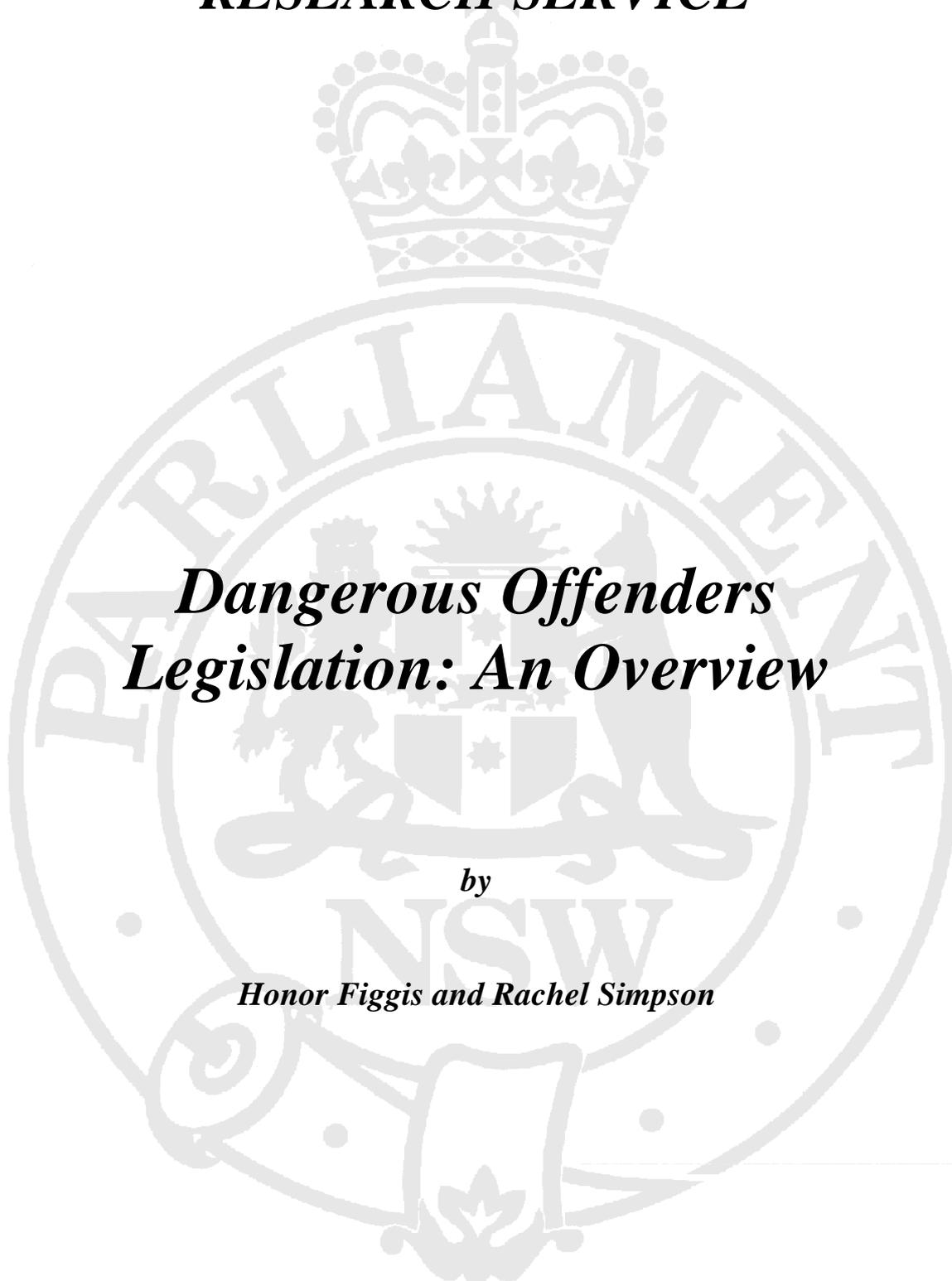


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***Dangerous Offenders  
Legislation: An Overview***

*by*

*Honor Figgis and Rachel Simpson*

***Briefing Paper No 14/97***

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## ***EXECUTIVE SUMMARY***

There are relatively few offenders who are ‘dangerous’ in the sense that they pose a continuing real danger of serious harm to members of the public. Most serious crimes against the person are committed by people who have not previously offended, and most offenders convicted of violent offences do not repeat their crimes. However, there are a small number of ‘career’ violent offenders who do present a continuing risk (pp 9-11).

