Sentencing Advisory Council

High-Risk Offenders:

Continued Detention and Supervision Options

Community Issues Paper

August 2006

State Government Victoria

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- conduct research and disseminate information on sentencing matters
- gauge public opinion on sentencing
- consult on sentencing matters
- advise the Attorney-General on sentencing issues
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- one member of a victim of crime support or advocacy group
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Sentencing Advisory Council

High-Risk Offenders:
Continued Detention and Supervision Options
Community Issues Paper

Professor Bernadette McSherry

Louis Waller Chair of Law, Monash University

on behalf of the

Sentencing Advisory Council

August 2006

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Contributors

Author	Professor Bernadette McSherry	
Sentencing Advisory Council		
Chair	Professor Arie Freiberg	
Deputy-Chair	Thérèse McCarthy	
Council Members	Carmel Arthur Carmel Benjamin AM Noel Butland Bernard Geary OAM David Grace QC Professor Jenny Morgan Simon Overland Jeremy Rapke QC Barbara Rozenes	
Council Secretariat	Prue Boughey Julie Brandsen Kelly Burns Jenni Coady Andrea David Dr Karen Gelb Shelley Goldwasser	Alana Hodgins Sue Kaufmann Victoria Moore Felicity Stewart Nick Turner Sarah Walker Melissa Williamson
Chief Executive Officer	Jo Metcalf	

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CASA Forum (Victorian Centres Against Sexual Assault Inc), the Criminal Bar Association, Corrections Victoria, Queensland Corrective Services, Victoria Police, Victoria Legal Aid and the Victorian Bar.

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Providing Comments on the Issues Paper

This Issues Paper outlines some of the existing legal mechanisms in Victoria and in other jurisdictions to manage offenders who may pose a serious risk to the community on their release from prison. The Council welcomes comments on the issues raised in this paper, and on any other issues you think the Council should explore in its Discussion Paper (to be released late in 2006).

Comments can be provided in writing by mail, email (contact@sentencingcouncil.vic.gov.au) or fax, or by phone or in person. Written comments can also be uploaded to the Council's website.

This issues paper contains ten questions. You may choose to address each of the issues raised in the paper, or just the issues of most interest to you. You may also wish to provide comments on other issues or options not discussed in the paper or make a general comment. If you need any assistance in preparing your comments and/or need access to an interpreter, please contact the Council.

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Contact Details:

Sentencing Advisory Council
Level 4, 436 Lonsdale Street
Melbourne Victoria 3000
Dx 210307
Telephone 03 9603 9047
Facsimile 03 9603 9030
contact@sentencingcouncil.vic.gov.au
www.sentencingcouncil.vic.gov.au

Background

Scope of the Inquiry

The Attorney-General, the Hon Rob Hulls, MP, wrote to the Sentencing Advisory Council on 19 May 2006, requesting the Council's advice about the merit of introducing a scheme that would allow for the continued detention of offenders who have reached the end of their custodial sentence but who are considered to pose a continued and serious danger to the community. Such schemes are currently in operation in Queensland, Western Australia and New South Wales.

In providing this advice the Council was asked to consider:

- current approaches to post custodial detention in other jurisdictions;
- the issues raised when Queensland's *Dangerous Prisoners (Sexual Offenders) Act 2003* was considered by the High Court in *Fardon v Attorney-General for Queensland*;[1] and
- how such a scheme could operate against the backdrop of the existing power of the courts to order an indefinite sentence under the *Sentencing Act 1991* (Vic).

Should the Government decide to introduce some form of continued detention, the Council was also asked to provide advice on the structure of such a scheme, including:

- the offences for which an order might be available;
- what process for making a continued detention order should be established;
- which body would be empowered to apply for such an order;
- what the criteria for making an order should be, and what process for assessing an offender against these criteria should be established;
- what body should be empowered to make an order;
- what the duration of such orders should be;
- what processes for review should be put in place; and
- what safeguards could be incorporated to ensure that such orders may only be imposed in appropriate circumstances.

As the scheme would have to operate alongside the *Serious Sex Offenders Monitoring Act 2005* (Vic), the Council was asked to consider the introduction of such a scheme in the context of that Act.

The Council's Approach

This issues paper examines current legal responses in Victoria and other jurisdictions to high-risk offenders at different points in the criminal justice system, with a particular focus on sentencing and post-sentence options. It describes human rights and criminal justice issues which these schemes have been said to raise. The paper asks questions about the current approach in Victoria, the merit of introducing a scheme of post-sentence preventive detention in prison and whether there are other legal options to the ones explored in this paper that would help reduce the risk of harm to the community. The paper takes the following format:

- **Community protection and managing 'dangerousness'—**highlights some of the complexities and difficulties that relate to the management of those considered to be 'high-risk offenders'. This section provides an overview of some of the legal measures currently in place to manage high-risk offenders and identifies a number of issues that are discussed in more detail later in the Issues Paper.

- **Who are 'high-risk' offenders—**discusses the types of offences that sentencing provisions for high-risk offenders and post-sentence supervision and detention schemes aim to cover, and raises some of the problems associated with identifying which offenders are at a high-risk of causing harm in the future.

- **Sentencing options—**looks at the existing options available to courts in sentencing high-risk offenders, such as indefinite sentences and serious offender provisions. The section also examines some of the potential problems with these approaches.

- **Management during sentence—**examines existing mechanisms to manage high-risk offenders while they are serving their sentence. Such measures include the monitoring of offenders on parole and treatment programs.

- **Post-sentence options—**discusses the legislation that currently exists in Victoria and other jurisdictions to manage high-risk offenders after they have served their sentence, such as post-sentence detention and supervision orders and sex offender registers. This section also looks at some of the human rights and criminal procedure considerations that must be taken into account in formulating policy for high-risk offenders, particularly once they have completed their sentence.

The paper is not intended to be an exhaustive examination of the issues but rather to stimulate discussion and debate, and through responses received to this paper, to assist the Council in identifying any additional issues to be explored in a more detailed discussion paper due for release late in 2006. The Council welcomes comments on the issues raised in this paper by mid-September 2006. Those who are unable to comment at this stage will have the opportunity to do so in response to the discussion paper.

To assist with the preparation of this paper, preliminary meetings were held with victims' representatives, members of the legal community, Victoria Police, Corrections Victoria and psychiatrists. A number of organisations also provided written comments. Some of the issues which were raised at these meetings and in the written comments are included in this paper.

The Next Step

The Council plans to release a discussion paper late in 2006 and will invite formal submissions at that stage. Members of the public are welcome to join the Council's mailing list to receive a copy of the discussion paper. The Council will also undertake a public consultation process. The Council will take the views expressed in submissions and at consultations into account in making its recommendations to the Attorney-General.

Community Protection and Managing 'Dangerousness'

Introduction

The Council has been asked to provide advice about the merit of introducing a scheme that would allow for the continued detention of offenders who have reached the end of their custodial sentence but who are considered to pose a continued and serious danger to the community. Post-sentence detention laws raise complex ethical, moral and legal questions about the lengths to which we as a community are prepared to go to endeavour to protect ourselves from the risks posed by dangerous offenders.

Continued detention schemes have been introduced in New South Wales, Queensland and Western Australia. These schemes apply to offenders who are serving a period of imprisonment and who have committed a serious sexual offence, and allow these offenders to be detained beyond the end of their sentence. Offenders convicted of other serious violent crimes, such as murder, are not currently covered by these schemes.

Research has shown that most serious crimes against the person are committed by offenders who have not previously been convicted of a violent offence, and who will not go on to commit further violent offences.[2] At the same time however, in any society there is likely to be a small group of convicted offenders who pose a real danger of inflicting serious harm on others, and from whom the community rightly expects protection.

While their numbers may be few, this group of offenders presents one of the most significant challenges for our justice system. As a community we value the rule of law, the presumption of innocence and principles such as that punishment should only follow a finding of guilt. But we are also concerned about the need to protect ourselves and others from the risk of future harm—particularly from those whom we know to be, or believe to be, dangerous. There is no time when these concerns are brought more sharply into focus than when high-profile offenders convicted of serious offences reach the end of their sentence and are due to resume their lives back in the community.

At the heart of the dilemma is a balancing exercise—between the community's right to safety and the right of potential future victims to be protected from convicted offenders who are assessed as being at a high-risk of committing further serious crimes, and the rights of offenders who have served their sentence to be free from further confinement based on predictions, which may be inaccurate, of possible future offending.

There are a number of practical challenges associated with accurately predicting the risks of future offending by those believed to be dangerous. Because of the complexities of assessing risk and the high rates of 'false positives' (those predicted as likely to reoffend, who would not have reoffended) there is potential for continued detention and other similar measures to operate as a form of arbitrary detention, in violation of human rights.

If a continued detention scheme were to be introduced in Victoria, then a number of policy decisions would need to be made about who should be permitted to make an application, what the criteria should be for making an order, what types of offences should be covered, and what sorts of mechanisms should be in place for review of the order and rights of appeal. As these schemes limit certain offenders' liberty after completion of their sentence for their past crimes, principles

of fairness need to be taken into account and rigorous procedural safeguards considered to ensure that any scheme adopted is not cast too broadly across the offender population.

Other more practical issues relate to where offenders subject to supervision or detention should be housed, cost considerations, and in the longer term, how the effectiveness of these schemes can be monitored.

In considering the question of whether a continued detention scheme should be introduced in Victoria, the broader context of serious violent offending also needs to be borne in mind. Current legal responses to dangerous offenders in Australia and overseas have attracted criticism for ignoring the realities of sexual and violent offending and focusing disproportionate attention on some offenders over others—typically those who have committed offences outside the family.

Research shows that most sexual offences committed against both children and adults are perpetrated by family members and acquaintances, and the majority of these offences are never reported to police.[3] The 2005 National Personal Safety Survey conducted by the Australian Bureau of Statistics (ABS) found that only 11 per cent of those who experienced sexual abuse before the age of 15 years reported being abused by a stranger, compared to 45 per cent reporting abuse by a relative, and 31 per cent abuse by an acquaintance, neighbour or someone else known to them.[4] Similar trends are found with serious violent crimes, such as homicide.[5]

By focusing on the small group of high-risk offenders who have been processed by the criminal justice system, it is argued, funds are potentially diverted away from combating other forms of violence, including abuse within the family.[6] Some have argued that resources are better targeted at the treatment of children and young people with sexual behaviour problems,[7] and in building the evidence base around 'what works' in preventing reoffending.[8]

While responses to high-risk serious offenders do not necessarily have to be implemented at the expense of investing resources in other areas, clearly resources are not unlimited. Continued detention and supervision options, and other approaches that might be considered, carry with them certain costs. For example, the cost of keeping a person in prison is more than $83,000 a year.[9] While cost should not be the only consideration when assessing the merits of such schemes, it is important that responses to high-risk offenders are considered in the broader context of community responses to violence more generally.

Community Protection and Managing 'Dangerousness'

The Current Response

There are a number of options for managing high-risk offenders currently in place across Australia (as set out in Figure 1). These options—which will be explored in detail below—include:

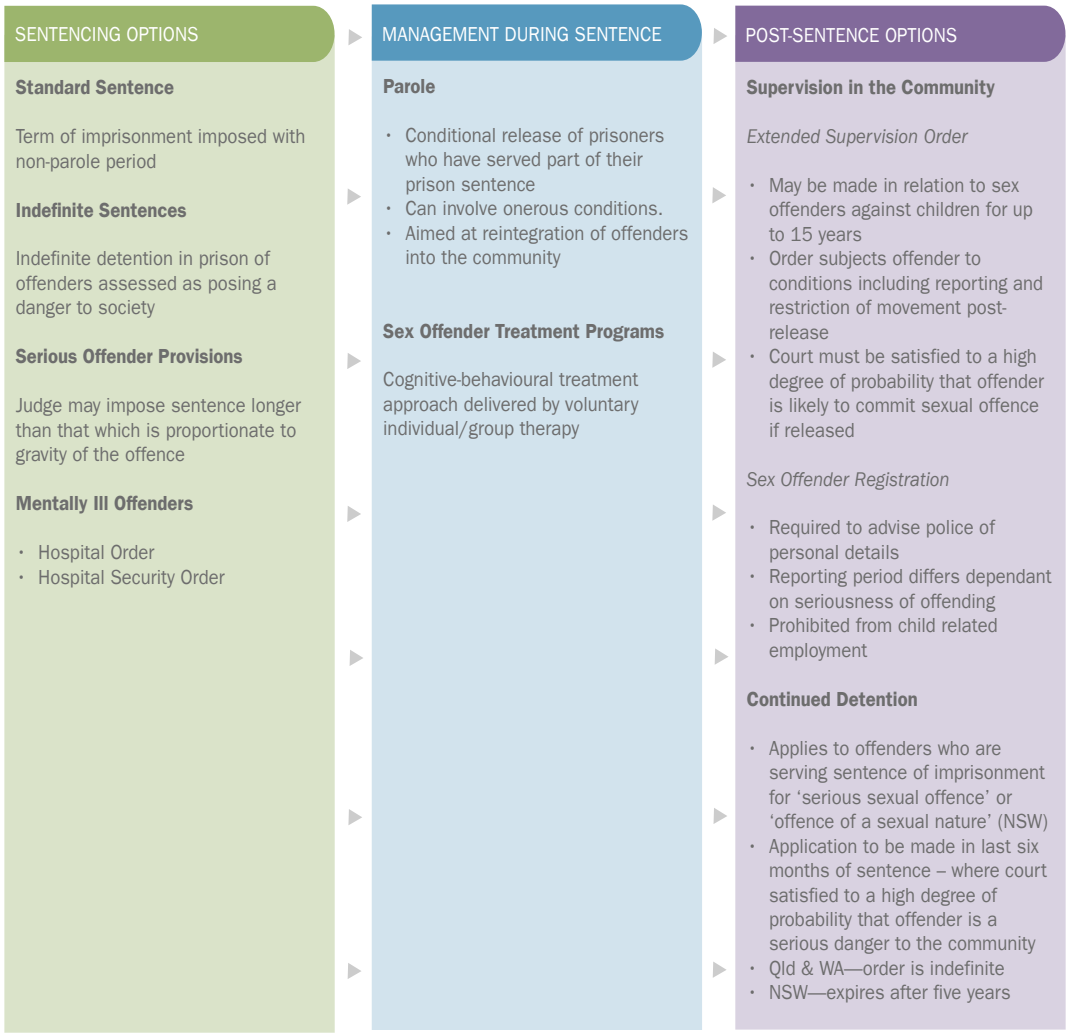
- **Sentencing options** such as indefinite terms of imprisonment, longer sentences for serious offenders and special options for mentally ill offenders.

