commented that it suspected that prisons fail to reduce the propensity to violence of many offenders.

In addition, there is the controversial area of the responsibility of government in relation to the provision of reasonable and adequate rehabilitation services which can be seen as a form of reciprocity of responsibility if government wishes to use such exceptional and drastic legislation. The Queensland and Western Australian courts have shown a willingness to develop a concept of imposing some duties or responsibilities on government under the schemes to provide such resources if the government wishes to impose orders under this legislation. In the writers' view, for the reasons expressed above, the NSW Court of Appeal has regrettably declined in Winters to follow the same line of reasoning. Barnett and Hayes affirm that the analysis of judicial interpretations of the operation of the civil commitment laws demonstrates that they are in many ways a blunt instrument that focuses on punishment at the expense of prevention, early intervention, treatment, rehabilitation and reintegration into the community. They rely on guesswork, albeit educated or informed guesswork, that has a clearly unreliable foundation, rather than operate on any firm empirical base. Moreover, what these laws might be able to achieve on risk reduction is out-weighed by the damage that they do to the tradition and integrity of our legal and medical systems and to the human rights of offenders. What is needed says Barnett and Hayes is the repeal of these laws and substituted in their place an integrated and planned response to sex offences that focuses on prevention, early detection, proportionate sentencing of offenders and a comprehensive, well resourced and integrated management and treatment system both within prison and in the community.[11]

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[11] Michael Barnett and Robert Hayes, Evaluating the judicial interpretation of civil commitment schemes for serious sex offenders, in University of Western Sydney, Law Review, www.thefree library.com, January 1, 2008

(footnote continued)

HOWELLS, HESELTINE, SARRE, DAVEY AND DAY (2004)

This report provides a descriptive picture of the nature of offender rehabilitation programs in Australia. It does this in three ways: first, it describes offender treatment programs that are currently offered to adult clients of correctional services throughout Australia. Second, it highlights areas of strength and areas for development in relation to internationally accepted good practice criteria. Third, it describes likely future developments and possible impediments to program implementation from the perspective of correctional managers in each jurisdiction.

Howells, Heseltine, Sarre, Davey and Day (2004) begin with stating there has been a resurgence of interest in offender rehabilitation, both in Australia and overseas. This is based upon a mounting body of international research suggesting that programs can be effective in reducing rates of re-offending. In light of this Kevin Howell et al. (2204) it is surprising that comparatively little information (either outcome-based or descriptive) is currently available about offender programs delivered to offenders in Australia. The information contained in this report was obtained from face-to-face interviews with representatives (and their nominees) from each State/Territory correctional administration. In addition, program information was elicited from existing documentation and program manuals supplied by each jurisdiction. Both interview data and program documentation were used to complete a checklist of program characteristics. Comments were then sought from individual States/Territories about the accuracy of the reports provided to them by the researchers. This information was collated into the report.

Kevin Howells et al. (2004) affirms rehabilitation programs in Australia are clearly established, with each jurisdiction offering a range of offences-focussed programs. Each jurisdiction has a well-developed system of program delivery, highly motivated program staff and a general organizational acceptance of the importance of offender rehabilitation. The legislative context for rehabilitation programs in Australia is varied and diverse. This diversity operates to thwart any clear national approach to achieving rehabilitative goals. In all jurisdictions, other factors (for example, protection of the community) appear to be given pre-eminence in sentencing. It can be argued strongly that affirmations of the rehabilitative purpose in legislation are not only useful, but should be required of legislators.

Each correctional jurisdiction delivers offender rehabilitation programs on a local level, both in the community and the custodial setting. Correctional departments share ideals in offender rehabilitation, as evidenced by the overwhelming use of the "what works" literature to inform program development, organizational structure, and program implementation.

The similarities between jurisdictions are great. Most, if not all, have programs dedicated towards the reduction of re-offending risk in sexual and violent offenders, along with other programs, such as cognitive skills, which have been designed to address some of the more general causes of offending. The lack of development of programs for Indigenous offenders and female offenders is noticeable. The most intensive programs are offered to violent and sexual offenders, and there is a trend in most jurisdictions to offer programs that are targeted to offenders of differing levels of risk of recidivism. A general comparison of the programs currently offered against "good practice" criteria suggested areas for development.

There is some variation between jurisdictions, examples of these included a need for further work articulating the theoretical underpinnings of programs, more developed assessment and selection processes, and better integration with broader case management processes. A predictable consequence of the focus on 'good practice' in program delivery has been an interest in evaluation, quality assurance, and accreditation. This has led to the development of systems for program accreditation in England and Wales, Canada, and Scotland. Nationally two jurisdictions are developing program accreditation mechanisms, while other jurisdictions are developing program standards. Whether or not a national accreditation system is required remains open for discussion. It would appear; however, many would welcome increased opportunities to share information and solutions to implementation problems.

SEX OFFENDER PROGRAMS

Sex offending is a learned behaviour and as such, amenable to change (Curnow, Streker & Williams, 1998). Ward and Stewart (2003) have suggested that focussing solely on criminogenic needs, or those factors which are directly related to recidivism, limits sex offenders' engagement in treatment. They propose that addressing unmet human needs in sex offenders and assisting them to implement 'good lives plans' will move the offender beyond simply managing risk. Ward and Stewart emphasise the central role of identity formation, drawing on the work of Maruna (2001) to suggest that effective rehabilitation and further desistance from crime is dependent on offenders establishing an alternative and coherent prosocial identity. Ward and Stewart also point to work that demonstrates the role of non-criminogenic needs, such as self-esteem (Marshall, Cripps, Anderson & Cortoni, 1999), collaborative engagement (Mann & Shingler, 2001) and therapeutic alliance (Marshall et al., 2003) have in moderating treatment outcome. Generally speaking, sex offender programs take a victim-centred approach. Their primary aim is to reduce the likelihood of sexual re-offence, thereby protecting the community and potential victims. Typically, they involve challenging offender denial, accepting responsibility, reducing cognitive distortions, reducing deviant arousal and fantasising, developing victim empathy, understanding offence-related behaviour, and relapse prevention strategies (Polaschek & King, 2002; Matson, 2002) using cognitive-behavioural approaches to treatment (Beech & Fisher, 2002).

A number of factors have been shown to impact upon the effectiveness of interventions, including nature of offence, risk level of offender, motivation and readiness factors, timing of interventions and program integrity (Lievore, 2003; Kemshall, 2001; McGrath, 1994). Recent discussions about sex offender treatment programs by leading Australasian researchers are proposing accommodating individual differences in sexual offending programs through more flexible and personalised intervention approaches (Glaser, 2003; Drake & Ward, 2003).

Six jurisdictions deliver sex offender program of varying intensities. In general, programs are of high intensity, that is greater than 100 hours in length and are delivered over extended periods. A number of programs are delivered in therapeutic communities. Many jurisdictions have well developed frameworks for program delivery based on the client's assessed risk of recidivism. Risk and criminogenic needs assessments are comprehensive and typically include a risk/need assessment (sexual offender specific), a clinical assessment, file review and psychometric assessment. Case formulation and identification of individual treatment goals are an integral component of the intensive programs. In general, the programs aim to develop insight (both historical and proximal) into the offending cycle, increase understanding of the effects of the offence on the victim, challenge cognitive distortions, modify deviant arousal, explore the role of fantasy in offending, develop intimacy and relationship skills, enhance problem solving, and to develop an individualised relapse prevention plan.