The *concept of dangerousness* is ambiguous and subjective - what is dangerous depends on what one is prepared to put up with. Attempts to define ‘dangerousness’ raise a number of questions, including what kinds of harm are ‘serious’, and how likely a person must be to cause such harm in order to be classed as dangerous. Most dangerous offender legislation is aimed at people who pose a real risk of inflicting serious physical harm on others, such as murder, attempted murder, and violent and sexual assaults. The kinds of serious harm which attract protective measures often also include arson, robbery and drug trafficking offences (pp 6-7)

***‘Dangerous offender’ laws are generally aimed at protecting the public by removing persons identified as dangerous from the community.*** The focus of these laws tends to be on incapacitation of offenders rather than punishment or treatment/rehabilitation, although these last two approaches are often combined with incapacitating measures. Incapacitation may be selective (aimed at particular offenders individually assessed as dangerous) or general (aimed at groups of offenders on the basis of their offences). Dangerous offender measures take several forms:

- ***Protective sentencing*** involves imposing sentences that detain certain offenders for longer than their offences would otherwise justify. These measures include sentencing dangerous offenders on the basis of special sentencing principles; indefinite sentences; mandatory or minimum sentences; cumulative sentences; recidivism laws; life imprisonment without parole; and creating offences that may warn of the potential for grave harm, such as the making of mass threats (pp 14-25).
- ***Restricting or abolishing parole*** involves making it more difficult for offenders to be released early by tightening the criteria for parole, setting long non-parole periods, establishing a presumption against parole, or otherwise limiting the ability of the Parole Board to grant parole. Parole may also be abolished for offenders to ensure that they serve their total sentence (pp 25-32).
- ***Preventive detention*** involves detaining persons to prevent them committing future grave harms. It is usually a post-sentence measure used to incapacitate persons who have served their sentence and so must be released, and who cannot be detained involuntarily under mental health laws. Preventive detention measures vary from clinically-based detention in hospitals, asylums and so on to incapacitation-based detention in prison or civil institutions (pp 32-39).

- ***Supervision in the community*** involves monitoring and controlling offenders who have been released, in order to limit their opportunities to commit further crimes. These measures include community notification of the presence of an offender, and long-term parole supervision (p 39).

Dangerous offender measures raise a number of issues. There is the practical problem of ***predicting dangerousness***. Mental health professionals and other experts are not able to predict accurately which offenders will commit violent acts. Research studies have indicated that assessments of individuals as ‘dangerous’ are more likely to be wrong than right, and that there is a tendency to over-predict dangerousness (that is, to identify people as dangerous who do not, in fact, go on to injure others) (pp 9-11)

***Detaining persons to prevent future crimes*** also poses an ethical problem of incarcerating individuals for crimes that they have not committed, and may well not commit. Detention of offenders solely for the purpose of community protection involves a choice between possible grave injury to members of the public and certain deprivation of liberty for offenders whose future conduct can only be estimated. Many argue that because offenders have already committed a serious offence, they forfeit the presumption that they are free of harmful intentions. It may therefore be justifiable to favour the potential victims and burden the known offender (pp 11-13).

There is also the question of whether dangerous offender legislation will in fact have an ***effect on public safety***. It seems that a policy of detaining dangerous offenders for longer than their offences would otherwise justify is unlikely to reduce significantly the number of grave crimes against the person (pp 13-14). Some commentators have questioned whether ***public alarm*** in itself justifies exceptional protective measures regardless of whether the alarm is reasonable or excessive (p 14). It has also been argued that statutory powers to detain persons other than by the normal processes of the criminal law may be ***open to abuse*** for political purposes, to suppress awkward dissidents or opponents (p 14).