- **Management during sentence** through the parole system and treatment programs (including the sex offender treatment program) 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 continued 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 continued detention and a continued supervision scheme.

Figure 1: Current Schemes for the Management of High-Risk Offenders in Australia



Who are 'High-Risk' Offenders?

Introduction

Laws that detain offenders beyond the term of their sentence to protect the community involve balancing the risk of future harm to the public with the restriction of liberty for offenders whose future offending can only be estimated. Difficult practical questions arise, such as:

- which offenders should be treated as high-risk; and
- 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.

Recent legislation in Victoria and other Australian jurisdictions has focused on the 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 reference to a list of 'serious' sexual offences and a list of 'serious' violent offences. Figure 2 illustrates the types of offences captured by different schemes.

Figure 2: Offences in High-Risk Offender Schemes

	Sentencing Options		Post-sentence Options				
Offences	Indefinite Sentences (Vic)	Serious Offender Provisions (Vic)	Registration (Vic)	Extended Supervision Order (Vic)	Supervision & Continued Detention (Qld)	Supervision & Continued Detention (WA)	Supervision & Continued Detention (NSW)
Sexual offences against adults	✓	✓	✓	✗	✓ 1	✓ 2	✓ 3
Sexual offences against children	✓	✓	✓	✓	✓ 1	✓ 2	✓ 3
Serious violent offences	✓	✓	✗	✗	✗	✗	✗

1 Sexual offences where violence is involved
2 Sexual offences where the maximum penalty is more than seven years' imprisonment
3 Serious sexual offences and offences of a sexual nature

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 that the 'question of penalties for serious—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'.[10]

With the exception of sex offender registers, most of the measures for high-risk offenders require certain criteria to be met before one of these orders can be made. For example, before a court in Victoria can impose an indefinite sentence, it must be satisfied 'to a high degree of probability, that the offender is a serious danger to the community'.[11] This may provide some protection against the net being cast too broadly. However, identifying which offenders are at high-risk of causing serious physical harm in the future is a notoriously difficult task.[12]

Determining Risk: Which Offenders are at Risk of Reoffending?

Most serious violent criminals do not have previous convictions for violence and do not repeat their violent offending.[13] In fact, a review of studies examining recidivism (reoffending) rates of sex offenders, while acknowledging problems of relying on reconviction rates and the limited follow-up periods of some studies, found that only 13.4 per cent committed a new sexual offence within four to five years.[14]

During the early 1980s research showed that mental health professionals tended to be especially cautious in their assessments of possible future offending and to over-predict violence.[15] One study concluded that these predictions were accurate in only about one-third of cases.[16] Such over-prediction has been shown to result in large numbers of 'false positives', where individuals have been identified as likely to commit further offences but who, upon release, have not actually reoffended.[17]

There are different ways of assessing risks of reoffending including clinical assessments of risk, and statistical or 'actuarial' approaches which 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 a 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).[18]

Who are 'High-Risk' Offenders?

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.[19] In particular, 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.[20]

A 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.

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 victimisation 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. These are 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.[21]

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.[22] These assessments of risk tend to be taken out of their primary context, which is one of treatment and intervention.[23] 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 or high) should be required by such schemes and what level of offending the risk should relate to (any offending, serious offending, or serious 'relevant' offending).

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.

Introduction

The only purposes for which sentences may be imposed in Victoria are:[24]

- to punish the offender to an extent and in a manner which is just in the circumstances;
- to deter the offender and/or others from committing the same or similar offences;
- to establish conditions within which the rehabilitation of the offender may be facilitated;
- to denounce the type of conduct engaged in by the offender;
- to protect the community from the offender; or
- a combination of two or more of the above purposes.

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.[25] 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.

Options for High-Risk Offenders who are Mentally Impaired

Defence of Mental Impairment

Although it is widely acknowledged that a large proportion of prisoners have a history of mental health problems, most high-risk offenders in prison, including sex offenders, are not clinically mentally ill. For example, recent Australian research has shown that most child sex offenders do not have any diagnosable psychosexual disorder, although they tend to have drug, alcohol and anger problems.[26]

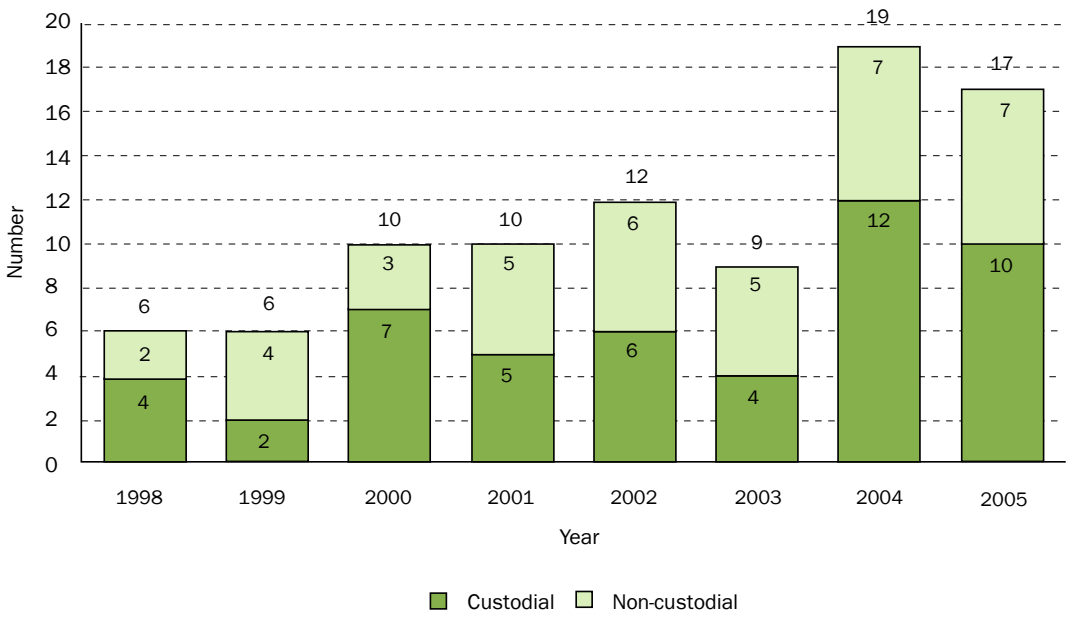
For the small group of offenders whose behaviour is due to a diagnosable mental illness, Australian legislation provides protections under the defence of mental impairment.

Every Australian state and territory and Federal criminal law allows for offenders to be excused from criminal responsibility if, at the time the crime was committed, they were suffering from a serious mental illness that meant that they did not understand what they were doing was wrong. However, this does not mean that such offenders are allowed to walk free. The result of a finding of not guilty on the ground of mental impairment in relation to serious offences usually results in the offender being detained in a mental health facility.[27]

In Victoria, the defence must prove on the balance of probabilities that the offender was mentally impaired at the time of the offence and the effect of the mental impairment was that he/she did not know the nature and quality of what he/she did, or did not know that the conduct was wrong.[28]

Figure 3 below illustrates the number of orders made under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA) since inception for people supervised within the mental health system.

Figure 3: Supervision Orders made under the CMIA to 31 December 2005[29]



Sentencing Mentally-Ill Offenders

If a person with a mental illness does not avail him or herself of the defence of mental impairment and pleads guilty or is convicted of an offence, some jurisdictions enable judges and magistrates to make 'hospital orders' in lieu of a sentence so that mentally ill offenders cross from the criminal justice system to the civil mental health system.

In Victoria a sentencing court has the power to:

- *Instead of passing sentence* order a person to be admitted to and detained in an approved mental health service as an involuntary patient (**hospital order**).[30]
- *By way of sentence* order a person to be admitted to and detained in an approved mental health service as a security patient for a specified period (**hospital security order**).[31]

Hospital orders empower the court to transfer a mentally ill person from the criminal justice system to the mental health system. Such orders are not a sentence and no other sentencing order may be imposed on the offender at the same time.[32] The person is dealt with as an involuntary patient under the *Mental Health Act 1986* (Vic) and not as an offender. The person is usually detained at Thomas Embling Hospital.

Hospital orders are currently indefinite. There are three criteria (rather than the five needed for civil involuntary commitment) for consideration in relation to hospital orders. The Court must be satisfied that:

- the person appears to be mentally ill and to require treatment for the illness;
- the treatment can be obtained by admission to and detention in an approved mental health service; and
- involuntary admission is necessary for the person's health or safety, or the protection of the public.

Unlike hospital orders, a hospital security order is a sentence. Such an order may only be imposed where the Court would have sentenced the person to a term of imprisonment, but for the person's mental illness.[33] The order must specify a period of detention and it must not be any longer than the period of imprisonment the Court would otherwise have ordered.[34] It must, however, reflect the gravity of the crime.[35]

The difference between a hospital order and a hospital security order is that a person discharged from a hospital order is discharged into the community, whereas a person discharged from a hospital security order must be returned to prison for the remainder of the specified term of the original sentence.

Issues

The main advantage of the hospital orders and the supervision scheme under the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) is that mentally ill offenders can have access to treatment from mental health professionals in secure environments.

However, these types of schemes are generally not relevant to many high-risk offenders as these offenders are not considered clinically mentally ill and therefore fall outside the scope of these provisions. If the definition of mental illness were broadened to include, for example, offenders with personality disorders or psychopathy, it may place strains on resources for those currently classified as mentally ill. There is already a strong demand for beds at the secure facility at Thomas Embling Hospital, often resulting in a substantial delay before a person with a mental illness who is subject to a custodial order can be moved across from prison.[36] Concerns have also been expressed that high-risk offenders would present a disruptive influence in mental health facilities as these are not appropriate places for them.

Serious Offender Provisions

Three Australian states 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 the protection of the community as a sentencing principle.

Victoria

In 1993, the *Sentencing Act 1991* (Vic) was amended to allow for longer prison terms for serious sexual and violent offenders.[37] If a person is a serious sexual offender or a serious violent offender, the sentencing judge **must** give priority to the protection of the community[38] and **may** impose a sentence longer than that which is proportionate to the gravity of the offence considered.[39]

A 'serious sexual offender' is a person who has been convicted of either;

- two or more sexual offences for which he or she has been sentenced to a term of imprisonment; or
- one sexual offence and one violent offence arising out of the one course of conduct for which he or she has been sentenced to a term of imprisonment.[40]

A 'serious violent offender' is a person who has committed one serious violent offence such as murder, causing serious injury intentionally, causing a very serious disease or threats to kill for which he/she has been sentenced to a term of imprisonment.[41]

Once an offender is classified as a 'serious offender', any term of imprisonment imposed on that offender must be served cumulatively on any uncompleted sentence or sentences of imprisonment imposed unless the court orders otherwise.[42]

New South Wales

In New South Wales, section 4 of the *Habitual Criminals Act 1957* (NSW) enables a judge to declare a person to be a habitual criminal in order to pass a sentence for the current offence before adding on a further sentence. The further sentence must be not less than five years or more than fourteen years and must be served concurrently.[43]

A habitual criminal may be any person older than twenty-five years who has been convicted of an indictable (serious) offence and has on at least two previous occasions served separate terms in prison for indictable offences.[44] This means that a large number of offenders could potentially be declared habitual offenders, but in practice, this section is not used.[45]

In 1996 the New South Wales Law Reform Commission recommended the repeal of the habitual criminal provisions on the basis that the provisions were 'archaic', offended against the principle of proportionality in sentence, were rarely used and because the belief underpinning the provisions that certain offenders possessed inherent criminal qualities was no longer appropriate.[46]

South Australia

South Australian law permits a court to declare a person to be a serious repeat offender if the person has been convicted of three serious offences (committed on at least three separate occasions).[47] When a person is declared to be a serious repeat offender, the court is not bound to ensure that the sentence is proportional to the offence and any non-parole period fixed for the sentence must be at least four-fifths the length of the sentence.

In 2005, the scheme was extended to sexual offences to enable a court to declare an offender a serious repeat offender if convicted of two child sex offences (rather than three).[48]

Issues

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.

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.[49] A study was conducted examining 553 relevant cases from the County and Supreme Courts for the period 1994 – 2002.[50] 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 disproportionality of the sentence.[51] There has been similar reluctance displayed in other Australian jurisdictions, the United Kingdom and New Zealand.[52]

Indefinite Sentencing

Introduction

Indefinite detention laws have existed in various forms for close to a century. 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. A court can sentence an offender to an indefinite sentence on its own initiative, or after an application from the prosecution. The appropriateness of an indefinite sentence can be reviewed at various stages.

The power to pass an indefinite sentence on offenders who are assessed as posing a danger to society exists in the Northern Territory and four Australian states, including Victoria.[53] Some of the provisions specifically refer to violent offenders and sex offenders, while others are broader in their scope.

Indefinite Sentencing in Victoria

Under the *Sentencing Act 1991* (Vic),[54] an adult offender who is convicted of a 'serious offence' may be sentenced to an indefinite term of imprisonment. A 'serious offence' includes:

- murder;
- manslaughter;
- causing serious injury intentionally;
- armed robbery;
- rape;
- assault with intent to rape; and
- sexual offences against children.[55]

Generally, an application for such an order is made by the Director of Public Prosecutions, who has the burden of proving that the offender is a serious danger to the community, but the court can impose such an order under its own initiative.[56]

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.[57]

The judge must consider a number of matters in deciding whether the offender poses a serious danger to the community. He/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; and
- the need to protect members of the community from that risk.[58]

An offender who is sentenced to an indefinite sentence is ineligible for parole.[59] Instead, the judge fixes a 'nominal sentence' equal in length to the non-parole period he/she would have set if passing a determinate sentence.[60] The expiry of the nominal sentence triggers a review of the appropriateness of the indefinite sentence.[61] If the offender remains detained after the initial review, he/she can apply for further reviews at three year intervals.[62]

When the court is no longer satisfied to a high degree of probability that the offender remains a serious danger to the community, it must cancel the sentence and order the offender subject to a five year re-integration program administered by the Adult Parole Board.[63]

The Victorian Commissioner for Corrections has advised that only four prisoners to date have received orders for indefinite detention, one of which was amended to a fixed sentence on appeal, leaving three offenders still serving indefinite sentences.[64] All four had committed sexual offences and had previous convictions for such offences.