For programs that target medium to high-risk offenders, facilitators are generally psychologists. For these programs, staff training programs have been developed and national and international experts regularly give staff workshops. Most sex offender treatment programs have undergone (or are undergoing) external review. Evaluation data were unavailable for the report. Several issues arose for those involved in program delivery. First, most jurisdictions excluded offenders denying responsibility for the offence, but did not provide alternative treatments options. Second, some types of sex offender (e.g., sexual murders) were excluded from programs, but also not referred to violent offender programs due the sexual nature of their offending. Third, there were differing views about the merits of including those with offences against adult and children in the same treatment group.

VIOLENT OFFENDER PROGRAMS

There are a wide variety of variables that contribute to violent offending behaviour and as such, there is a need to structure intervention programs with a mind to this heterogeneity. Violent offenders therefore have a range of criminogenic needs that might be targeted by intervention programs. Persistently violent offenders have been shown to have greater needs than non-persistent violent offenders or non-violent offenders, particularly in the areas of substance abuse, employment, personal/emotional stability, community functioning, criminal attitudes, associations and marital and family relationships (Serin & Preston, 2001). Others have discussed the importance of the social context in which violence occurs as warranting attention

(Henry, Tolan & Gorman-Smith, 2001; Beck, 2000, 2002). Howells and Day (2002) have discussed the importance of addressing low readiness in violent offenders. They identify a number of impediments to readiness in this group, and highlight the challenge of engaging such clients in treatment. "Such clients may have been referred because of concerns of others about their violent behaviour, may enter treatment with quite different goals from those of staff and referring agents, feel pressured into attending and have high levels of hostility to program staff".

Evaluations of violence treatment programs have concluded that anger management is not of itself sufficient in the treatment of violent offenders (Howells & Day, 2002; Howells et al., 2002). Anger has been shown to be only one criminogenic need and it would be insufficient to attempt to address violent offending with anger management programs. The most recent literature indicates a need to expand on current approaches to therapeutic treatment with violent offenders in ways that begin to address the broad range of causal influences on violent offending behaviour and in ways that increase engagement of offenders.

Three Departments currently deliver intensive custodial-based violent offender programs. Both Victoria and South Australia intend to implement violent offender programs in the near future. These programs aim to promote an understanding of violence offending, identify and challenge cognitive distortions that maintain offending, develop an understanding of the consequences of offending and develop an individualised relapse prevention plan. Staff training is mandatory for all programs. At least one psychologist delivers programs deliver the programs. Models of ongoing supervision and staff support are generally well developed. When custodial staff are involved in program delivery, they are given specialist training. Pre-program assessments are comprehensive and include file review, clinical interview and psychometric assessment. Case formulation and identification of individual treatment goals are an integral component of the more intensive programs. All of the violent offender programs have undergone, or are undergoing, review. The results of the evaluations were not available for the current study.

SPECIAL GROUPS

Within the correctional system, there are a number of recognised groups whose needs are deemed sufficiently different from the mainstream prison population to warrant special attention. They often include women offenders, Indigenous offenders, mentally ill offenders, intellectually disabled offenders, and offenders from other cultures. It may be argued that most offender treatment programs are substantially based upon dominant cultural assumptions which are inconsistent with the understandings, values and beliefs of certain diverse groups. Within a Risk-Needs approach, these concerns largely reflect the Responsivity Principle, which suggests that rehabilitation programs are most effective when they are designed and delivered with the learning styles and specific needs of the participants in mind. Within Australia, there is recognition amongst many that special offender rehabilitation programs are appropriate for Indigenous offenders and Women

offenders. There is also some movement towards acknowledging the specific program requirements of offenders from other cultures and intellectually disabled offenders.

FEMALE OFFENDERS THE LITERATURE

In a comprehensive review of the needs of Australian women offenders, Sorbello, Eccleston, Ward and Jones, (2002) highlight the inadequacy of a criminogenic needs focus in devising correctional programs for women. They argue that women offender's diverse range of gender-specific issues such as sexual abuse, self-image, or parenting is ignored in mainstream male correctional programming. "Correctional policy needs to look beyond recidivism rates to recognising the various obstacles preventing female offenders from living balanced and fulfilling lives". A current trend in rehabilitation for women offenders is to base programs on best practice principles, especially the principles of risk, need, and responsivity, whilst acknowledging the gender-specific needs of women offenders. What is clear in discussions of specific rehabilitation programs for women offenders is that this is an area that calls for continued exploration, investigation and the monitoring of the needs of women offenders.

Western Australia was the only jurisdiction to develop programs specifically for female offenders. Both Victoria and Queensland have adapted programs to meet the needs of female offenders. In Queensland, the Department has recently piloted a "Transitional Program" for female offenders; the evaluation of this program is still underway. There was recognition that programs need to be developed and/or adapted for women offenders, which address the differing needs of Indigenous and non-Indigenous women offenders and women serving custodial sentences and community orders.

INDIGENOUS OFFENDER PROGRAMS

When discussing the needs of Indigenous offenders, a caveat should be drawn. There is a danger of generalizing across Indigenous Australians from various communities and indeed across Indigenous peoples from various countries. Australian and Torres Strait Islander peoples consist of more than 600 different cultures and tribal groups. The diversity of such groups invites various and specific responses to local needs and highlights the importance of seeking local Indigenous guidance and input into offender treatment strategies.

Given the over-representation of Indigenous people in the criminal justice system, especially in custodial environments, and the general recognition by informants that mainstream offender rehabilitation programs do not adequately meet the needs of Indigenous offenders, it is surprising that only a handful of programs have been specifically developed for Indigenous offenders. In a custodial environment, it was noted that Indigenous offenders often served sentences short sentences which made then ineligible for many programs. Informants report that Indigenous offenders have multiple needs, including poly-substance use, employment

and educational difficulties, accommodation problems, grief and loss issues, parental problems (e.g. stolen generation) and family abuse/violence, and "trans-generational trauma".

While Indigenous offender specific programs are available, informants noted difficulty in recruiting appropriately qualified Indigenous staff, especially in regional locations. For example, in Western Australia it was reported that that Indigenous programs were often delivered in metropolitan prisons with non-Indigenous facilitators. In these cases the Indigenous participants were transferred from rural/remote prisons to the metropolitan prison for the duration of the program. Participants noted that there was a need to develop Indigenous programs throughout Australia, as one of the shared strategic goals was to decrease Indigenous recidivism.

There appeared to be major challenges in program delivery to Indigenous offenders, including offender discomfort with non-Indigenous facilitators, the high proportion of Indigenous offenders who repeat programs without receiving any additional benefit, the failure of Indigenous offenders to complete programs in mixed groups, the cultural relevance of key program concepts (especially the use of jargon and the lack of relevance of content to Indigenous participant), difficulty with language, the heterogenous needs of this group, and the high proportion of Indigenous offenders will not complete programs unless they are mandated. These challenges were attributed to program content, especially the use of jargon and the lack of relevance of content to Indigenous participants and the paucity Indigenous-informed policy.

WHAT IS GOOD PRACTICE?

Andrews and Bonta (1998) have put forward a number of 'good practice' principles for rehabilitation, among them the frequently cited principles of Risk, Need, Responsivity, Professional Discretion and Program Integrity. The Risk principle suggests that higher risk offenders stand to benefit more from rehabilitation programs than low risk offenders; the Needs principle suggests that programs should target individual 'criminogenic' needs, or those dynamic risk factors that are directly related to offending behaviour, and the Responsivity principle refers to those internal and external factors that may impede an individual's response to interventions, such as weak motivation or program content and delivery. The Professional Discretion Principle refers to ensuring that program deliverers have a degree of discretion and a capacity to use professional judgement in assessing and managing offenders when necessary. Program Integrity relates to reducing the gap that commonly exists between the program as it exists in design and the reality of how it is delivered in practice.