Indefinite Sentencing in Other Australian Jurisdictions

The offences to which indefinite sentences apply vary between jurisdictions, but most apply to both serious violent and sexual offences.

In Queensland, a court may impose an indefinite sentence on an offender convicted of a serious (indictable) offence that involves violence against a person and for which an offender may be sentenced to imprisonment for life, as well as nominated sexual offences against children and intellectually impaired persons, rape and other sexual assaults. Similarly, in the Northern Territory, the power to order an indefinite sentence applies to offences involving violence against the person and for which an offender may be sentenced to imprisonment for life,[65] as well as to certain sexual offences against children under 16 years, and sexual intercourse and gross indecency without consent.[66]

In Tasmania the provisions apply if the offender has been 'convicted for a crime involving violence or an element of violence' and the offender has at least one previous conviction for a violent offence.[67] The criteria in Western Australia are far broader, allowing the Supreme or District Court to order an indefinite sentence in circumstances where the court sentences an offender for a serious (indictable) offence to a term of imprisonment, does not suspend that imprisonment and does not make an order for parole eligibility.[68]

Similarities exist between jurisdictions as to the criteria to be applied. In Queensland, in order to impose an indefinite sentence the court must be satisfied that the offender is 'a serious danger to the community' because of the offender's antecedents, character, age, health or mental condition, the severity of the offence and any special circumstances.[69] The court must also have regard in determining whether the offender is a serious danger to the community to whether the 'nature of the offence is exceptional', as well as other factors including 'the risk of serious

physical harm to members of the community if an indefinite sentence were not imposed'.[70] A similar list of factors appears in the Northern Territory legislation.[71]

In Tasmania, before a declaration can be made that the offender is a dangerous offender, the judge must be of the opinion that 'the declaration is warranted for the protection of the public', having regard to the nature and circumstances of the offences, the offender's antecedents or character, any medical or other opinion and any other matter that the judge considers relevant.[72] In Western Australia, the court must be satisfied on the balance of probabilities that when the offender would otherwise be released from custody, he or she 'would be a danger to society, or a part of it' due to one or more of the following factors:

- the exceptional seriousness of the offence;
- the risk that the offender will commit other indictable offences;
- the character of the offender and in particular —
    - any psychological, psychiatric or medical condition affecting the offender;
    - the number and seriousness of other offences of which the offender has been convicted;
- any other exceptional circumstances.[73]

Special Indefinite Detention Schemes for Sex Offenders

Special provisions exist in Queensland and South Australia for the indefinite detention of sex offenders. In Queensland, these operate alongside the power to order an indefinite sentence under the *Penalties and Sentences Act 1992* (Qld). These same schemes also allow the relevant Attorney-General to apply for an order for continuing detention during the term of imprisonment (although it appears that this power has never been exercised). In this respect they operate in a similar way to post-sentence continued detention schemes.

In Queensland, a convicted sex offender may be detained indefinitely where there is evidence from two medical practitioners, one of whom must be a psychiatrist, that the offender is incapable of exercising proper control over his/her sexual instincts and that this incapacity is capable of being cured by continued treatment.[74] It must also be necessary for the offender to be detained in prison after the expiration of the sentence in order to continue treatment.

If such evidence is available, the Attorney-General can apply to the Supreme Court for a declaration that the offender be detained at the Governor's pleasure. Issues with this scheme include that it does not apply to those who are capable of controlling their instincts, but choose not to, nor does it apply to those who are incapable of being cured.[75] This legislation has been described as being 'archaic and out of touch with community standards'.[76]

In 2005 in South Australia, a scheme similar to the Queensland regime was extended to apply not only to those incapable of controlling their sexual instincts but also to those **unwilling to control** such instincts.[77] Although this law allows the Attorney-General to apply to the Supreme Court for an offender already serving a sentence to be detained indefinitely once that sentence has expired,[78] this option does not appear as yet to have been exercised. Instead, as with other forms of indefinite detention schemes, applications tend to be made after conviction and prior to sentence so that the Supreme Court can deal with the question of sentence at the same time as it deals with the question of preventive detention.[79]

Are Indefinite Detention Regimes Lawful?

Australian courts have upheld the lawfulness of schemes for indefinite detention at the time of sentence.[80]

In *R v Moffatt*,[81] the Victorian Supreme Court confirmed the legality of the Victorian indefinite sentence provisions, noting that the ability to pass such a sentence was tied to a finding of guilt for an offence, and that a person was deprived of liberty because of what he had done rather than because of what he **might** do.[82] However, Justice Hayne also emphasised that the power to order indefinite imprisonment should be sparingly exercised.[83]

Indefinite Detention in Practice

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.[84]

The High Court in *McGarry v The Queen*,[85] 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.[86]

The effect of several 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.

Issues

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 continued detention orders are made at the point when an offender has almost completed his/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/her release. Many states that have indefinite sentencing regimes also have introduced continued 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. Concerns have been raised that this may not occur 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, for example, the nominal period set as part of an indefinite sentence may not always do so.

Assessing Risk at the Sentencing Stage: Information and Resources

Introduction

Assessing an offender's risk of future reoffending at the time of sentencing is a particularly difficult task. Mental health professionals are called upon to identify the level of risk that an offender might pose many years in the future, before any experience of imprisonment or treatment. Opinions may be formed on the basis of brief interviews and assessments, without the benefit of developing a therapeutic relationship and having sufficient time to understand the person's particular situation.

For prisoners being assessed under preventive detention schemes at the end of their sentence, a key difficulty for mental health professionals is how to take into account relevant risk factors when offenders have been in prison for many years. In such a case, many of the dynamic risk factors may be difficult to assess—factors such as the availability of supportive social networks can only be determined from the person's situation *prior* to imprisonment. This will undoubtedly affect the accuracy of the prediction of risk.

Given the limitations of risk assessments both at the time of sentencing and prior to release from prison, it has been suggested that the ideal form of risk assessment would be one that continues throughout the course of an offender's sentence. This approach allows a case manager to develop a relationship with an offender, providing the time needed for a thorough understanding of both the static and dynamic risk and protective factors that will affect an individual's level of risk to the community.

The Scottish Risk Management Authority

In Scotland, the MacLean Committee on Serious Violent and Sexual Offenders recommended the formation of a Risk Management Authority (RMA) which would have a range of responsibilities around assessing risks posed by serious violent and sexual offenders.[87] The establishment of the RMA was one of a number of recommendations to respond better to high-risk offenders. Other recommendations included the introduction of a new form of indefinite sentence to be ordered at the time of sentence—the Order for Lifelong Restriction.

The Risk Management Authority was subsequently established by the *Criminal Justice (Scotland) Act 2003*. The purpose of the Authority is to:

- develop policy and carry out and monitor research in risk assessment and minimisation;
- set standards for and issue guidance to those involved in the assessment and minimisation of risk;
- approve and monitor risk-management plans for those high-risk sexual and violent offenders who receive an order for lifelong restriction (a new form of indefinite sentencing order);
- accredit people involved in risk assessment and minimisation and the methods and practices used in the assessment and minimisation of risk; and
- carry out education or training activities in relation to the assessment and minimisation of risk or to commission such activities.[88]

Sentencing Options

The Risk Management Authority consists of a Convenor and four Board members appointed by the Scottish Ministers on a part time basis. There is also a Chief Executive Officer and ten staff members.

The new provisions providing for Orders for Lifelong Restriction (OLR) came into force in Scotland on 20 June 2006. The scheme provides for the lifelong supervision of high-risk violent and sexual offenders both in prison and subsequently on licence in the community.

One of the challenges for courts in making indefinite sentencing orders is the quality of information available at the point of sentencing. Under the OLR scheme introduced in Scotland, once a court determines that certain risk criteria[89] may be met, it is required to make a Risk Assessment Order.[90] The Risk Assessment Order provides for a risk assessor accredited by the RMA to carry out a risk assessment and to prepare a Risk Assessment Report, the purpose of which is to assist the court to make an informed decision about the level of risk an offender poses to the community. If, on the basis of this report and other evidence, the court is satisfied on the balance of probabilites that certain risk criteria are met, it must impose an Order for Lifelong Restriction.[91]

Introduction

This Part considers two areas for the management of high-risk offenders during sentence—the ability to supervise offenders through the granting of parole and prison-based sex offender treatment programs which may aid in the rehabilitation of offenders.

Parole

In Victoria, if a court imposes a sentence of over two years' imprisonment, it ordinarily must set a non-parole period.[92] A non-parole period is the minimum term an offender must serve in prison before he or she is eligible to be released on parole. Courts have discretion not to set a non-parole period at all if the nature of the offence or the past history of the offender makes it inappropriate to allow for possible release on parole.[93]

The main purpose of parole is to supervise the reintegration of offenders into the community. The Adult Parole Board determines whether offenders should be released into the community at the expiry of the non-parole period. The membership of the Adult Parole Board includes judges and members who are appointed to represent the community's interests.

The Adult Parole Board meets with offenders early on during their prison sentences to ensure that offenders undertake appropriate programs aimed at helping them reintegrate into the community. When deciding whether to release an offender on parole, the Board considers the protection of the community, the rights of victims, the intentions of the sentencing body and the needs of the offender. In the period 2004–2005, the Board considered 7,515 cases, interviewed 1,674 offenders in prison and made 1,538 parole orders.[94] Parole was denied in 159 cases and parole orders cancelled in 456 cases. Of the parole orders cancelled, 258 were because of a failure to comply with the conditions of parole and 198 because of further conviction and sentence.[95]

Parole orders include a number of conditions such as instructing parolees when to report, requiring them to stay within the relevant State or Territory and preventing them changing address or employment without the permission of a community corrections officer.

The Board is able to impose onerous conditions of parole, including curfews, strict conditions about place of residence, requirements to attend treatment programs, random substance testing and restrictions upon where the person may go and with whom he/she can associate.

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.

New South Wales has established a Serious Offenders Review Council (SORC) to assist in the management of serious offenders in prison, including decisions made concerning parole.[96] The Council's functions include providing advice on the security classifications, placement and case management of prison inmates classed as 'serious offenders'. The Council also advises the New South Wales Parole Authority concerning the release of serious offenders and provides reports about these offenders to the Supreme Court and the Minister for Justice.[97]

Management During Sentence

The parole system is based on the premise that there are adequate services to assist parolees reintegrate into the community. The Chairperson of the Adult Parole Board, The Honourable Justice Murray Kellam AO, has pointed out that 'community mental health services that are available to parolees are scarce and do not provide the level of safety the community requires, let alone the level of psychiatric support required by many offenders who suffer from psychiatric and psychological problems'.[98] For parole to work properly, there is a need for adequate resourcing for appropriate accommodation such as 'half-way houses' and support services.

In the case of serious sex offenders, their participation in sex offender treatment during their sentence is likely to be one of the issues taken into account by the Parole Board in determining if an offender should be granted parole. Consequently, any delays in providing offenders with access to treatment ultimately may have an impact on the likelihood of an offender being granted parole.

Some jurisdictions have introduced a power to order an extended period of parole for sexual and violent offenders instead of, or in addition to, other indeterminate sentencing orders and mechanisms allowing for post-sentence supervision. These orders are made at the point of sentencing. For example, the United Kingdom introduced a power in 1998 for a court to impose an extended supervision period in sentencing violent and sexual offenders.[99] An extended sentence, as it is known, consists of a custodial term (the term the court would have otherwise imposed) and a further extension period during which the offender is on parole (in the case of sexual offences, up to 10 years and 5 years for violent offences).

In Scotland, an extended sentence may be imposed in circumstances where the court intends to make a determinate sentence of imprisonment and considers that the period for which the offender would otherwise be subject to parole would 'not be adequate for the purpose of protecting the public from serious harm from the offender'.[100] Scotland has increased the maximum period for which the extension period could apply for violent offences from 5 to 10 years.[101] In England and Wales the criteria are slightly broader, allowing for such a sentence to be imposed where the period for which the offender would otherwise be subject to parole 'would not be adequate for the purpose of preventing the commission by him of further offences and securing his rehabilitation'.[102]

While this form of order may avoid some of the criticisms of post-sentence supervision by virtue of being made at the point of sentencing, such an order is likely to suffer from similar problems as those identified with longer than proportionate sentences. These problems include predicting in advance the possible risk an offender may pose to community safety some years after he or she was first sentenced.

Sex Offender Treatment Programs

An exclusively penal approach cannot address all the factors that lead to reoffending and some behaviour may not be amenable to change without co-existing options for treatment. Most Australian jurisdictions have some form of prison-based sex offender treatment programs.[103] Many programs reflect a cognitive-behavioural treatment approach delivered by individual and/or group therapy. Participation is open to all eligible offenders and while treatment is voluntary, many offenders participate with the aim of obtaining parole.[104]

In 1996, Corrections Victoria began the Sex Offender Strategy with the aim of providing a coordinated and integrated system of assessment, management and intervention for sex offenders across both Prison Services and Community Correctional Services. The primary objectives of Corrections Victoria Sex Offender Programs are community protection and reducing the likelihood of sexual reoffending.

The Sex Offender Strategy is aimed at convicted rapists and child sex offenders and offenders whose offences contain a sexual element. Programs are available through Ararat Prison and at Carlton Community Correctional Services. The Wimmera Treatment Unit at Ararat Prison offers intensive therapy to two groups of 12 offenders over an eight month period (after an initial one month assessment period). The Adult Parole Board requires all sex offenders to participate in programs offered within the prison system. The failure of sex offenders to participate in recommended programs may result in parole being denied.

Issues

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, some questions have been raised about the efficacy of sex offender treatment programs. As a recent review recognised, few proper systematic evaluations of treatment programs have been carried out and where such evaluations exist, the results have not been definitive.[105] What evidence does exist, however, suggests small but significant reductions in sexual recidivism following completion by offenders of prison-based treatment. This is particularly the case where offenders have access to maintenance programs in the community.[106]

In the Council's preliminary discussions, some concerns were expressed about the current operation of sex offender treatment programs. There was concern that 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.

Concerns were also expressed about the timing of the provision of sex offender programs. 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 the 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.[107] If an offender's attempts at rehabilitation—including participation in sex offender programs—are relevant to an application for an extended supervision or continued detention order, then 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 was suggested that more resources 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.

Post-Sentence Options

Introduction

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 is about to end.

Five Australian states,[108] including Victoria, have introduced legislation enabling the supervision of sex offenders in the community. Three states[109] also have provisions allowing for the post-sentence continued detention of offenders in prison. Victoria currently does not have a post-sentence detention scheme. In *Fardon v Attorney-General (Qld)*,[110] the High Court held that post-sentence preventive detention relating to a class of offenders may be constitutional if certain criteria are met.

Post-Sentence Preventive Detention

Introduction

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 punish the offender further. 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, that allow for post-sentence preventive detention in prison as well as supervision in the community. The purposes of the legislation that sets up these schemes in each of these jurisdictions are set out below.

In Queensland, the purposes are:[111]
- to ensure adequate protection of the community; and
- to provide continuing control, care or treatment of a particular class of prisoners to facilitate their rehabilitation.

In Western Australia, the purposes are:[112]
- to ensure adequate protection of the community; and
- to provide for the continuing control, care or treatment of persons of a particular class.

In New South Wales, the purposes are:[113]
- to ensure the safety and protection of the community; and
- to facilitate the rehabilitation of serious sex offenders.

This section outlines the operation of these schemes with a view to encouraging debate about the structure that a continued detention scheme should take in Victoria, if such a scheme is introduced.

The Offences for Which a Continued Detention Order is Available

In June 2003, the Queensland Parliament enacted the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). This applies to offenders serving a period of imprisonment for a **serious sexual offence**, whether the person was sentenced to imprisonment before or after the commencement of the Act. A serious sexual offence is defined as an offence of a sexual nature involving violence or against children.[114]

In Western Australia, the *Dangerous Sexual Offenders Act 2006* (WA) also applies to offenders under sentence of imprisonment for a **serious sexual offence**.[115] A serious sexual offence is defined as a sexual offence in the *Criminal Code* where the maximum penalty that may be imposed is seven or more years.[116] This includes sexual offences against children, aggravated indecent assault, sexual penetration without consent and sexual offences on mentally impaired persons.

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**.[117] This is broader than the Queensland and Western Australian schemes as it encompasses indecent assault and other specified offences where the punishment is less than seven years' imprisonment.

Figure 2 at page 7 above illustrates the broad categories of offences included in the various high-risk offender schemes. Serious violent offences are included in the Victorian indefinite sentencing scheme and the serious offender provisions. However they are excluded from the post-sentence extended supervision scheme in Victoria and post-sentence supervision and detention schemes in New South Wales, Queensland and Western Australia.

In the Council's preliminary discussions some suggested that if a system of continued detention is introduced, a range of offences similar to those captured in the schemes in other Australian jurisdictions should be included. Others suggested a broader approach, which included a wide range of offences such as:

- sexual offences against children and persons with a cognitive impairment/disability;
- murder or manslaughter involving children who have also been a victim of kidnapping or a sexual act by the offender;
- serious sexual offences against adults including rape, abduction, or murder/manslaughter involving the commission of a sexual act;
- offences committed by Australians citizens overseas that involve the sexual exploitation of children; and
- multiple homicides.

Another suggestion was that a continued detention scheme should only apply to limited offences where the prisoner has received a maximum sentence in excess of 20 years.

Applications for Continued Detention Orders

In all three States, the application period is restricted to the last six months of the prisoner's term of imprisonment. The Queensland scheme provides that this is 'to ensure that the prisoner is able to take full advantage of any opportunities for rehabilitation offered during the term of imprisonment'.[118]

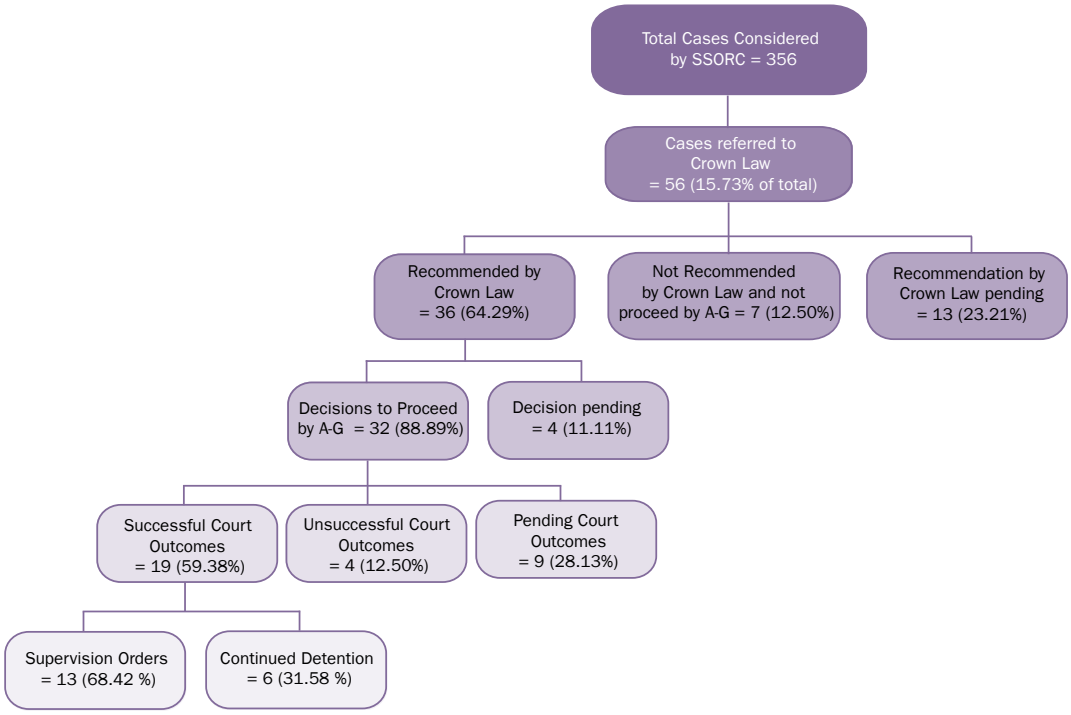
In Queensland and New South Wales, the State Attorney-General may apply to the relevant Supreme Court for the continuing detention of an offender currently serving a period of imprisonment for a serious sexual offence.[119] In Western Australia, the Director of Public Prosecutions may file an application,[120] although the Attorney-General also has the power to do so.[121] In order for the Attorneys-General or the Director of Public Prosecutions to make the decision as to whether or not to apply for a continued detention order, there are internal procedures for ensuring that the appropriate cases are referred to them. By way of example, the procedural stages in the Queensland scheme will be examined.

In Queensland, an interdepartmental committee—the Serious Sexual Offenders Review Committee (SSORC)—was established to refer cases to the Attorney-General for consideration of whether to make an application for continued detention in a particular case. The Committee comprises senior officers from the Queensland Corrective Services, Department of Justice and Attorney-General and the Queensland Police Service and is chaired by the Deputy Director-General, Correctional Operations.[122]

SSORC meets monthly to review eligible prisoners and obtain legal advice from Crown Law about the prospects of success of an application under the Act. The review occurs when the prisoner is 18 months from full time discharge. The Crown Solicitor makes a recommendation to the Attorney-General who decides whether to proceed with an application. Eligible prisoners are those in custody serving a sentence of more than two years' imprisonment which includes a period for a serious sexual offence.[123]

Figure 4 below describes the number of cases considered, referred and applications granted since the commencement of the Queensland Act on 6 June 2003. Of the 19 successful applications, six continued detention orders and 13 supervision orders have been made. There have been four unsuccessful applications, all of which occurred prior to October 2004.[124]

Figure 4: Cases Considered, Referred and Applications Made and Granted under the DPSOA 2003 (Qld) Since 6 June 2003[18]



Who Makes the Order?

In the Queensland, Western Australia and New South Wales schemes, the Supreme Court is the body who makes the decision about whether an offender should be placed on a Continued Detention Order.

It has been suggested that decisions about continued detention—that have the potential to deprive an individual of liberty without a new crime having been committed—should be made by members of the community rather than by a single judge. One option might be to empanel a jury to make this decision.[126] Alternatively, an expert panel that is representative of the community could be given this responsibility. Such a panel could be chaired by a member of the judiciary but include members who represent the community, including the judiciary, the legal profession, victims of crime, mental health professionals, parole officers, Indigenous representatives, and a member of the Adult Parole Board. Another option would be for such a panel to take an advisory, rather than decision-making, role to assist the judge in making his or her decision. The New South Wales Serious Offenders Review Council was suggested as a possible model.[127] Such a body might also have a role in the management of offenders subject to post-sentence supervision or detention. This might ensure that a clearer distinction is made between arrangements for the management of offenders subject to parole supervision, and those on some form of post-sentence order.

Criteria and Standard of Proof for Making an Order

Figure 5 below sets out the criteria and standard of proof in the Victorian scheme for extended supervision and the New South Wales, Queensland and Western Australian schemes for extended supervision and continued detention.

In Victoria, for a court to make an extended supervision order it must be satisfied, *to a high degree of probability*, that the offender is likely to commit a sexual offence if released in the community after serving a prison sentence.[128] The standard of proof of a 'high degree of probability' lies between the criminal standard of proof (beyond reasonable doubt) and the civil standard of proof (on the balance of probabilities).

In the Queensland continued detention scheme, the Supreme Court must be satisfied *to a high degree of probability* that the offender is a '*serious danger to the community*'.[129] This is defined as meaning that there is an 'unacceptable risk that the offender will commit a serious sexual offence' if released from custody or if released from custody without a supervision order being made.[130] In practice, this operates as a two-tiered system—if the Court decides that the offender is a serious danger to the community, the Court must then decide whether a supervision order would be sufficient to protect the community or whether it is necessary to make an order for continued detention. As Figure 4 above shows, since the Queensland scheme came into operation there have been 19 successful applications. Six of these resulted in a continued detention order and 13 in supervision orders.

In Queensland, in making its decision, the court must have regard to:[131]

- psychiatric reports and other assessments;
- information indicating any propensity to commit serious sexual offences;
- whether there is any pattern of offending;
- the offender's background;
- the need to protect members of the community; and
- any efforts by the offender to address the cause of the offending behaviour.

In Western Australia, the Supreme Court must be satisfied '*by acceptable and cogent evidence*' and '*to a high degree of probability*' that the offender is a *serious danger to the community*.[132] A 'serious danger to the community' has the same meaning as in the Queensland legislation[133] and the criteria for making the order are the same.[134]

In New South Wales, the Supreme Court must be satisfied '*to a high degree of probability*' that the offender is likely to commit a further serious offence if he or she is not detained **and** that 'adequate supervision will not be provided by an extended supervision order'.[135] The criteria for making the order are similar to those in Queensland, but the safety of the community is set out first[136] and there is specific reference to statistical material as to the likelihood of 'those with histories and characteristics similar to those of the offender committing a further serious crime'.[137]

Figure 5: Criteria for Extended Supervision and Continued Detention Orders

	Vic Extended Supervision Order	**NSW** Extended Supervision Order and Continued Detention Order	**Qld** Supervision Order and Continuing detention order	**WA** Supervision Order and Continuing detention order
Test of Risk	The offender is likely to commit a relevant offence if released in the community on completion of the service of any custodial sentence that he or she is serving, or was serving at the time at which the application was made, and not made subject to an extended supervision order.	Extended Supervision Order: The offender is likely to commit a further serious sex offence if he or she is not kept under supervision. Continued Detention Order: 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.	Unacceptable risk that the prisoner will commit a serious sexual offence • if the prisoner is released from custody; or • if the prisoner is released from custody without a supervision order being made.	Unacceptable risk that, if the person were not subject to • a continuing detention order; or • a supervision order, the person would commit a serious sexual offence.
Factors	• Assessment report filed in court • Medical expert • Anything else considered appropriate	• Community safety • Psychiatric reports • Expert assessment of likelihood of offender committing further sexual offences • Offender participation in assessment • Likelihood that person with similar characteristics and history will reoffend • Willingness and level of participation in treatment programmes • Compliance with obligations of parole or earlier supervision orders or other Acts • Criminal history and pattern of offending. • Other information as to the likelihood that the offender will in future commit offences of a sexual nature • Other relevant matters	• Psychiatric reports • Offender participation in assessment • Other expert assessments • Information indicating propensity to commit future sexual offences • Pattern of offending • Attempts by prisoner to address cause of behaviour • Effect of rehabilitation • Antecedents and criminal history • Community protection • Other relevant matters	• Psychiatric reports • Offender participation in assessment • Other expert assessments • Information indicating propensity to commit future sexual offences • Pattern of offending • Attempts by prisoner to address cause of behaviour • Effect of rehabilitation • Antecedents and criminal record • Risk that, if not subject to a continuing detention order or a supervising order, the person would commit a serious sexual offence • Community protection • Other relevant matters
Standard of Proof	• High degree of probability	• High degree of probability	• High degree of probability	• High degree of probability
Legislation	*Serious Sex Offenders Monitoring Act 2005* (Vic), s11	*Crimes (Serious Sex Offenders) Act 2006* (NSW), s17	*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s13	*Dangerous Sexual Offenders Act 2006* (WA), s7

In the Council's preliminary discussions, several suggestions were made about necessary procedural requirements, should a continued detention scheme be introduced in Victoria.

It was suggested that in applications for continued detention the criminal standard of proof (beyond reasonable doubt) should apply[138] and that offenders should have a right to be heard and the right to legal representation. There should also be clear definitions and tests in the legislation (for example as to the level of risk to the community that is required before an order can be made). It was suggested that the decision to detain must be made in accordance with judicial principles, including the normal rules of evidence, and that the power to detain should be discretionary, not mandatory.

Once the threshold test is met as to whether an extended supervision or continued detention order should be made, it was suggested that there should be a presumption that the court will proceed with the least restrictive means reasonably available to achieve the purpose of the scheme. Therefore the court would first be required to consider whether an extended supervision order was appropriate before considering continued detention.

What is the Duration of Continued Detention Orders?