Paul Gendreau (1996) has attempted to identify those characteristics that distinguish between effective and ineffective programs, using primarily meta-analytic techniques. He found that effective rehabilitation programs were intensive and behavioural or cognitive-behavioural in nature; targeted criminogenic needs of

high-risk offenders; matched the characteristics of offenders, facilitators and programs; reinforced program contingencies and behavioural strategies in a firm but fair manner and were delivered by appropriately qualified/trained, competent facilitators with well developed interpersonal skills.

Effective rehabilitation programs also included adequate supervision of facilitators, were designed to provide offenders with situations where prosocial activities predominate, provided relapse prevention strategies and provided through care and brokerage with community agencies. Those aspects of program intervention that have been found to have less success in reducing reoffending, include unstructured case work or counselling, insight-oriented psychodynamic and client-centred approaches, medical model approaches, punishment, sanction or deterrence approaches (Gendreau, 1996).

In fact, other large-scale reviews have shown that those intervention strategies that employ intensified criminal sanctioning or deterrence have been found to increase recidivism (Andrews et al., 1990; Lipsey, 1992, 1995; Lipsey & Wilson, 1998). Similarly, programs that target low-risk offenders or that target weak predictors of criminal behaviour (such as depression or self-esteem) have been found to be largely ineffective in reducing rates of re-offending. Whilst self-esteem, psychological distress or anxiety may be targets of attention within a duty of care context, empirical research indicates that intervention in these areas does little to alter recidivism risk.

IMPLEMENTATION OF GOOD PRACTICE PRINCIPLES

The evaluation of the effectiveness of different interventions has been steadily increasing; however, there is now an acknowledgement of the need to evaluate these interventions within practical settings. Whilst most evaluations of programs have been structured research projects which typically use controlled selection of participants, manuals and careful selection of staff, there is now an understanding that in practice, interventions are responsive to various referral or allocation practices which are affected by resources, and secondary decision-making (such as courts or administrations). There is also much less control over the pattern of delivery within a real setting.

Not surprisingly, when studies that investigate programs in real world settings are compared with controlled research projects (called 'demonstration studies') lower mean effect sizes are evident (Lipsey 1999); however, even within these 'real-world' studies, a significant reduction in recidivism rates is evident. Whilst mean effect sizes of recidivism are lower, ironically the 'problem' of external validity has yielded some potentially valuable information in terms of the implementation of rehabilitation programs. We are now beginning to acknowledge the importance of organisational factors, staff training and supervision, communication and feedback systems, referral systems and resources – now collectively referred to as program implementation - for effective intervention. In fact the importance of the setting and the quality of program delivery has only

just begun to be recognised as an important aspect of effective offender rehabilitation (Gendreau, Goggin & Smith, 1999, 2001).

There is also evidence that the quality of implementation is directly correlated with reduced recidivism in community-based interventions (Byrne & Kelly, 1989; Fagan, 1990). This is especially true where attendance was court-mandated and the program was delivered by a criminal justice agency (Lipsey, 1999). Gendreau, Goggin and Smith (1999) have presented 32 guiding principles of program implementation organised under the following categories: general organisational factors, program factors, change agent activities, staffing. Whilst they admit that their principles are still evolving and are not currently supported by data pertaining to the individual factors, they offer them as an impetus for validity studies of various implementation factors. Bernfeld, Blasé and Fixen (1990) have adopted a systems perspective as a way of understanding implementation issues. They argue that successful program implementation involves an interplay between sometimes competing variables in the multilevel correctional systems. They identify four levels of analysis for attention: client, program, organisational and societal. Within the client level, this systems perspective encourages a view of the client as embedded in a broader social system. The program level includes those factors directly related to the implementation of the program itself, such as staffing and resource issues. The organisational level includes those socio-political factors that operate within organisations and the societal level includes those aspects of broader social economy and cultural imperatives that impact upon policymakers. As James Maguire (in press) suggests, "it may be that in recent policy developments in some countries there have been disproportionate amounts of attention given to the second of these ingredients at the expense of the other three". From a systems perspective then, effective offender rehabilitation programming is best implemented when all four levels are considered.

GOOD PRACTICE: IN AUSTRALIA

In order to generate an overall picture of offender rehabilitation in Australia, data from each jurisdiction, including State/Territory reports, program manuals and informant interviews, were compiled by Howells, Heseltine, Sarre, Davey and Day (2004) to highlight strengths of the offender programming in Australia and the challenges for future program implementation, data were sorted in accordance with the following categories described by Gendreau, Goggin and Smith (1999): theoretical/philosophical, staffing considerations, program referral, program selection, program exclusion, treatment manual, participant profile, evaluation, participant follow-up, departmental support, level of program need and relationship between rehabilitation programs.

THEORETICAL/PHILOSOPHICAL

Departments were committed to delivering programs congruent with "good practice", with offender rehabilitation strategies being Departmental foci. Australian offender rehabilitation philosophy was strongly underpinned by the "What Works" literature, as outlined by the Departmental policies, procedures and action plans. While participants expressed some difficulty with the movement from policy to practice, there was a uniform Department commitment to the delivery of offender rehabilitation programs, by recognising the need to ensure that staff practices mirrored Departmental philosophy. Programs manuals were available in all jurisdictions, which clearly outline the contents of the program; and some manuals included a theoretical introduction to introduce facilitators to the criminogenic need addressed by the program. While some theoretical introductions were comprehensive, most were lacking.

STAFFING CONSIDERATIONS

While all Departments were committed to providing training programs for new facilitators, a number of difficulties were identified that hindered the delivery of effective training.

TRAINING

All Departments recognised the need for staff to receive formal training before they delivered programs. In practice, staff training practices varied, both between and within jurisdictions. Staff training needs analyses were infrequently undertaken, sometimes resulting in all facilitators receiving the same training. It was not uncommon for formal staff training to be conducted on an infrequent basis; with staff more likely to be introduced to programs in their workplaces. Methods for staff training included formal training, training through co-facilitation, "picking up the manual" and/or a combination of these. For the more intensive sexual offender, violent offender and cognitive skills programs, however, staff training packages had been developed and were routinely delivered. While staff training is a priority for Departments, budgetary constraints, a lack of centralised scheduling of training and underdeveloped mechanisms for ongoing monitoring of staff competency, appear to be ongoing challenges for most jurisdictions.

SUPERVISION

Models of professional supervision varied between and within Departments. There was a strong emphasis on the provision of ongoing progressional supervision for all program facilitators. In practice, however, more developed models of professional supervision were associated with the more intensive programs. Departments recognised the need to aim for high levels of professional supervision in all programs. Supervisors appear to have no specific pre-requisite skills, and range from peers, Senior Social Workers, Senior Psychologist to extra-Departmental "experts".

FACILITATOR NUMBERS

In general, offender rehabilitation programs were delivered in a group format, by (ideally) two facilitators with between 8-12 participants. In special circumstances, programs might be offered on an individual basis. Facilitator numbers appeared to be problematic across the Departments. Staff movement, difficulties with staff retention and recruitment and a lack of suitably trained staff to run programs contribute to the problem. Departments specifically expressed difficulty recruiting and retaining psychologists.