In the Queensland and Western Australian schemes continued detention orders are indefinite.[139] In New South Wales, a continuing detention order expires at the end of the period specified in the order, or if not specified, within five years of the date it was made.[140] This does not prevent an application for a second or subsequent continuing detention order being made.[141]

It has been suggested that if a continued detention scheme is introduced in Victoria, continued detention orders should be of a fixed length, rather than indefinite.

Civil versus Criminal Processes

The scheme for continued detention in New South Wales provides that the proceedings are **civil** in nature and are therefore to be conducted in accordance with the law relating to civil proceedings.[142]

In comparison, the Western Australian scheme makes it clear that proceedings under the Act are **criminal** in nature.[143]

In *Fardon v Attorney-General (Qld)*,[144] the decision that the Queensland legislation conferred jurisdiction upon the Supreme Court which was not repugnant to, or incompatible with, its integrity as a court, was based on the premise that the proceedings were **civil** in nature. Making proceedings **criminal** in nature changes the way in which proceedings are conducted, for example the way in which evidence is gathered and led.

The Role of Mental Health Professionals

In all three states, the respective Supreme Courts may make an order that the offender undergo examinations by two psychiatrists.[145] In Queensland and Western Australia, the psychiatrists examining the prisoner must prepare reports indicating the level of risk that the prisoner will commit another serious sexual offence and the reasons for that assessment.[146] In New South Wales, there is no direction as to what should be included in the reports. The criteria for making post-sentence preventive detention orders make it clear that the respective Supreme Courts may also take into account other assessments by psychiatrists, psychologists or registered medical practitioners.

Review and Appeal Processes

Figure 6 below illustrates the processes for reviewing or appealing extended supervision and continued detention orders in Victoria, New South Wales, Queensland and Western Australia.

Figure 6: Extended Supervision and Continued Detention Review and Appeal Process

	Vic (Extended Supervision Order)	**NSW** (Extended Supervision Order and Continuing Detention Order)	**Qld** (Extended Supervision Order and Continuing Detention Order)	**WA (**Extended Supervision Order and Continuing Detention Order)
Review Process	The court must review extended supervision orders • no later than three years after it was first made; or • at any earlier first review date specified in the order; and • at intervals of no more than three years; or • shorter intervals specified in the order The Secretary to the Department of Justice and offender may apply to the court at any time for a review	Extended supervision orders and continuing detention orders may be varied or revoked at any time on the application of the Attorney-General or the offender The Commissioner of Corrective Services must provide the Attorney-General with an annual report on the offender	The court must review a continuing detention order at • the end of one year after the order first has effect; and • afterwards at intervals of not more than one year after the last review was made An offender may apply for the continuing detention order to be reviewed at any time after the court's first review in exceptional circumstances	The court must review a continuing detention order • one year after the offender was first in custody under the order; and • one year after the most recent review of the order An offender may apply for the continuing detention order to be reviewed at any time after the court's first review in exceptional circumstances
Appeal Process	An appeal against a decision to make, renew, or not revoke an extended supervision order may be made by • the offender concerned; or • the Secretary to the Department of Justice, if he or she considers that it is the public interest within 28 days after the relevant decision was made	Extended supervision orders and continued detention orders may be appealed against within 28 days of the decision or by leave of the Court of Appeal	The Attorney-General or prisoner concerned may appeal against extended supervision orders and continued detention orders within one month of the decision or by leave of the Court of Appeal.	The DPP or offender concerned may appeal against extended supervision orders and continued detention orders
Legislation	*Serious Sex Offenders Monitoring Act 2005* (Vic), s 21 (review); ss 36 – 38 (appeal)	*Crimes (Serious Sex Offenders) Act 2006* (NSW), ss 13 (review of extended supervision order) and 19 (review of continued detention order); s 22 (appeal)	*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld),ss 27 and 28 (review) and ss 31 and 32 (appeal)	*Dangerous Sexual Offenders Act 2006* (WA), ss 29 and 30 (review) and s 34 (appeal)

Review

In Queensland and Western Australia, there is a process for annual review of the order for continued detention.[147] If there are exceptional circumstances, the Supreme Court can grant leave to an offender for an early review.[148]

In the Queensland scheme, the issue for consideration on review is whether the prisoner is still a serious danger to the community in the absence of an order for supervision or continued detention. Since the Queensland scheme came into operation there have been two reviews of a detention order.[149]

In the Council's preliminary discussions, it was proposed that there should be a right to regular review of the additional detention period if a continued detention scheme is introduced in Victoria.

Appeal

In Queensland, the Attorney-General or the offender concerned has a right of appeal against a court decision.[150] In Western Australia, the Director of Public Prosecutions and the offender concerned have a right of appeal against a court decision.[151]

In New South Wales, the Attorney-General or the offender can apply at any time for the variation or revocation of a continuing detention order[152] and the Commissioner of Corrective Services must provide the Attorney-General with an annual report on the offender.[153] Unlike Queensland and Western Australia where the orders are indefinite, in New South Wales, a continuing detention order expires at the end of the period specified in the order, or if not specified, within five years of the date it was made.[154] This does not prevent an application for a second or subsequent continuing detention order being made.[155] An appeal against a decision may be made to the Court of Appeal within 28 days of the date the decision was made or by leave of the Court of Appeal.[156]

Management of Offenders on Continued Detention

In Queensland the Courts have made clear that there are high expectations in relation to the management of prisoners subject to a continuing detention order.[157] As a result a higher level of scrutiny is applied to the management of these prisoners and separate procedures have been developed for their management.[158]

In the Council's preliminary discussions, it was suggested that tailored programs to facilitate rehabilitation and reintegration should be offered to offenders on continued detention orders. A submission was made that if a system of continued detention is established, it should place a heavy onus (beyond reasonable doubt) on those seeking the order to establish that all reasonable steps had been taken to provide rehabilitation to the offender; that the offender had been given full information about the availability of programs and that if necessary, programs had been specifically designed to meet the needs of the offender. It was suggested that lack of finance or program resources to meet the offender's needs should mean that this onus has not been satisfied. It was further suggested that the prison authorities should be required to prove that a

systematic review in relation to the offender had been undertaken at least five years prior to the earliest release date of the offender and that the offender's fundamental rights within the prison system had been protected, or that any failings had not had an adverse impact on the offender's prospects of rehabilitation. It was suggested that an order should only be made if the court is satisfied that the circumstances giving rise to the alleged need for the detention order arise solely because of the behaviour of the prisoner while in the prison system, and not because of a failure of, or manipulation by, the prison system itself.

It was further submitted that offenders who are placed on continued detention orders should be segregated from the general criminal prison population.

It was also proposed that a permanent independent review body should be established to examine the operation of prisons to ensure that prisoners' fundamental rights are protected and to review the adequacy of rehabilitation services. This body should have the power to seize prison records and to enter and inspect prisons at any time. It was suggested that this body be resourced on the basis of a fixed percentage of the prison budget to be determined independently by the Ombudsman as part of its ability to fulfil its charter.

US Scheme for Post-Sentence Civil Commitment

Seventeen states[159] in the United States of America have enacted what are generally termed 'sexual predator' laws. These enable the civil commitment of sexual offenders at the completion of a criminal sentence under a mental health model. Instead of continued detention in prison, the offender is usually committed to a hospital, secure facility or a mental health facility. Differences exist between states, including eligibility criteria and procedures for commitment.

Most schemes are based on the Washington State legislation[160] which allows the commitment of 'a person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or a personality disorder which makes the person likely to engage in predatory acts of sexual violence'.[161] In the majority of states, the state must prove beyond reasonable doubt that the person is a sexually violent predator.[162] The person has a right to a trial by jury. The term of commitment is indeterminate. As of 2001, the numbers of those committed in states with such laws varied from three offenders (in North Dakota) to 374 offenders (in California).[163]

These schemes have been the subject of much criticism by mental health professionals and others, including on the basis that they involve the use of civil commitment to serve non-medical incapacitative purposes and affect the ability to provide services for people with treatable mental illnesses.[164]

Another issue has been the high costs involved in detaining offenders under these forms of orders as states must ensure facilities established for this purpose are both secure and therapeutic.[165] States have reported average annual in-patient treatment as costing from $70,000 to $165,000 per patient.[166] In Minnesota, it is estimated that it costs $100,000 a year to house a sex offender under this scheme. In 2005, there were 300 such offenders in Minnesota costing $30 million a year.[167] In contrast, the cost of incarceration in a mainstream Minnesota prison is $25,000 a year.

There may also be issues with detaining sex offenders together in a facility, particularly if some do not wish to undertake treatment.

Post-Sentence Options: Policy Issues

A number of issues arise in relation to post-sentence options for high-risk offenders. These relate to:

- human rights;
- principles of criminal process;
- the principles of proportionality and finality in sentencing;
- the principle of legality;
- double jeopardy and the principle of double punishment; and
- the principles that detention should only follow a finding of criminal guilt.

The Relevance of Human Rights

The *Universal Declaration of Human Rights* recognises the 'inherent dignity and inalienable rights of all members of the human family' and sets out a series of rights as 'a common standard of achievement for all peoples and all nations'. Australia has signed several international treaties that set out economic, social and cultural rights, such as the right to education, as well as the more well known civil and political rights such as the right to a fair trial.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic)[168] was recently enacted in Victoria. The Charter enshrines many of these rights, including the right of every person to liberty and security[169] and the right not to be subjected to arbitrary arrest or detention.[170]

The Charter provides that a person must not be deprived of his or her liberty 'except on grounds, and in accordance with procedures, established by law'.[171]

The legislation recognises the right of all persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person[172] and that a person must not be tried or punished more than once for an offence.[173] A person who is detained without charge must also be segregated from other people convicted of offences, except where reasonably necessary,[174] and must be treated in a way that is appropriate for a person who has not been convicted.[175]

Other principles recognised by the Charter include the principle against retrospective criminal laws, including the principle that a penalty must not be imposed on a person for an offence that is greater than the penalty that applied at the time when the offence was committed.[176]

All of these rights need to be taken into account when considering options for the supervision and detention of high-risk offenders and, unless there are exceptional circumstances, any new legislative scheme should be compatible with them.

Schemes such as extended supervision and continued detention orders are not necessarily incompatible with the rights enshrined in the Charter, provided necessary protections are put in place. The Charter specifically allows for human rights to be subject to reasonable limitations 'as

can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'[177] and taking into account all relevant factors including:

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.[178]

Should a form of continued detention be introduced in Victoria, this may mean that protections must be put in place to ensure any scheme adopted limits the rights outlined above by the least restrictive means to achieve the purpose of community protection.

The Relevance of Principles of Criminal Process

Fairness in the administration of law is a fundamental legal principle. It promises legitimacy for the criminal process through maintaining a balance between the coercive powers of the State and the human rights of citizens of the State.[179]

Article 14 of the International Covenant on Civil and Political Rights guarantees the general right, in both criminal and civil proceedings, to a 'fair and public hearing by a competent, independent and impartial tribunal established by law'. It then specifies a number of procedural safeguards such as the presumption of innocence. The criminal standard of proof— 'beyond reasonable doubt'—occupies a central place in legal and popular culture.

The right to a fair hearing is also enshrined in the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides that a person charged with a criminal offence or party to a civil proceeding has the right to have the charge or proceeding decided 'by a competent, independent and impartial court or tribunal after a fair and public hearing'.[180]

The principle of fairness is relevant to any scheme that seeks to supervise or preventively detain high-risk offenders because it requires procedural safeguards to be established to ensure the scheme is not cast too broadly and operates in a way that is fair to the person being detained or supervised. Such safeguards could include periodic reviews and the right to appeal a decision made by an independent tribunal.

The Principles of Proportionality and Finality in Sentencing

The principle of proportionality provides that the type and extent of punishment should be proportionate to the gravity of the harm and the degree of the offender's responsibility.[181] The majority of the High Court in the case of *Veen v The Queen (No 2)*,[182] confirmed that proportionality is paramount in determining the sentence to be imposed, but said that this does not mean that public protection is irrelevant.[183]

Post-sentence preventive detention is based on what the offender **might** do in the future and is not as firmly connected to the seriousness of the offence committed which led to the period of imprisonment, as is indefinite detention at the time of sentence. It might therefore be argued that post-sentence preventive detention offends against the principle of proportionality in sentence.

Post-sentence preventive detention legislation may also be seen as contrary to the principle of finality of sentence.[184] If an order for indefinite detention is made **at the time** of sentence, then the offender at least knows that there is a nominal term and there is a system for periodic review. Applications for post-sentence preventive detention are made at the end of the offender's sentence, leading to uncertainty as to how long the offender must remain in prison after the sentence expires.

The Principle of Legality

The principle of legality, or—as it is more traditionally known—the rule of law, requires that there should be no punishment without law. An important principle behind the rule of the law is that governments should punish criminal conduct, not criminal types.

The premise for post-sentence schemes rests on the status of the person. Justice Gummow of the High Court recognised this when considering the Queensland legislation in *Fardon's* case. The very title of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) attests to this: 'The Act operated by reference to *the appellant's status deriving from [his] conviction*, but then set up its own normative structure'.[185] Post-sentence preventive detention schemes carry the danger of detaining people because of their status.

Double Jeopardy and the Principle against Double Punishment

Post-sentence preventive detention regimes may also offend against the principle against double punishment. The term 'double jeopardy' has been held not only to apply to the determination of guilt, but also to the quantification of punishment.[186]

The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was challenged in *Fardon's* case on the basis that the court making the order under it was '*required* to have regard to the prior offences of a person in determining whether he should be a prisoner or not in circumstances where no crime has been committed'.[187]

Justice Gummow was the only judge in *Fardon's* case to deal with this argument and he did so briefly. He found that the Act does not breach the 'double jeopardy' rule as it relates to sentencing because it did not punish Fardon twice or increase the punishment for the offences for which he was convicted.[188]

However, it can be argued that a post-sentence preventive detention scheme dependent on a finding of guilt that involves imprisonment must be seen as a form of punishment above and beyond that of the sentence already served. Justice Kirby in his dissenting judgment was clearly of the opinion that the Queensland legislation imposed both double and retrospective punishment. He said:

> Effectively, what is attempted involves the second court in reviewing, and increasing, the punishment previously imposed by the first court for precisely the same *past* conduct. Alternatively, it involves the second court in superimposing additional punishment on the basis that the original maximum punishment provided by law, as imposed, has later proved inadequate and that a new foundation for additional punishment, in effect retrospective, may be discovered in order to increase it. Retrospective application of new criminal offences and of additional punishment is offensive to the fundamental tenets of our law.[189]

Criminal Detention Must Only Follow a Finding of Guilt

There is a general principle that involuntary detention should only be a consequence of a finding of guilt. This principle was recognised by the High Court in *Chu Kheng Lim v Minister for Immigration*:

> The involuntary detention of a citizen in custody by the State is penal or punitive in character and … exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[190]

The established exceptions to this general rule referred to in *Lim's* case are:

- the arrest and detention in custody of a person accused of a crime to ensure he or she is available to be dealt with by the courts;
- the civil detention of those with a mental illness for treatment;
- the civil detention of those with infectious disease for treatment and to stop the spreading of the disease; and
- the 'administrative' detention of immigrants seeking refugee status to enable enquiries and a determination of their status to be made.[191]

The common thread running through these exceptions to the general rule is that they have a primary purpose that is non-punitive in nature.

Justice Gummow in *Al-Kateb v Godwin* suggested that detention may contain a mixture of punitive and non-punitive traits and that it was of little assistance to label detention as one or the other.[192]

However, it could be argued that while preventive detention schemes may omit any mention of punishment, the effect of the detention is precisely that. Justice Kirby pointed out that in Queensland, the continued detention takes place in prison (not a hospital or a detention centre) and the detainee remains a 'prisoner'.[193]

Post-Sentence Supervision in the Community

Post-sentence supervision involves an order being made as an offender reaches the end of his or her prison sentence, which requires the offender to be subject to ongoing supervision in the community upon release. In recent years, five Australian states have introduced schemes which enable the post-sentence supervision of sex offenders in the community.[194]

The Victorian scheme of extended supervision orders set out in the *Serious Sex Offenders Monitoring Act 2005* (Vic) commenced on 26 May 2005. The main purpose of the scheme is to enhance community protection.[195]

The Secretary to the Department of Justice may apply to the Supreme or County Court for an extended supervision order of up to 15 years[196] in relation to 'serious sex offenders'. The definition of 'serious sex offenders' includes those serving a prison sentence for a wide range of offences against children including rape, indecent assault, the possession of child pornography

as well as other offences including bestiality or loitering near schools.[197] The definition does not include sexual offences committed against adults. The application must be accompanied by an assessment report by a psychologist, psychiatrist or specified health service provider.[198] A court may only make an extended supervision order if it is satisfied, to a high degree of probability, that the offender is likely to commit a sexual offence if released in the community after serving a prison sentence.[199]

An extended supervision order contains a number of conditions including that the offender:[200]

- not commit an offence;
- report to and receive visits from the Secretary to the Department of Justice or his/her nominee;
- not move to a new address without prior written consent;
- not leave Victoria without permission; and
- obey any instructions given by the Adult Parole Board such as when the offender must be at home and places that the offender must not visit.

The court making an extended supervision order must undertake a review of the order no later than three years after it was made and thereafter at intervals of no more than three years.[201] The Secretary may apply for a renewal of an extended supervision order at any time while it is still in force.[202]

The offender has a right to appeal a decision to make, renew or not to revoke an extended supervision order.[203] Similarly, the Secretary has a right to appeal a decision not to make, not to renew or to revoke an extended supervision order.[204]

As at 18 July 2006, nine Extended Supervision Orders had been granted by the Courts.[205] Eight of these are still in place, with one having been suspended due to the person's reoffending and subsequent return to custody. Only a minority of offenders have contested the application for an extended supervision order in court—most have been made by consent. The conditions that have been made under Extended Supervision Orders include curfews, outings only under escort and accommodation within a temporary centre established by Corrections Victoria.

Issues

The main advantage of supervision in the community is that, as with sex offender registration, it enables the police to monitor the whereabouts of sex offenders and the conditions attached to such orders may aid in reducing reoffending.

A number of issues have been raised in relation to extended supervision orders, in addition to the policy considerations outlined above. It was suggested that offences which should perhaps be included in the extended supervision scheme—such as sex offences against adults—are currently excluded.

It was also suggested that the supervision scheme is expensive and resource intensive, particularly given that extended supervision orders can be up to 15 years and are renewable.

Another issue concerns the conditions that can be imposed in extended supervision orders. Orders can contain highly restrictive conditions which may severely limit offenders' opportunities for normal day-to-day interaction. Offenders who have completed parole and are subsequently placed on an extended supervision order may find the conditions more onerous than their parole conditions. Although restrictive conditions may be considered necessary to protect the community, their effect may be to 'punish' offenders by restricting their liberty at the expense of aiding their rehabilitation and reintegration into the community. There was concern that the number and degree of conditions of an extended supervision order have the potential effectively to transform it into a form of continued detention.

It was said that because conditions can be imposed on an offender who is subject to an extended supervision order under the *Sex Offenders Registration Act 2004* (Vic) as well as the *Serious Sex Offenders Monitoring Act 2005* (Vic), and by the Adult Parole Board, offenders may be confused as to which conditions apply.

Another issue related to the significant problem of finding suitable accommodation for offenders who are on extended supervision orders. Some offenders are socially isolated and do not have family support in the community. Other offenders might have offended within their family which generally would make it inappropriate to send them back to live with family members. Where offenders are housed inside prison grounds, supervision orders may, in effect, operate more like a form of preventive detention.

A concern was expressed that the process for responding to suspected breaches of conditions of extended supervision orders is too cumbersome in comparison to the process for responding to breaches of parole.

It was suggested that consideration should be given to establishing a separate body to monitor extended supervision orders. This would create a clear distinction between the arrangements for monitoring offenders under sentence and on parole and the arrangements in place once an offender's sentence has expired.

Other Approaches to Managing High-Risk Offenders in the Community

A range of other strategies have been introduced in Victoria and elsewhere designed to minimise the risks posed by serious offenders to the community upon their release. These strategies include:

- the establishment of sex offender registers;
- the development of formal arrangements to coordinate more effectively the management of violent and sexual offenders in the community by police, correctional services and others; and
- the introduction of civil orders targeted at serious offenders requiring them to comply with certain conditions.

Sex Offender Registration

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). This provided the impetus for the establishment of a national scheme and all Australian states and territories now have introduced legislation requiring sex offenders on release from prison to register with the Australian National Child Offender Register (ANCOR).[206] This requires the offender to notify police of their address, places they frequent, car registration and other personal details.

In Victoria, the purpose of the *Sex Offenders Registration Act 2005* (Vic) is to require sex offenders to keep the police notified of their whereabouts and inform them of their personal details in order to reduce the likelihood that they will reoffend.[207]

An offender must report to police within 28 days of being sentenced or released from prison.[208] The offender must notify police of his/her name, address, date of birth, distinguishing features such as tattoos, the address at which the offender usually lives and the names and ages of any children who usually live in the same household.[209]

The registered offender must then report annually[210] and report any changes to relevant personal details.[211] The length of the reporting period differs according to the seriousness of the offence committed. The length ranges between eight years and life. The punishment for failing to comply with any reporting obligations without a reasonable excuse is 240 penalty units ($25,783)[212] or imprisonment for two years.

Registered sex offenders are prohibited from child-related employment such as working in schools, clubs, associations and movements that provide services or conduct activities for children, religious organisations, fostering children and baby sitting or child minding services arranged by a commercial agency.[213]

Sex offender registers assist police in monitoring the whereabouts of sex offenders and facilitate the investigation and prosecution of any further offences. However, maintaining such registers can be resource intensive and can add a level of complexity to the conditions imposed in supervising sex offenders under other orders, such as the *Sex Offenders Monitoring Act 2005* (Vic). 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[214] and persons with access must not disclose personal information,[215] concerns may also be raised that registration may lead to 'vigilantism' if the whereabouts of sex offenders is leaked to the public.

Arrangements for the Management of Violent and Sexual Offenders

The United Kingdom has sought to improve arrangements for the management of violent and sexual offenders through the development of more coordinated responses at a local area level. These arrangements were put on a statutory footing in 2000 with the introduction of the *Criminal Justice and Court Services Act 2000* (UK) and have been re-enacted under the *Criminal Justice Act 2003* (UK). These arrangements apply to offenders on licence (parole), subject to extended supervision and to offenders who have reached the end of their sentence but who are still considered at risk of serious offending.

Post-Sentence Options

Section 325 of the *Criminal Justice Act 2003* (UK) makes it mandatory for the police, prison and probation services (acting as the 'responsible authority') in each of the local areas of England and Wales to put in place arrangements for the purpose of assessing and managing the risks posed by violent or sex offenders. These arrangements are generally referred to as 'multi-agency public protection arrangements' (MAPPA). There are requirements for these agencies to monitor the arrangements and to prepare and publish an annual report on their operation.[216] A number of other agencies are required to cooperate with the responsible authority including social services, job centres and local housing and education authorities.

In Scotland the recently established Risk Management Authority is responsible for approving and monitoring risk-management plans developed for those high-risk sexual and violent offenders who are under an Order for Lifelong Restriction, including plans that apply on an offender's release from prison back into the community.

Other Civil Orders

Some jurisdictions in Australia and overseas have introduced specific forms of civil orders that can be applied for, even once an offender is no longer under sentence. For example, Canada has introduced a provision under the *Criminal Code* allowing a judge to impose a peace bond or recognisance based on a reasonable fear that a person might commit a sexual offence against a child under 14 years or a serious personal injury offence.[217] Unlike other forms of civil orders, the risk need not be linked to a particular individual. The order can be made for up to 12 months.[218]

The court can impose a range of conditions including weapons prohibitions, orders to stay away from specific places or persons, requirements to report regularly to police or corrections officials, drug and alcohol prohibitions and curfews. In the case of peace orders imposed on people at risk of committing a sexual offence, conditions can prohibit the person from engaging in any activity that involves contact with persons under the age of 14 years, including using a computer for the purpose of communicating with a person under the age of 14 years or attending places where young people are present or can reasonably be expected to be present, such as daycare centres, schoolgrounds, playgrounds, public parks and community centres.[219] If the person fails or refuses to enter into the recognisance, he or she can be imprisoned for up to 12 months.[220] A breach of the order is punishable by a term of imprisonment of up to two years.[221]

Similar forms of civil orders have been introduced in the United Kingdom for sex offenders with a previous conviction or caution for a sexual offence. These orders, known as sex offender prevention orders, may be made by a court at the time of sentencing or applied for by the police against any sex offender whose behaviour in the community gives reasonable cause to believe that it is necessary for an order to be made.[222] The court must be satisfied that it is necessary to make the order 'for the purpose of protecting the public or any particular member of the public from serious sexual harm from the defendant'.[223]

The order may contain conditions such as prohibiting the offender from frequenting places such as playgrounds or swimming pools, or living with children under 16 years and can also be used to prohibit the offender from attempting to make contact with the victims of the offence from the point of sentence and for a minimum of five years to life upon release. The minimum duration of the order is five years.[224] The maximum penalty for a breach of the order is five years' imprisonment.[225]

The United Kingdom Government recently announced that it will shortly introduce violent offender orders that will operate in a similar way to sex offender prevention orders.[226]

Both New South Wales[227] and Western Australia[228] have introduced child protection prohibition orders which may be applied for by police. An application for these orders can be made in relation to a person who has previously been sentenced for certain offences and who is eligible to be registered on the sex offender registers for those states. The maximum term of these orders is five years or, in the case of a young person, not more than two years.[229]

The court may make the order if satisfied that 'the person poses a risk to the lives or sexual safety of one or more children, or children generally' and 'the making of the order will reduce that risk'.[230] In determining whether the person is a risk, the court is required to take a number of factors into account, including the effect of the order on the person in comparison with the level of the risk that the person might commit another registrable offence.[231]

The orders may prohibit the offender from associating with, or having other contact with specified people or kinds of people, being in specified locations or kinds of locations, or engaging in certain behaviour. The court may also prohibit the person from being in certain types of employment. The maximum penalty for breaching the order is two years' imprisonment.[232] The Queensland Police Minister has announced that similar orders will be introduced in Queensland later this year.[233]

Questions

High-Risk Offenders

1. Which offenders should be considered at high-risk of posing a continued and serious danger to the community upon their release from prison?

2. Are there any other relevant issues in relation to determining who should be considered a high-risk offender?

Measures at or During Sentencing

3. Are reforms required to improve the current approach to the sentencing of high-risk offenders?

4. Are reforms required to improve the current management of high-risk offenders while under sentence?

Post Detention Measures

5. Are there any other issues with the operation of the current scheme for the post-sentence supervision of sex offenders in Victoria that need consideration?

6. Is the current system of extended supervision orders adequate to deal with offenders who have reached the end of their prison sentence but who are considered to pose a continued and serious danger to the community or is a system of continued detention also required in Victoria?

7. If so, what structure should such a post-sentence detention scheme take, including:
    (a) What offences should an order be available for?
    (b) What process for making a continued detention order should be established?
    (b) Which body should be empowered to apply for such an order?
    (c) What should be the criteria for making an order, and what process for assessing an offender against these criteria should be established?
    (d) What body should be empowered to make an order?
    (e) What should the duration of such orders be?
    (g) What processes for review should be in place?
    (h) What processes for appeal should be in place?
    (i) What processes should be in place for the provision of psychiatric and other assessments?
    (j) Are there any other safeguards that could be incorporated into the scheme to ensure that such orders may only be imposed in appropriate circumstances?

8. Are other alternative measures required to supplement the current scheme for post-sentence supervision of high-risk offenders?

9. If a system of continued detention is introduced in Victoria, how could it operate alongside the existing power of the Court to:
    (a) Order an indefinite sentence under the *Sentencing Act 1991* (Vic); and
    (b) Order an extended supervision order under the *Serious Sex Offenders Monitoring Act 2005* (Vic)?

10. Are there other options to the ones explored which would help reduce the risk of serious harm to the community posed by high-risk offenders?

Endnotes

1 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50.

2 Nigel Walker, 'Ethical and Other Problems' in Nigel Walker (ed), *Dangerous People* (1996) 7–8.

3 Only 19 per cent of those surveyed as part of the most recent ABS Personal Safety Survey who had experienced sexual assault in the last 12 months had reported the incident to police: Australian Bureau of Statistics, *Personal* Safety *Australia*, Catalogue 4906.0 (2005) 21.