QUALITIES

The desirable personal qualities of program facilitators were infrequently documented in program manuals. When comments are made, desirable qualities centred on tertiary qualifications, training and relevant experience. A few program manuals mentioned personal attributes of staff suited to working with specific offender groups, including Indigenous, sexual, and violent offenders.

WORKLOADS

Some participants reported that high facilitator workloads made it difficult to prepare for, and debrief after, program sessions. For others, however, facilitators had developed work-management strategies to ensure that they had adequate preparation and debriefing time. Policies and procedures that clearly outline the amount of time required for program preparation, debriefing and writing exit reports were helpful in ensuring that this occurred. There was a general view that pre- and post-program assessments, especially psychometric assessments, created an additional workload for program facilitators.

PROGRAM REFERRAL

Six of the Departments had mechanisms in place for screening offender program needs, both in custodial and community corrections environments. Such screening commonly involved the development of a Case Management Plan, in which program needs are identified using an actuarial risk/need assessment tool. These program needs were used to make program referrals.

PROGRAM SELECTION

Across most jurisdictions, programs were delivered when the required number of participants to run a group was reached. In general, pre-group assessment, when undertaken, tended to focus on the ability of participants to work together, the level of individual offender motivation to complete the program and the offender's "Stage of Change". In some programs, assessments were largely unstructured and relied on the facilitator discretion. On one hand, efforts were made to accommodate every offender in the next program. This might mean that exclusion criteria (e.g. low literacy) might not be not strictly adhered to. On the other hand, strict pre-assessment procedures often existed which clearly state the need to assess criminogenic need (through structured/semi-structured interviews, case formulation and psychometric tools) and determine

whether the individual need is congruent with that of the program. In many of the program manuals pre-test (and sometimes post-test) tools were recommended, however informants note that due to time constraints and the perceived lack of relevance of these tools, they were not always completed.

PROGRAM EXCLUSION

Although some program manuals specify criteria for program exclusion, in practice only offenders who cannot be accommodated in a group, for example because of psychotic symptoms, were excluded. Participants noted however, that group members would be suspended/removed from the group if they were inappropriate or disruptive, or if they did not attend regularly. The more intensive violent and sex offender programs, however, were typically much clearer about their exclusion criteria and took steps to enforce them.

TREATMENT MANUAL

All of the offender rehabilitation programs had facilitator treatment manuals. These manuals clearly outlined the aims and objectives of each session. Most provide a script for the facilitator to follow, however, in most cases specific exercises were not linked back to theoretical concepts. Participant handouts and facilitator leaning aids were included, although some appeared to require a level of literacy beyond that of the target population. Many program manuals contain guidelines for assessing offender change. These range from pre- and post-program psychometric evaluation, assessment of knowledge gained at the end of sessions to level of participant satisfaction with the session/program.

PARTICIPANT PROFILE

The recording of data related to program performance varied across jurisdictions. Most informants indicated that there is a need to develop further electronic management systems to ensure exchange of program information between program staff and other staff. Participant attendance was recorded by all jurisdictions. Any additional information relating to participant change varies from program to program. Despite this, facilitators generally kept a written record of participant participation during each session and their impressions of behaviour, attitudinal or knowledge change.

EVALUATION

There was limited information available on the efficacy of offender programs in Australia. Anger Management Programs in South Australia, Western Australia and Queensland have undergone an external evaluation. In Queensland Department of Corrective Services has evaluated, or is in the process of evaluating, all of its rehabilitation programs. Unfortunately, these data were unavailable for the current report. In Western Australia, the Department is committed to external evaluation of its offender rehabilitation programs, and over the last few years has commissioned evaluations of several programs. In addition, the

Department, in conjunction with Edith Cowan University, has established "Offender Program Edith Cowan" (OPEC) in which the university has been commissioned to determine longer-term outcomes for all offender programs. The data collection process has been running for two years. In Victoria, the sex offender program is currently under review and the manual is in the process of being modified. A similar situation is occurring with the violent offender program in NSW. In both, Tasmania and NSW the sex offender programs are undergoing evaluation. Finally, the Northern Territory has just undergone external review of its offender rehabilitation framework. More commonly, measurement of offender change throughout the program is primarily based upon the personal observations of program staff, who typically look for evidence of learning, group interaction and attendance, and review homework tasks. These data are then collated into an exit report. While many rehabilitation programs have psychometric assessments inbuilt (pre- and post-program), in many cases it was unclear how, or even if these data were used to inform the evaluation of offender change.

POST-PROGRAM FOLLOW-UP

The routine follow-up offenders who have completed programs does not occur. Moreover, there appeared to be poor links between program performance and ongoing case management. All of the jurisdictions indicated that a future goal was to enhance throughcare within and between prisons and community corrections. Several Departments plan to develop an electronic information system that would promote integration between prisons and community corrections.

DEPARTMENTAL SUPPORT

Despite a policy framework that broadly supports the provision of offender rehabilitation programs, participants suggested that strategic support could be undermined by several factors including: a lack of commitment to training, inadequate program resources, organisational culture, and the de-centralising of program delivery.

LEVEL OF PROGRAM NEED

Although population needs analyses have not been routinely undertaken, informants reported that there is a high need for the programs. Many jurisdictions had data management systems that did not produce a detailed profile of the criminogenic needs of their population.

RELATIONSHIP BETWEEN OFFENDER REHABILITATION PROGRAMS

There is an urgent need to draw links between different rehabilitation programs, more specifically to begin to identify a sequence for program completion for offenders with multiple needs. In general, offender programs were offered as independent treatment units with no integration either with other programs or to long-term

case-management. Moreover, many of the more psycho-educational, lower intensity programs, which might be understood as aiming to increase motivation to change, had no apparent therapeutic sequel. With only a few exceptions (e.g., sex offender programs), there appeared to be little or no relationship between prison-based and community based interventions.

PRIVATE PRISONS

Several jurisdictions have privately operated prisons, which uphold the strong emphasis on offender rehabilitation programs. Private prisons delivered either identical programs to that of the Department, or programs with "like outcomes". Models of program delivery, including referral and pre-program assessment, mirror those of the Department. The challenge for some Departments is the exchange of offender information from and to private prisons.

COMMUNITY CORRECTIONS

In general, offender rehabilitation programs are less developed in Community Corrections. This can be attributed largely to the recency of offender programming initiatives, resource limitations, the greater diversity, in terms of sanction and risk, and thus the prioritisation of custodial environments. Most Community Corrections Departments are developing or have developed frameworks for the identification of offender risk and criminogenic needs, and the development of case management plan. Probation and Parole Officers then make program referrals. There appears to be a trend in the community to refer, and indeed accept, clients who might not be suited to the programs. This was attributed to the perceived need that "doing something" is better than "doing nothing".

Howells, Heseltine, Sarre, Davey and Day (2004) conclude with some valid points as to the way forward regarding offender rehabilitation. Their findings highlighted a remarkable degree of uniformity across jurisdictions in their approach to offender rehabilitation. Whilst the suite of programs offered varies slightly, each jurisdiction has shown a commitment to developing evidence-based rehabilitation programs united around a common set of human service principles. There appears to be a strong case for closer collaboration between the States and Territories in further developing these programs. For example, staff training conducted by international experts could be better co-ordinated, and jurisdictions could share the responsibility for developing a stronger theoretical rationale for programs. It is particularly encouraging that jurisdictions now appear to be sharing programs, such that a consistent approach to sex offender and cognitive skills programming is now emerging across Australia. The recent introduction of an offender programs newsletter represented a positive attempt to share expertise between jurisdictions, and it is unfortunate that this initiative now seems likely to fold.