4 Ibid.

5 For an examination of trends, see Jenny Mouzos, *Homicide in Australia: 2003-2004 National Homicide Monitoring Program (NHMP) Annual Report*, Research and Public Policy Series No. 66 (2005). Mouzos reports that over a third of homicides in 2003-04 involved a falling out between friends or acquaintances or persons in other relationships, such business associates, neighbours or employees/ employers and the majority of these (81%) involved 'male-on-male confrontations'.

6 See, for example, Lenore Simon, 'Matching Legal Policies with Known Offenders' in Bruce Winick and John La Fond (eds) *Protecting Society from Sexually Dangerous Offenders - Law, Justice and Therapy* (1st ed) (2003).

7 See for example, Alison Gray and Michaell Davis, 'Investing in the Future of Children: Building Programs for Children or Prisons for Adult Offenders' in Winick and La Fond (2003), above n 6. The Victorian Government recently announced a $31 million package over four years aimed at reforming the justice system and providing additional services to support victims of sexual assault. This funding includes $1.4 million to run treatment programs for people aged 15 to 18 years aimed at reducing juvenile sexual offending and $2.7 million, which includes new treatment programs for children under 10 with behavioural problems. Source: Department of Justice, '$34.2 Million to Support Victims of Sexual Assault and Child Witnesses', 2006-07 Budget Fact Sheet. http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb236c4180c0a69/ Bring_Justice_To_Sexual_Assault_Victims.pdf at 28 August 2006.

8 See, for example, Danny Sullivan, et al, 'Legislation in Victoria on Sexual Offenders: Issues for Health Professionals' (2005) 183 (6) *Medical Journal of Australia* 318.

9 Productivity Commission, Steering Committee for the Review of Government Service Provision *Report on Government Services 2006* (2006) Table 7A.6.

10 Jean Floud, *Dangerousness and Criminal Justice* (1982) 22 British Journal of Criminology 213, 216.

11 *Sentencing Act 1991* (Vic) s 18B(1).

12 Paul Mullen, 'Dangerousness, Risk and the Prediction of Probability' in Michael Gelder, Juan Lopez-Ibor and Nancy Andreason (eds), *New Oxford Textbook of Psychiatry* (2000) 2066.

13 Walker (1996), above n 2, 7–8.

14 R. Karl Hanson and Monique T Bussière, 'Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies', (1998) 66 *Journal of Consulting and Clinical Psychology* 348.

15 Finbarr McAuley, *Insanity, Psychiatry and Criminal Responsibility* (1993) 7.

16 John Monahan, *The Clinical Prediction of Violent Behaviour* (1981).

17 Henry Steadman, 'From Dangerousness to Risk Assessment of Community Violence: Taking Stock at the Turn of the Century' (2000) 28 (3) *The Journal of the American Academy of Psychiatry and the Law* 265, 266.

18 Bernadette McSherry, *Risk Assessment by Mental Health Professionals and the Prevention of Future Violent Behaviour* (2004).

19 Hanson (2003), above n 14, 67.

20 Richard Rogers, 'The Uncritical Acceptance of Risk Assessment in Forensic Practice' (2000) 24(5) *Law and Human Behavior* 596.

21 Hanson (2003), above n 14, 71.

22 David Ruschena, 'Determining Dangerousness: Whatever Happened to the Rules of Evidence?' (2003) 10 (1) *Psychiatry, Psychology and Law* 122.

23 Ibid 127–128.

24 *Sentencing Act 1991* (Vic) s 5(1)

25 *Sentencing Act 1991* (Vic) s 5.

26 Richard Wortley and Stephen Smallbone, 'Ten Myths About Child Sex Offenders' (Presentation at the Australian and New Zealand Society of Criminology Conference, Hobart, February 2006).

27 Table 1 in the Appendix to this paper sets out the relevant legislative provisions in Australia for the defence of mental impairment.

28 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 20–21. Although the sentencing judge has power to order that the offender be 'released unconditionally, in the vast majority of cases, the judge makes a 'supervision order' which is of indefinite duration. This usually means that the person is kept for treatment at Thomas Embling Hospital which is a 100-bed secure hospital. Section 28 requires a nominal term to be fixed such as 25 years for the offence of murder. Section 35 requires the court that made the supervision order to undertake a major review of the order at least three months before the end of the nominal term of the order and, if the person is still under supervision, then within five year intervals. There is also a system of extended leave available to ease the transition

of the person back into the community. In deciding whether to make, vary or revoke a supervision order, section 39 requires the court to take into account the principle that restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.

29 Source: Tom Dalton and Gerard Mullaly, 'Mental Impairment and the Criminal Law' (Paper delivered to the Victorian Criminal Bar, Melbourne, 2005). Data for 2005 received via email from Tom Dalton, 25 August 2006.

30 *Sentencing Act 1991* (Vic) s 93(1)(d).

31 *Sentencing Act 1991* (Vic) s 93(1)(e).

32 *Wright and Pope* [1980] VR 41.

33 *Sentencing Act 1991* (Vic) s 93(2).

34 *Sentencing Act 1991* (Vic) s 93(3).

35 *Jolly* [1994] VR 446.
Further, the Court must fix a non-parole period (section 93(4)). If the person is discharged from the mental health service at any time prior to the expiration of the fixed period, the person must serve the remainder of that period in prison, unless released on parole (section 93(5)). In Victoria, judges and magistrates are currently able to order mentally ill offenders into a psychiatric hospital for treatment on an indefinite basis. Such offenders can subsequently be placed by the Chief Psychiatrist on Restricted Community Treatment Orders, the purpose of which is to ease mentally ill offenders out of hospital and into the community while still enabling supervision and treatment. The *Sentencing and Mental Health Acts (Amendment) Act 2005* contains a number of amendments to the *Sentencing Act* 1991 and the *Mental Health Act* 1986, most of which will come into effect on 1 October 2006. The key proposed amendments are that judges and magistrates may order that a mentally ill offender be placed on a Restricted Involuntary Treatment Order which means that the person can be detained in an approved mental health service (s 93(4)). Such an order is unavailable for serious offences (s 93(1)) and must specify the duration of the order which must not exceed two years (s 93(3)). In making a Restricted Involuntary Treatment Order, a Court must consider the person's 'current mental condition, his or her medical, psychiatric and forensic history, and his or her social circumstances' (s 93(2)). An authorised psychiatrist or the Chief Psychiatrist may then make a Restricted Community Treatment Order at any time requiring the person concerned to obtain treatment while not detained in an approved mental health service. This means that some mentally ill offenders can be immediately placed on Restricted Community Treatment Orders, bypassing detention as an inpatient in a psychiatric hospital.[36]

36 Dalton and Mullaly (2005), above n 29.

37 In 1997, the Victorian Government extended serious offender provisions to include 'serious arson offenders' and 'serious drug offenders'.

38 *Sentencing Act 1991* (Vic) s 6D(a).

39 *Sentencing Act 1991* (Vic) s 6D(b).

40 *Sentencing Act 1991* (Vic) s 6B(2).

41 *Sentencing Act 1991* (Vic) s 6B(1); Schedule 1, Clause 3.

42 *Sentencing Act 1991* (Vic) s 6E. See also *Sentencing Act 1991* (Vic) s 16.

43 *Habitual Criminals Act 1957* (NSW) s 6.

44 *Habitual Criminals Act 1957* (NSW) s 4(2).

45 David Biles, *Report prepared for the ACT Government on Sentence and Release Options for High-Risk Sexual Offenders* (2005) 14. The scheme reflects mid twentieth-century policies in relation to offenders as reflected in section 7 of the *Habitual Criminals Act 1957* (NSW), which enables the Governor to 'grant to the habitual criminal a written licence to be at large'. The release on licence scheme was abolished in 1989 in favour of determinate parole—*Sentencing Act 1989* (NSW).

46 New South Wales Law Reform Commission, *Sentencing,* Discussion Paper No 33 (1996) [10.19].

47 *Criminal Law (Sentencing) Act 1988* (SA) s 20B. Up until 2003, South Australia also allowed the indeterminate detention of habitual criminals, where there was evidence of repeat convictions for certain violent and other serious offences (*Criminal Law (Sentencing) Act 1998* (SA)). This section was repealed by the *Criminal Law (Sentencing) (Serious Repeat Offenders) Amendment Act 2003* (SA).

48 *Statutes Amendment (Sentencing of Sex Offenders) Act 2005* (SA).

49 Elizabeth Richardson and Arie Freiberg, 'Protecting Dangerous Offenders from the Community: The Application of Protective Sentencing Laws in Victoria' (2004) 4(1) *Criminal Justice* 81.

50 Ibid 88. The cases examined were all cases held in a computer database containing all copies of the sentences handed down in the Supreme and County Court of Victoria for the period stated.

51 Ibid 91.

52 Andrew Ashworth, *Sentencing and Criminal Justice* (2nd ed, 1995); Arie Freiberg, 'Guerillas in our Midst? Judicial Responses to Governing the Dangerous' in Mark Brown and John Pratt (eds), *Dangerous Offenders: Punishment and Social Order* (2000) 51–69.

53 The legislative provisions in each jurisdiction are set out in Table 2 in the Appendix to this paper.

54 *Sentencing Act 1991* (Vic) s 18A.

55 *Sentencing Act 1991* (Vic) s 3(1).

56 *Sentencing Act 1991* (Vic) s 18A(5).
57 *Sentencing Act 1991* (Vic) s 18B(1).
58 *Sentencing Act 1991* (Vic) s 18B(2).
59 *Sentencing Act 1991* (Vic) s 18A(2).
60 *Sentencing Act 1991* (Vic) s 18A(3).
61 *Sentencing Act 1991* (Vic) s 18H(1).
62 *Sentencing Act 1991* (Vic) s 18H(1).
63 *Sentencing Act 1991* (Vic) s 18M.
64 Biles (2005), above n 45, 17.
65 *Sentencing Act 1995* (NT) s 65(1)(a).
66 *Sentencing Act 1995* (NT) s 65(1)(b).
67 *Sentencing Act 1997* (Tas) s 19.
68 *Sentencing Act 1995* (WA) s 98(1).
69 *Penalties and Sentences Act 1992* (Qld) s 163(3)(b).
70 *Penalties and Sentences Act 1992* (Qld) s 163(4).
71 *Sentencing Act 1995* (NT) s 65(9).
72 *Sentencing Act 1997* (Tas) s 19(2).
73 *Sentencing Act 1995* (WA) s 98(2).
74 *Criminal Law Amendment Act 1945* (Qld) s 18.
75 Explanatory Memorandum, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld) 2.
76 Queensland, *Parliamentary Debates,* Legislative Assembly, 3 June 2003, 2484 (Rod Welford, Attorney-General and Minister for Justice).
77 Section 23 of the *Criminal Law (Sentencing) Act 1988* (SA) was cast in similar terms to the Queensland provision, but this was amended by the *Statutes Amendment (Sentencing of Sex Offenders Act) 2005* (SA).
78 *Criminal Law (Sentencing) Act 1988* s 23.
79 *Criminal Law (Sentencing) Act 1988* s 23(6).
80 In *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 486 the majority of the High Court noted that it is possible for Parliament to set up a scheme for indefinite detention. Similarly, Justices Toohey and McHugh in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 97 (Toohey J), 121–122 (McHugh J), accepted that State legislatures may enable State courts to impose indefinite sentences upon those found guilty of an offence.
81 *R v Moffatt* [1998] 2 VR 229.
82 Ibid 251.
83 Ibid 255.
84 See for example *Thompson v The Queen* (1999) 165 ALR 219.
85 *McGarry v The Queen* (2001) 207 CLR 121.
86 Ibid 129.
87 Scottish Executive, *Report of the Committee on Serious Violent and Sexual Offenders* Chairman: Lord Maclean, SE/2000/68 (2000).
88 Scottish Executive, *Risk Management Authority* <http://www.scotland.gov.uk/Topics/Justice/criminal/17309/14128> at 30 July 2006.
89 The risk criteria are 'that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large': *Criminal Procedure (Scotland) Act 1995* s 210E.
90 The exceptions are where the court makes an interim hospital order by virtue of section 210D(1) of this Act in respect of the person; or the person is subject to an order for lifelong restriction previously imposed: *Criminal Procedure (Scotland) Act 1995* s 210B(2)
91 *Criminal Procedure (Scotland) Act 1995* s 210F.
92 *Sentencing Act 1991* (Vic) s 11. Table 3 in the Appendix to this paper provides an overview of the legislation allowing for parole across Australia.
93 *Sentencing Act 1991* (Vic) s 11(1).
94 Adult Parole Board of Victoria, *Annual Report 2004–2005* (2005) 4.
95 Ibid.
96 The Council is an independent statutory body created by the *Crimes (Administration of Sentences) Act 1999 (NSW).*
97 NSW Department of Corrective Services, 'Serious Offenders Review Council', <http://www.dcs.nsw.gov.au/offender_management/SORC/index.asp> (at 25 August 2006).
98 Adult Parole Board of Victoria *(*2005), above n 94, 6.
99 *Crime and Disorder Act 1998* (UK) s 58 (re-enacted as s 85 of the *Powers of Criminal Courts (Sentencing) Act 2000*) and s 86 inserting a new s 210A in the *Criminal Procedure (Scotland) Act 1995*. This sentence is available for crimes committed after 30 September 1998.

100 *Criminal Procedure (Scotland) Act 1995* s 210A.
101 The Extended Sentences for Violent Offenders (Scotland) Order 2003.
102 *Powers of Criminal Courts (Sentencing) Act 2000* s 85(1)(b).
103 Denise Lievore, *Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy: A Report Prepared for the Office of the Status of Women by the Australian Institute of Criminology* (2004) [80] <http://www.aic.gov.au/publications/reports/2003-06-recidivism.pdf>.
104 Ibid.
105 Ibid 89.
106 Ibid 102.
107 Adult Parole Board of Victoria (2005), above n 94, 6.
108 NSW, Qld, SA, Vic, WA (see further Table 5 in the Appendix to this paper). For discussion of the Victorian extended supervision scheme, see page 37.
109 NSW, Qld, WA. South Australia and Queensland have a form of indefinite detention for sex offenders that allows an order to be made at the time of sentencing or during the offender's sentence. In Queensland this scheme operates alongside the scheme under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). See further page 16.
110 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50.
111 *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) s 3.
112 *Dangerous Sexual Offenders Act 2006* (WA) s 4.
113 *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 3.
114 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), Schedule.
115 *Dangerous Sexual Offenders Act 2006* (WA) s 8(1).
116 *Evidence Act 1906* (WA) s 106A.
117 *Crimes (Serious Offenders) Act 2006* (NSW) s 6(1).
118 Explanatory Memorandum, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld) 5.
119 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 5; *Crimes (Serious Offenders) Act 2006* (NSW) s 6.
120 *Dangerous Sexual Offenders Act 2006* (WA) s 8.
121 *Dangerous Sexual Offenders Act 2006* (WA) s 6(1).
122 Queensland Corrective Services.
123 E-mail from Queensland Corrective Services, 22 August 2006.
124 Ibid.
125 Ibid.
126 One of the concerns raised about having a jury make the decision about continued detention is that because a jury does not give reasons for its decision, it would be difficult to review these decisions.
127 See further the discussion of the SORC in the section on parole at page 20.
128 *Serious Sex Offenders Monitoring Act 2005* (Vic) s 11(1).
129 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13.
130 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(2).
131 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(4).
132 *Dangerous Sexual Offenders Act 2006* (WA) ss 7(1)–(2).
133 *Dangerous Sexual Offenders Act 2006* (WA) s 7(1).
134 *Dangerous Sexual Offenders Act 2006* (WA) s 7(3).
135 *Crimes (Serious Offenders) Act 2006* (NSW) ss 17(2)–(3).
136 *Crimes (Serious Offenders) Act 2006* (NSW) s 17(4)(a).
137 *Crimes (Serious Offenders) Act 2006* (NSW) s 17(4)(d).
138 Because determining applications for continued detention involve predicting the level of risk that an offender poses to the community, it could be argued that such a determination could never be reached if the standard of proof required were 'beyond reasonable doubt'. However, the civil standard of proof 'on the balance of probabilities' might be seen as too low a threshold given the serious consequences for an offender of a continued detention order being imposed.
139 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 14; *Dangerous Sexual Offenders Act 2006* (WA) s 25.
140 *Crimes (Serious Offenders) Act 2006* (NSW) s 18(1).
141 *Crimes (Serious Offenders) Act 2006* (NSW) s 18(3).
142 *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 21.
143 *Dangerous Sexual Offenders Act 2006* (WA) s 40.
144 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50.
145 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 8(2); *Dangerous Sexual Offenders Act 2006* (WA) s 14(2); *Crimes (Serious Offenders) Act 2006* (NSW) s 15(4).
146 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 11; *Dangerous Sexual Offenders Act 2006* (WA) s 37.
147 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 27; Dangerous Sexual Offenders Act 2006 (WA) s 29.

148 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 28; *Dangerous Sexual Offenders Act 2006* (WA) s 30. Early review can only be granted after the first annual review has taken place.
149 *Attorney-General for the State of Queensland v Fardon* [2005] QSC 137 (Unreported, Moynihan J, 11 May 2005); *Attorney-General (Qld) v Francis* (2005) 158 A Crim R 399.
150 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 31.
151 *Dangerous Sexual Offenders Act 2006* (WA) s 34.
152 *Crimes (Serious Offenders) Act 2006* (NSW) s 19(1).
153 *Crimes (Serious Offenders) Act 2006* (NSW) s 19(2).
154 *Crimes (Serious Offenders) Act 2006* (NSW) s 18(1).
155 *Crimes (Serious Offenders) Act 2006* (NSW) s 18(3).
156 *Crimes (Serious Offenders) Act 2006* (NSW) s 22.
157 See for example *Attorney-General (Qld) v Francis* (2005) 158 A Crim R 399.
158 E-mail from Queensland Corrective Services, 22 August 2006.
159 States with civil commitment legislation for sexual offenders are Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Jersey, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington and Wisconsin.
160 W Lawrence Fitch and Debra Hammen, 'The New Generation of Sex Offender Commitment Laws: Which States Have Them and How Do They Work?' in Winick and La Fond (2003), above n 6, 28–29.
161 1990 Washington Laws 71.09.030. Mental abnormality is defined as 'a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts': 1990 Washington Laws 71.09.020(2). 'Personality disorder' is not defined: Fitch and Hammen (2003), above n 160, 29.
162 Fitch and Hammen (2003), above n 160, 29.
163 Ibid 33.
164 Ibid 35.
165 John La Fond, 'The Costs of Enacting a Sexual Predator Law and Recommendations for Keeping them from Skyrocketing' in Winick and La Fond, above n 6, 291.
166 Ibid ($70,000 in Arizona; $165,000 in the District of Columbia).
167 Biles (2005), above n 45, 32.
168 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) became law on 25 July 2006.
169 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(1).
170 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(2).
171 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(3).
172 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22(1).
173 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 26.
174 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22(2).
175 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22(3).
176 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 27(2).
177 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).
178 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).
179 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 94.
180 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).
181 Richard Fox, *Victorian Criminal Procedure* (2000) 298.
182 *Veen v The Queen (No 2)* (1988) 164 CLR 465.
183 Ibid 472–475. The majority drew a distinction between merely inflating a sentence for the purposes of preventive detention, which is not permissible, and exercising the sentencing discretion having regard to the protection of society among other factors, which is permissible. Accordingly, an order for indefinite detention at the time of sentencing may be justified on the basis that it is commensurate to the seriousness of the offence committed.
184 Kate Warner, 'Sentencing Review 2002–2003' (2003) 27 *Criminal Law Journal* 325, 338.
185 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50, 72 (emphasis added).
186 *Rohde v DPP* (1986) 161 CLR 119, 128–129; *Pearce v The Queen* (1998) 194 CLR 610, 628.
187 Patrick Keyzer, et al, 'Pre-Emptive Imprisonment for Dangerousness in Queensland Under the *Dangerous Prisoners (Sexual Offenders) Act 2003:* The Constitutional Issues' (2004) 11 (2) *Psychiatry, Psychology and Law* 244, 250.
188 *Fardon v Attorney-General* (Qld) (2004) 210 ALR 50, 72. Justice Gummow said that instead, it set up its own 'normative structure'. He did not go on to explain this. At the same time, he emphasised that the preventive detention regime was consequential to a finding of guilt. There was 'a connection between the operation of the Act and anterior conviction by the usual judicial processes': at 80.
189 Ibid 101 (footnotes omitted).
190 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27, Brennan, Deane and Dawson JJ.
191 Ibid 33. The list of exceptions to the general rule was never meant to be exhaustive. Both Justices Gaudron and McHugh in *Lim's* case referred to the possibility of other forms of detention to achieve some legitimate non-punitive object: at 27, 55, 71.

192 *Al-Kateb v Godwin* (2004) 208 ALR 124, 159. In *Fardon's* case, Justice Gummow again referred to the punitive/non-punitive dichotomy as a concept fraught with difficulty given the multiplicity of accepted sentencing objectives: *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50, 74-75. However, it could be argued that this ignores the *effect* of the preventive detention.
193 Ibid 92–93.
194 Victoria, New South Wales, Queensland, South Australia and Western Australia. The legislative provisions for these schemes are set out in Table 4 in the Appendix to this paper.
195 *Serious Sex Offenders Monitoring Act 2005* (Vic) s1.
196 *Serious Sex Offenders Monitoring Act 2005* (Vic) s14.
197 *Serious Sex Offenders Monitoring Act 2005* (Vic) Schedule to s 3(1).
198 *Serious Sex Offenders Monitoring Act 2005* (Vic) ss 6–7.
199 *Serious Sex Offenders Monitoring Act 2005* (Vic) s 11(1).
200 *Serious Sex Offenders Monitoring Act 2005* (Vic) s 15.
201 *Serious Sex Offenders Monitoring Act 2005* (Vic) ss 21(1)(a)–(b).
202 *Serious Sex Offenders Monitoring Act 2005* (Vic) s 24(1).
203 *Serious Sex Offenders Monitoring Act 2005* (Vic) s 36.
204 *Serious Sex Offenders Monitoring Act 2005* (Vic) s 37.
205 Corrections Victoria, letter dated 31 July 2006.
206 Table 5 in the Appendix to this paper sets out the relevant legislation in Australian jurisdictions.
207 *Sex Offenders Registration Act 2005* (Vic) s 1.
208 *Sex Offenders Registration Act 2005* (Vic) s 12.
209 *Sex Offenders Registration Act 2005* (Vic) s 14.
210 *Sex Offenders Registration Act 2005* (Vic) s 16.
211 *Sex Offenders Registration Act 2005* (Vic) s 17.
212 The value of a penalty unit fixed under section 6 of the *Monetary Units Act 2004* (Vic) for the financial year commencing 1 July 2006 is $107.43: *Victorian Government Gazette*, 6 April 2006, 680.
213 *Sex Offenders Registration Act 2005* (Vic) ss 67–68.
214 *Sex Offenders Registration Act 2005* (Vic) s 63.
215 *Sex Offenders Registration Act 2005* (Vic) s 64.
216 *Criminal Justice Act 2003* (UK) s 326.
217 *Criminal Code*, RSC 1985, c 46, ss 810.1 (sexual offences against children) and 810.2 (serious personal injury offence).
218 *Criminal Code*, RSC 1985, c 46, s 810.1(3).
219 *Criminal Code*, RSC 1985, c 46, s 810.1(3).
220 *Criminal Code*, RSC 1985, c 46, ss 810.1(3.1) (sexual offences against children) and 810.2(4) (serious personal injury offence).
221 *Criminal Code*, RSC 1985, c 46, s 811.
222 *Sexual Offences Act 2003* (UK) c 42, s 104.
223 *Sexual Offences Act 2003* (UK) c 42, s 104(1)(b).
224 *Sexual Offences Act 2003* (UK) c 42, s 107.
225 *Sexual Offences Act 2003* (UK) c 42, s 113.
226 Home Office, *Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority: Cutting Crime, Reducing Offending and Protecting the Public* (2006) 6.
227 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW).
228 *Community Protection (Offender Reporting) Act 2004* (WA) Part 5.
229 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 6; *Community Protection (Offender Reporting) Act 2004 (WA)* s 91.
230 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5(1); *Community Protection (Offender Reporting) Act 2004* (WA) s 90(1).
231 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 5(3); *Community Protection (Offender Reporting) Act 2004* (WA) s 90(3).
232 *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) s 13(1).
233 Rosemary Odgers, 'Tags for Pedophiles', *The Courier Mail* (Brisbane), 11 July 2006.

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Table 1: The Defence of Mental Impairment / Mental Disorder

Jurisdiction	Act	Section
ACT	Criminal Code	28
CTH	Criminal Code	7.3
NSW	The common law *M'Naghten Rules* apply	
NT	Criminal Code	43C
QLD	Criminal Code	27
SA	*Criminal Law Consolidation Act 1935*	269C
TAS	Criminal Code	16
VIC	*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*	20
WA	Criminal Code	27

Table 2: Legislation Enabling Indefinite Detention

Jurisdiction	Act
NT	*Sentencing Act 1995* - s 65 (violent offenders convicted of a crime for which a life sentence may be imposed can be sentenced to an indefinite term of imprisonment by the Supreme Court, where the court considers the prisoner to be a serious danger to the community).
QLD	*Penalties and Sentences Act 1992* - s 163 (violent offender who presents a serious danger to the community can be detained indefinitely). *Criminal Law Amendment Act 1945* – s 18 (sex offender incapable of exercising control over sexual instincts).
SA	*Criminal Law (Sentencing) Act 1988* - s 23 (sex offender incapable of controlling or unwilling to control sexual instincts).
TAS	*Sentencing Act 1997* - s 19 (dangerous offender convicted of a violent crime).
VIC	*Sentencing Act 1991* - s 18A (offender convicted of a serious offence and high probability that offender is a danger to the community).
WA	*Sentencing Act 1995* - s 98 (superior court may impose indefinite imprisonment where if released, the offender would pose a danger to society).

Appendix

Table 3: Australian Parole Provisions

Jurisdiction	Act	Sections
ACT	*Crimes (Sentence Administration) Act 2005*	Chapter 7
CTH	*Crimes Act 1914*	Part 1B, Div 5
NSW	*Crimes (Administration of Sentences) Act 1999*	Part 6
NT	*Parole of Prisoners Act 1971*	S 5
QLD	*Corrective Services Act 2000*	Chapter 5
SA	*Correctional Services Act 1982*	Part 6
TAS	*Corrections Act 1997*	Part 8
VIC	*Corrections Act 1986*	Part 8, Div 5
WA	*Sentence Administration Act 2003*	Ss 13-48.

Table 4: Provisions for the Post-Sentence Supervision of Sex-Offenders

Jurisdiction	Act	Section(s)
NSW	*Crimes (Serious Sex Offenders) Act 2006*	6 to 13
QLD	*Dangerous Prisoners (Sexual Offenders) Act 2003*	13
SA	*Criminal Law (Sentencing) Act*	24
VIC	*Serious Sex Offenders Monitoring Act 2005* Nb note the Corrections And Other Justice Legislation (Amendment) Bill – second reading 9 August 2006.	5
WA	*Dangerous Sexual Offenders Act 2006*	17(1)(b)

Table 5: Australian National Child (Sex) Offender Register

Jurisdiction	Act	Section	Register
ACT	*Crimes (Child Sex Offenders) Act 2005*	117–122	Child Sex Offenders Register
NSW	*Child Protection (Offenders Registration) Act 2000*	19–19B	Child Protection Register
NT	*Child Protection (Offender Reporting And Registration) Act 2004*	64–68	Child Protection Offender Register
QLD	*Child Protection (Offender Reporting) Act 2004*	68–74	Child Protection Register
SA	Child Sex Offenders Registration Bill 2006[1]	60-63	Register of Child Sex Offenders
TAS	*Community Protection (Offender Reporting) Act 2005*	42-45	Community Protection Offender Register
VIC	*Sex Offenders Registration Act 2004*	62–66D	Sex Offender Register
WA	*Community Protection (Offender Reporting) Act 2004*	80–84	Community Protection Offender Register

Notes:
1 Laid on the table and read a first time 21 June 2006.