ACCREDITATION

A predictable consequence of the focus on 'good practice' in program delivery has been an interest in evaluation, quality assurance, and accreditation. In those international jurisdictions that have introduced treatment program accreditation, such as England and Wales, Canada, and Scotland, there has been acceleration in the effectiveness of correctional programming and renewed acceptance of treatment programs by authorities (Lipton et al., 2000). Two different models of quality control seem to exist in correctional services internationally. Formal accreditation systems require the preparation of an extensive application for accreditation and formal review procedures to ensure further accreditation. Offender program standards, on the other hand, provide basic guidelines for program development, implementation, and evaluation without the need to seek formal approval from an independent authority. The major differences between the two models relate to the role of the accreditation panel compared with the role of a responsible authority.

The Accreditation model vests a great deal of power in a centralised decision-making body prior to the implementation of any offender rehabilitation program. It also performs an annual audit of compliance with program design. The second model utilises clear program standards, which specify both service requirements and practice standards or performance indicators, to guide correctional services in the development of programs. The responsible authority conducts compliance monitoring after implementation of the program. In the United Kingdom, a new accreditation process was established in 1999 to operate jointly for prison and probation services. This operates as the Joint Prison and Probation Accreditation Panel, whose key responsibilities are to accredit programs; recommend and review program design and delivery criteria; advise on curriculum development and advise on related matters such as assessing risk and need.

Accreditation involves both video-monitoring and site visits and auditing of records of quality of delivery. The overall audit result for each site is expressed as an Implementation Quality Rating. In New Zealand, there is currently no independent body comparable to the UK Joint Prison and Probation Accreditation Panel. However, correctional authorities use a process of 'clinical monitoring' for their 100 hour programmes that addresses criminogenic needs. This involves regional staff viewing 15 hours live or videotaped recordings of programmes and subsequently rating the programme on a range of measures. In addition, all programmes within corrections are subject to outcome evaluation using a locally developed statistic entitled 'The Rehabilitation Quotient' which is reported on every twelve months.

The Correctional Service of Canada has been actively involved in a review process to ensure that its programs are designed to maximise effectiveness and that they embrace the latest treatment techniques

and delivery standards for each specific program area. Programs are presented to review panels that consist of internationally-recognised experts in the field who assess the program in relation to specific criteria. Those programs that are rated as fulfilling the required criteria are then recommended by the panel to the Commissioner for accreditation. In turn, the quality of the delivery of accredited programs in the field (institutions and community) is then assessed through a process of site accreditation.

The United States has a system of independent State jurisdictions in addition to the Federal government managing a correctional system under the Department of Justice's Bureau of prisons. According to Lipton et al. (2000), no jurisdiction has adopted an accreditation system for its correctional treatment programming. In the last few years however, the American Correctional Association and the Therapeutic Communities of America have developed a set of standards for in-prison therapeutic communities for drug-users. These provide minimum criteria for assuring appropriate implementation of prison based TC oriented programs.

In Australia, New South Wales has established a Program Accreditation Framework, and the Program Accreditation Panel has accredited one program, Think First. Moves are afoot in this jurisdiction to accredit sites delivering rehabilitation programs via the Site Accreditation Panel. Similar accreditation directions are planned for Queensland with the development of their Quality Assurance Guidelines. Other jurisdictions (e.g., Victoria and South Australia) have developed sets of program standards as a means of ensuring program quality.

To date there has been no attempt to describe the nature and scope of offender rehabilitation programs offered across Australia (Howells & Day, 1999) despite some interest in the idea of developing national accreditation procedures and some state based initiatives. Whether or not a national accreditation system is required remains open for discussion. In a federal system, such systems can easily become overly bureaucratic and limit service developments. It would appear; however, that increased opportunities to share information and solutions to implementation problems would be welcomed by many, and there appears little need for any jurisdiction to be defensive about it progress in the area of rehabilitation.12

McSherry, Keyzer and Freiberg (2006), suggests programs may need to be tailored for different types of sex offenders. For example, 'what works' for some child sex offenders may not work for rapists. Group therapy is less costly to run and may help offenders learn that their behaviours and problems are not unique, but may

[12] Kevin Howells, Karen Heseltine, Rick Sarre, Linda Davey and Andrew Day. Correctional Offender Rehabilitation Programs: The National Picture in Australia, Report for Criminology Research Council, Forensic Psychology Research Group, Centre for Applied Psychological Research, University of South Australia, May 2004.

raise issues for offenders not willing to share their experiences (for example of being abused themselves) with other sex offenders. It was suggested by Kevin Howells et al. (2004) that:

- Most jurisdictions excluded offenders denying responsibility for the offence, but did not provide alternative treatment options for them.
- Some types of sex offender such as those who had carried out sexual murders were excluded from sex offender treatment programs, but were not referred to violent offender programs because of the sexual nature of their crimes.
- There were differing opinions as to whether adult and child sex offenders should be placed in the same treatment group.

Part of the problem with measuring the efficacy of treatment programs appears to be caused by the low base rate of sex offender recidivism. A review of studies examining recidivism rates by Karl Hanson and Monique Bussière (1998) suggested that only 13.4 percent committed a new sexual offence within four to five years. This makes it difficult for researchers to find a significant treatment effect.

IMPRISONMENT PROVIDING THE IMPETUS TO PARTICIPATE IN TREATMENT

As McSherry et al. (2006) puts it, imprisonment can provide the impetus to encourage sex offenders to participate in treatment while delivering punishment for wrongdoing. Treatment programs may aid rehabilitation and mitigate the effects of prolonged imprisonment. However, sex offender treatment that is mandated by the Adult Parole Board or undertaken purely for the purpose of parole may not lead to any real behavioural change. The timing of the provision of sex offender programs may be vital to potential rehabilitation. It appears that many offenders only participate in treatment programs towards the end of their sentence as parole approaches or even after parole has commenced.

The Chairperson of Victoria's Adult Parole Board has pointed out that some parolees who are ordered to attend sex offender programs do not do so until some months after their release (Adult Parole Board of Victoria 2005: 6). As a matter of fairness, high-risk offenders should be given an opportunity to participate in rehabilitation programs as soon as possible after their sentence commences. Delaying the provision of sex offender programs and other rehabilitation programs until shortly before an offender is eligible for parole may be 'too little, too late'. It appears beneficial for resources to be provided to ensure that high-risk offenders are assessed prior to sentencing or as early as possible thereafter, so that an appropriate treatment regime can be put in place as soon as possible during an offender's prison sentence.

A further issue noted by McSherry, Keyzer and Freiberg (2006), relates to treatment programs and expert evidence. Robert Fardon's concern regarding confidentiality in sex offender treatment programs, is an

important one. Expecting an offender to build a therapeutic relationship with a mental health professional who is able, or even compelled, to reveal details of that treatment in court proceedings does not augur well for rehabilitation. A better scenario may be for a division to be made between those mental health professionals who provide clinical services and forensic mental health professionals who are not involved with the treatment programs, but who are able to make assessments of offenders for the courts.

ISSUES WITH POST-SENTENCE PREVENTIVE DETENTION AND SUPERVISION

Since the early 1990s, various state governments have been concerned with how best to manage a small number of high-risk offenders whose term in prison was about to end. Five Australian states have introduced legislation enabling the supervision of sex offenders in the community and the High Court has held in Fardon v Attorney-General (Qld) (2004) 210 ALR 50 that post-sentence preventive detention relating to a class of offenders may be constitutional if certain criteria are met. Such schemes now exist in Queensland, New South Wales and Western Australia.

As mentioned previously in this report, post-sentence preventive detention involves detaining offenders after they have already served their full sentence for the particular offence or offences that they committed. Because the offender has already been punished for the crime, the purpose of such schemes should not be to further punish the offender. The accepted purposes of preventive detention schemes are generally the protection of the community and/or the rehabilitation of the offender. Queensland, Western Australia and New South Wales now have legislative schemes in place, aimed at sex offenders, which allow for post-sentence preventive detention in prison. In New South Wales, the Crimes (Serious Offenders) Act 2006 (NSW) applies to those who are serving a sentence of imprisonment for a serious sexual offence or for an offence of a sexual nature (s 6(1)). This is broader than the Queensland and Western Australian schemes as it encompasses indecent acts and other specified offences, such as bestiality, where the punishment is less than seven years imprisonment.

SEX OFFENDER REGISTRATION

As well as some state legislation enabling supervision in the community, all Australian jurisdictions now have processes for registering sex offenders in order to monitor their movements on release from prison. In 2000, New South Wales was the first Australian jurisdiction to introduce a system for registering sex offenders under the Child Protection (Offenders Registration) Act 2000 (NSW). Sex offender registers assist police in monitoring the whereabouts of sex offenders and facilitate the investigation and prosecution of any further offences. According to McSherry, Keyzer and Freiberg (2006) maintaining such registers can be resource intensive and add a level of complexity to the conditions imposed in supervising sex offenders under other orders. A balance also needs to be struck between such legislation targeting high-risk offenders and casting the net too broadly. While access to information in the Register is restricted and persons with access must

not disclose personal information, concerns may also be raised that registration may lead to 'vigilantism' if the addresses of sex offenders are leaked to the public

CONSTITUTION ISSUES REGARDING PREVENTIVE DETENTION

McSherry, Keyzer and Freiberg (2006), notes that constitutional law issues have arisen in Australia in relation to continued detention legislation. These issues focus on whether decisions to deprive individuals of their liberty under continued detention schemes are incompatible with the concept of judicial power set out in the Commonwealth Constitution.

LOOKING AT OVERSEAS MODELS

McSherry, Keyzer and Freiberg (2006) look at a comparisomn of overseas models to that of the Australia and come up with some interesting facts. The Scottish model, for instance, of orders for lifelong restriction has only recently come into place and it is too early to measure this model's effectiveness. Many of the models in the United Kingdom are reflected in existing Australian schemes, although the model of multi-agency public protection arrangements may well be worth developing in Australia.

What is clear from the overseas literature is that any move to use the mental health system to 'warehouse' certain groups of individuals will be fraught with difficulties (Petrunik 2003). For example, the United States models of civil commitment of sex offenders into the mental health system after release from prison has been criticised on a number of grounds.

First, sex offenders do not clearly fit within the boundaries of the mental health system, which is to detain and treat those with an identifiable mental illness. It has been pointed out by Denise Lievore (2005) that the belief that the majority of sex offenders are mentally ill is not supported by research. The term 'paedophile' has been conflated to mean 'sex offender' in general parlance, whereas 'paedophile' is used much more narrowly in the American Psychiatric Association's Fourth Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) to refer to the 'paraphilia' (a sexual deviation) of being sexually attracted primarily or exclusively to children. Only a subset of sex offenders are diagnosed with this form of sexual deviation.

Mental health professionals in the United States have criticised the insertion of the term 'mental abnormality' in mental health legislation to bypass the mental illness debate and to encompass a broad group of sex offenders (Winick & La Fond 2003). For example, psychiatrist Paul Appelbaum (1997) has stated in relation to the criteria in the Kansas statute that 'it makes it likely that those offenders committed under this statute will be a heterogeneous group diagnostically similar only in the fears they arouse among authorities as their release approaches.'

Secondly, the use of civil commitment legislation to encompass the detention of sex offenders has been criticised as representing nothing more than the transferral of preventive detention from the criminal to the

civil system (Schneider 1995). In this regard, Herbert Sacks (1997), then President of the American Psychiatric Association, stated in this regard: *The civil commitment of sexual predators to a mental hospital for purposes of social control is an abuse of the mental health care system. It saddles already underfunded public mental hospitals with a potential lifetime warehousing of people whom the state says do not have a mental illness, only a 'mental abnormality'.*

Thirdly, the 'inpatient' medical model may ironically undermine treatment efforts for sex offenders who do not have a diagnosed mental illness. For example, Bruce J Winick (2003: 321) has pointed out that labeling individuals as violent sexual predators communicates to them that they are mentally abnormal in ways that prevent them from controlling their behaviour and may undermine the potential of any treatment offered. By concentrating treatment endeavours for mental abnormality after imprisonment, there are disincentives for sex offenders to take advantage of prison treatment programs and may take resources away from them. Having a system whereby sex offenders are forced to undergo mandatory treatment in mental health institutions after their sentence may also have a negative impact on mental health professionals. Coercive treatment programs raise ethical problems and are more concerned with social control than working in the best interests of the individual concerned.

Fourthly, the use of the civil mental health system to detain sex offenders after the expiry of their sentence has been criticised as violating civil rights. In this regard, J Andres Hannah-Suarez (2005) has argued that the Canadian practice of 'psychiatric gating' is fraught with possible violations of sections 7 and 12 of the Canadian Charter of Rights and Freedoms. Section 7 of the Canadian Charter protects against the deprivation of liberty in violation of principles of fundamental justice, and section 12 protects against cruel and unusual treatment or punishment.

Fifthly, inadequate focus has been placed on the potential for restorative justice alternatives to the civil mental health model of managing sex offenders (Petrunik 2003; McAlinden 2006). Sixthly, the medical model approach has significant resource implications. The use of the mental health system to detain sex offenders may limit the availability of resources for the treatment of individuals with mental illnesses who have not offended.

The attempt in Victoria to use the mental health system to detain Garry David after the expiry of his sentence resulted in a great deal of criticism by mental health professionals and this endeavour was abandoned in favour of enacting preventive detention legislation (Greig 2002). It appears unlikely that the medical model approach would find support from those working in the mental health system.

A criminal justice approach to managing sex offenders also has problems. The criminal justice system does not and cannot provide a perfect guarantee against crime and it is impossible to contrive a perfect risk-free society through the law alone. The main purpose of the three existing Australian schemes of preventive detention is to ensure the adequate protection of the community, with only the New South Wales legislation

focusing on rehabilitation (the Queensland and Western Australian models refer to the continuing control, care or treatment of offenders). The current schemes have only been operating in Australia for a very short period of time and it is difficult to find measures to establish whether they are indeed effective in relation to community protection. What preventive detention schemes aim to avoid is not harm, but potential harm which is empirically difficult to establish (Zdenkowski 1997).

Finally, what is clear from this (according to McSherry, Keyzer and Freiberg 2006), is that the 'inpatient' civil commitment models developed in the US States should not be followed because of these endemic problems. However, the Scottish model of orders for lifelong restriction, the Texas model of community treatment and the use of multi-agency partnerships and restorative justice techniques merit further investigation, to determine if they could lower recidivism rates in Australia.

FOCUS GROUPS

As part of their findings in the McSherry, Keyzer and Freiberg (2006) research, a number of focus groups were held in order to gauge issues regarding high risk offenders. The members of the focus groups carried out in Adelaide, Melbourne and Brisbane were all agreed that there exists a small group of high-risk offenders who need intensive management. However, the theme that strongly emerged was that indefinite detention and post-sentence continued detention and supervision schemes were not sufficient on their own and raised numerous practical problems. The provision of adequate services and treatment programs for high-risk offenders was seen as of the highest priority rather than preventive detention on its own.

Overall, it is clear from the practical perspective that more effort and resourcing is required for suitable treatment programs and services both within prisons, to ensure that continuing detention orders have a rehabilitative effect rather than a merely punitive effect, and in the post-release environment, to ensure prisoner reintegration into the community and to reduce the risk of recidivism.

STRUCTURE OF PREVENTIVE SCHEME

McSherry, Keyzer and Freiberg (2006) state that it is essential that preventive detention schemes should have the following features.

- The scheme must be directed against individuals in a certain category.
- In determining an application under the legislation, the Supreme Court must exercise judicial power in accordance with the rules of evidence.
- The Court must have a discretion as to whether and what kind of order to make.
- The Court 'must be satisfied of the 'unacceptable risk' standard 'to a high degree of probability'.

- Offenders must have adequate time to prepare for their hearings, to instruct counsel, to analyse the evidence and to make arrangements for witnesses to give evidence.
- Resources should be available to ensure legal representation and also to ensure that prisoners have the opportunity to engage expert witnesses who can critically review the work of the court-appointed psychiatrists
- The scheme must not be designed to punish, but to protect the community.
- Nothing in the legislation should suggest that the Court is exercising ordinary legislative or executive functions.
- There must be a system of periodic review, at the very least on an annual basis.
- There must be an appeal mechanism.
- There should be a fixed time limit for the preventive detention order (for example, a five year limit as in New South Wales).
- Preventive detention should be a last resort and a presumption inserted in the legislation in favour of the least restrictive alternative.

While these safeguards may provide some sort of balance between community safety and individual human rights, it is essential that policy-makers consider other options to post-sentence preventive detention schemes.

According to the discussions resulting from the focus groups it became clear that individual case management at the start of an offender's sentence had the potential to be of more benefit to community safety than indefinite detention, post-sentence preventive detention and supervision schemes. The vast majority of participants were of the opinion that legislative schemes that were too focused on detention rather than rehabilitation were doomed to failure. Many participants spoke of the need for properly resourced treatment programs and case management from the start of the offender's sentence. It was thought that offenders should be given an opportunity to participate in rehabilitation programs as soon as possible after their sentence commences. Delaying the provision of sex offender programs and other rehabilitation programs until shortly before an offender is eligible for parole was 'too little, too late'.

ALTERNATIVE TO POST-SENTENCE PREVENTIVE DETENTION

One alternative to post-sentence preventive detention is thus to ensure properly resourced treatment programs exist in prison and in the community once offenders are released. If this option is followed, it is recommended that:

- Resources should be provided to ensure that high-risk offenders are assessed prior to sentencing or as early as possible thereafter to ensure that an appropriate treatment regime is put in place as soon as possible during an offender's prison sentence.
- A division should be made between those mental health professionals who provide clinical services and forensic mental health professionals who are not involved with the treatment programs, but who are able to make assessments of offenders for the courts.
- Wherever possible, treatment programs should be tailored to the individual offender with a case manager appointed and group therapy remaining an option, but not the only option.

THE SCOTTISH MODEL

In this regard, the Scottish model of orders for lifelong restriction is worth considering for development in Australia. It is notable that the Scottish model relates to serious violent offenders as well as sex offenders and provides for a graduated release system that could provide offenders with achievable goals for reintegration into the community. As mentioned already, the overseas literature indicates that any move to use the mental health system to 'warehouse' certain groups of individuals will be fraught with difficulties. However, if treatment programs are to be boosted in the community, the Texas program has clear advantages over an 'inpatient' approach, including reduced cost and the recognition of the importance of liberty. If a graduated system of treatment were to be considered along the lines of the Scottish approach, then the Texas community-based treatment program could provide a model for moving treatment from prison towards a least restrictive community-based option.

McSherry, Keyzer and Freiberg (2006) recommend that, at the very least, a memorandum of understanding be developed as soon as possible between the relevant departments to coordinate therapeutic responses and the work of corrective services, therapists and the Attorney-General's Department in response to court orders.

Another approach to coordination is to set up a separate body like the Scottish Risk Management Authority to:

- develop policy and carry out and monitor research in risk assessment and minimisation
- coordinate the management of individual offenders through approving and monitoring risk-management plans and
- accredit people involved in risk assessment.

Such a body could be given a major role in coordinating the agencies involved in the supervision and treatment of high-risk offenders to ensure there is adequate communication between those working in social services, job centres, accommodation services and education authorities.

McSherry, Keyzer and Freiberg (2006) state that while their numbers may be few, 'dangerous' offenders such as high-risk sex offenders present one of the most significant challenges for our criminal justice system. Indefinite detention, post-sentence preventive detention and supervision provide options for managing this group. However the major theme running through the focus group discussions is the urgent need for adequate services and treatment programs for high-risk offenders. Legislative regimes that aim solely to remove offenders from the community or restrict their movements are resource intensive and may not ultimately succeed in reducing recidivism rates. The post-sentence preventive detention regimes of New South Wales, Queensland and Western Australia challenge long-established and widely accepted human rights principles. It is therefore recommended that such regimes be seen as a last resort and other alternatives such as the Scottish model be explored more fully in relation to the management of 'dangerous' offenders.13

CONCLUSION

As already mentioned the above comments should be taken as example only and thus aim to raise discussion on a number of factors and issues regarding high risk offenders. As evidenced from the literature works quoted already there still is a need for further rigorous research in many areas concerning the management of serious violent offenders. Some of those quoted already in this submission include (but not restricted to);

- Further research is necessary before the relationship between parole type and time to re-offend can be confirmed. This research should aim to control for a greater number of potential confounders of this relationship and in particular to include risk factors for re-offending, such as levels of parole supervision, drug and alcohol dependence, financial management skills and post-release housing availability.
- an exploration of the reasons why certain offenders fail on parole. Answers to these questions would help in designing policies and programs to reduce the risk of reoffending on parole. A better understanding of the conditions or experiences that lead to parole failure would assist the Parole Authority, the courts and the Government in selecting parole procedures that minimize the risk of further offending. Therefore continued investment in more rigorous evaluation of criminal justice interventions needs to be done.

[13] Monash University, Preventive Detention for "Dangerous" Offenders in Australia: A Critical Analysis and Proposals for Policy Development, Report to the Criminology Research Council, Bernadette McSherry, Patrick Keyzer, Arie Freiber, December 2006

- As violence can take many forms, violent offenders are a diverse group with numerous criminogenic needs. This area must remain the subject of continued investigation both within CSNSW and around the world. There are promising results from preliminary research into the VOTP's capacity to effect change in the violent offender population. CSNSW must remain committed to continued research and evaluation of the VOTP in making it a program meeting international standards of best practice.
- There remains considerable debate about the efficacy of predictions of dangerousness.
- further examination of the extent to which sentencing outcomes are responsive to changes in penalties, and especially to amendments to statutory maxima and minima;.
- research into the relationship between remand in custody and custodial sentencing outcomes, particularly in view of the high rate of remand in custody of Indigenous defendants;
- consideration of the extent to which breaches of community orders have contributed to the increase in short prison sentences and the extent to which the use of conditions in community orders is assisting in the achievement of the aims of sentencing;
- reviewing the extent to which reduction of the risk of re -offending is properly reflected in sentencing policy and legislation;
- analysis of interactions between factors affecting sentencing outcomes through the application of statistical techniques such as multivariate analysis or structured linear modelling;
- research into the effects of the gender of the offender and closer examination of the effects of ethnicity on sentencing trends (for example, the possible increase in the number of female violent offenders and their involvement in certain types of crime such as robbery) ;
- more systematic analysis of the impact of the guilty plea, by reference to factors such as age, gender and ethnicity (for example, what are the guilty plea rates for Aboriginal versus non Aboriginal offenders and how does this impact on sentencing)
- analysis of prior record as a factor at all stages of sentencing (in court and in the administration of penalties)
- analysis of the extent to which the increasing focus on 'Victims' Rights' may be affecting sentencing practices;
- research into the role played by public perceptions and the influence of the print, broadcast and electronic media on the determination of criminal justice and sentencing policy in particular;

- an attempt to assess and evaluate the factual circumstances surrounding certain crimes of violence (such as assaults) in order to determine whether there is any significant change in the objective seriousness of offences coming before the courts; and
- a continuing focus on alternative strategies to address Indigenous over-representation and issues of violence within Indigenous communities

In terms of improvements to preventive detention schemes they should have the following features:

- The scheme must be directed against individuals in a certain category.
- In determining an application under the legislation, the Supreme Court must exercise judicial power in accordance with the rules of evidence.
- The Court must have a discretion as to whether and what kind of order to make.
- The Court 'must be satisfied of the 'unacceptable risk' standard 'to a high degree of probability'.
- Offenders must have adequate time to prepare for their hearings, to instruct counsel, to analyse the evidence and to make arrangements for witnesses to give evidence.
- Resources should be available to ensure legal representation and also to ensure that prisoners have the opportunity to engage expert witnesses who can critically review the work of the court-appointed psychiatrists
- The scheme must not be designed to punish, but to protect the community.
- Nothing in the legislation should suggest that the Court is exercising ordinary legislative or executive functions.
- There must be a system of periodic review, at the very least on an annual basis.
- There must be an appeal mechanism.
- Preventive detention should be a last resort and a presumption inserted in the legislation in favour of the least restrictive alternative.

And in terms of alternatives to post-sentence preventive detention, it is recommended that;

- Resources should be provided to ensure that high-risk offenders are assessed prior to sentencing or as early as possible thereafter to ensure that an appropriate treatment regime is put in place as soon as possible during an offender's prison sentence.

- A division should be made between those mental health professionals who provide clinical services and forensic mental health professionals who are not involved with the treatment programs, but who are able to make assessments of offenders for the courts.
- Wherever possible, treatment programs should be tailored to the individual offender with a case manager appointed and group therapy remaining an option, but not the only option.

The Police Association thanks the NSW Sentencing Council, Attorney General & Justice for the opportunity to submit a response to its review of the most appropriate way to respond to the risks posed by serious violent offenders. The Police Association of New South Wales looks forward to the release of the final copy of the Report.

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INDEX

Consultation Q1 Can serious violent offenders (that is offenders who pose a significant high risk of violent re-offending following release from prison) be identified as part of a single cohort?
Page Reference in Submission Pages 5-8, 10-13, 13-16

If Yes: **Consultation Q2 What are the common characteristics of this single cohort?**
Page Reference in Submission Pages 15-16, 18-19, 27, 33-35

Consultation Q3 What is the best method for assessing their risk of re-offending?
Page Reference in Submission Pages 5-8, 8-9, 10-11, 13, 31-35, 58-62

Consultation Q4 How should serious violent offenders be identified, if not as part of a single cohort?
Page Reference in Submission Pages 15-16, 18-19, 27, 33-35

Consultation Q5 Are actuarial risk assessment methods or clinical risk assessment methods, or a combination thereof, appropriate as a basis for **(i) use in sentencing; or** **(ii) applying a preventative detention scheme**
Page Reference in Submission Pages 7-8, 13-16, 24-26, 31-35

Consultation Q6 How can serious violent offenders with complex needs? **(a) Best be identified?** **(b) Best be managed?**
Page Reference in Submission Pages 5-8, 8-16, 18-19, 24-27, 29-32, 36-65

Consultation Q7 Is the current legislative framework in NSW sufficiently equipped to deal with serious violent offenders? **If Yes: Is the framework being effectively used? Are there any issues with the current framework?** **If No: How can the current framework be amended to better deal with serious violent offenders?**
Page Reference in Submission Pages 3-5, 9-10, 16-17, 18-26, 27-41, 58-62

Consultation Q8 Does the Habitual Criminals Act have the potential to be useful in dealing with serious violent offenders? **Consultation Q9 If the legislation does have the potential to be useful in dealing with serious violent offenders, should it be amended in any way to ensure that its provisions are effectively used?** **Consultation Q10 Should there be an extension of the availability of life sentences, in limited circumstances, to cope with the sentencing of serious violent offenders? If so, how should such a mechanism work? Which offences should be included? Should any such system allow for release on parole in relation to those offences?** **Consultation Q11 Should there be some extension of gradated sentencing laws or should more use be made of those that currently exist? Should legislation be introduced to allow**

for continuing detention or extended supervision orders in relation to serious violent offenders, similar to the model applicable to serious sex offenders? **Q 12 If the answer to Q11 is yes, what form should such legislation take?**
Page Reference in Submission Pages 3-5, 9-10, 16-17, 18-26, 27-41, 58-62

Consultation Q13 Is there scope for the Parole Authority to effectively supervise serious violent offenders within the current parole provisions? **If yes: Should the provisions of the Crimes (Administration of Sentences) Act 1999 be amended in any way to enable the Parole Authority to effectively supervise serious violent offenders?**
Page Reference in Submission Pages 9-11, 19-26

Consultation Q14 Should the Violent Offender Therapeutic Program be expanded and if so in what respects? **Consultation Q15 Should legislation be introduced that would permit the making of Personal Restriction orders in relation to serious violent offenders that would be directed to ensuring community safety to supplement Parole Release conditions or that would endure the expiry of the sentence.** **If yes: What should be provided in this respect?**
Page Reference in Submission Pages 10-13, 18-23, 26-30, 41-57

Consultation Q16 Should a form of preventative detention be adopted in NSW for serious violent offenders? **If Yes:** **(a) What should be the key elements of such a scheme? In particular, should it follow the indefinite sentence or disproportionate sentence model available in other jurisdictions; or the continuing detention/extended supervision model?** **(b) If such a scheme is to be implemented in NSW, what precautions should be taken to avoid the issues that have arisen in relation to the UK legislation?** **(c) Should the question of violence be addressed by the Court at the time of the initial sentencing, or be subject of separate consideration by the Court towards the end of the sentence that is initially imposed?** **(d) In whatever form such detention is provided for, what should be required by way of review and subsequent modification of any portion of the sentence that constitutes a preventative element?** **Q17 Are there programs that should be considered in this review, for the management of serious violent offenders that are not presently available a) post-sentence? b) post-custody?** **If Yes:** **c) What are these program(s) and what should they comprise?** **Q 18 Should models of indeterminate sentencing as practiced in other jurisdictions be considered for serious violent offenders?**
Page Reference in Submission Pages 7-8, 10-13, 18-21, 24-26, 29-31, 36-41, 41-57, 58, 59-65