Other issues raised by dangerous offender legislation include:

- ***Role of judicial and executive discretion*** : The legislature’s role in sentencing has traditionally been to set maximum sentences and articulate sentencing policies. To what extent should the legislature direct the exercise of the judicial sentencing discretions, or executive government discretions such as decisions to grant parole? (p 39).
- ***Constitutional limitations*** : The New South Wales Parliament’s ability to enact some forms of preventive detention is restricted by the High Court decision in *Kable v DPP*. Other possible options include individual-specific legislation directly detaining particular offenders, and a preventive detention system administered by the executive government (pp 35-38).



## 1. INTRODUCTION

There has been much public concern in recent years that serious violent or sexual offenders whom some consider pose an unacceptable risk to the community are being released from prison on parole or at the end of their sentences. These are offenders who are legally sane, but whose past crimes or present mental condition raise fears that if released they are likely to inflict serious physical harm on members of the public. This briefing paper looks at a range of legislative measures designed to prevent, temporarily or permanently, violent or sexual offenders injuring others. It does not discuss developments in the treatment of offenders, nor does it discuss capital punishment.<sup>1</sup>

Three general approaches to dealing with dangerous offenders have been identified: treatment, just deserts, and community protection.<sup>2</sup>

- The *treatment* model of dangerousness assumes that those who commit serious violent offences suffer from an individual pathology. The focus is on treatment or rehabilitation to reduce the risk of reoffending. Punishment has no place in this approach, as it will do nothing to stop a person whose criminal behaviour is the result of a psychological or biological problem.
- The *just deserts* model deals with offenders on the basis of their past crimes, not on the basis of their individual character or pathology. The focus is on punishment, with offenders receiving sentences that are proportional to the crimes.
- The *community protection* model developed in the 1980s as a result of perceptions that public safety was in jeopardy and that community and victim needs were being overlooked in favour of offenders' civil rights. Community protection measures focus on incapacitating offenders with histories of or dispositions towards serious violence. Incapacitation can either be *general*, that is, aimed at preventing crime by taking a group of offenders out of the community, or *selective*, that is, aimed at incapacitating individual offenders who are assessed as dangerous in character.

While elements of all three approaches are present in the New South Wales penal system, there has been an increasing emphasis on community protection in legislation and policy. This has been accompanied by an increasing legislative involvement in the sentencing and incarceration of offenders. Traditionally, it has been the role of

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<sup>1</sup> For a discussion of capital punishment see Gilbert C, *Capital Punishment in NSW*, New South Wales Parliamentary Library Background Paper 1993/1.

<sup>2</sup> Petrunik M, *Models of Dangerousness: A cross jurisdictional review of dangerousness legislation and practice*, Ottawa: University of Ottawa, Criminology Department, 1994, as summarised in *Dangerous Offender Legislation Around the World: Directions for Canada*, publication of the John Howard Society of Alberta, <http://www.acjnet.org/docs/danger.html#intro>.

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Parliament to set maximum sentences and to articulate sentencing policies. The judiciary carried out the sentencing of offenders, and the executive government determined when offenders would be released from prison. However, in recent years the legislature has taken more responsibility for the sentencing and release processes. To some extent this has been as a response to the community protection and victims' rights movements. In comparison with other Australian states, however, New South Wales has relatively little legislation directly aimed at dangerous offenders.

Section 2 of this paper discusses the concept of 'dangerousness' (pp 6-9). Section 3 outlines some general ethical and other problems raised by the detention of offenders for the purpose of community protection (pp 9-14). The paper then considers a range of special community protection measures arising at several points in the criminal justice system:

- *At the time of sentencing.* Sentencing measures aimed at incapacitating dangerous offenders include indefinite sentences and mandatory sentences - Section 4, '**Protective sentencing**' (pp 15-25).
- *At the time of eligibility for parole (if available).* Measures to prevent imprisoned dangerous offenders being released before the end of their sentence are discussed in Section 5, '**Restriction or abolition of parole**' pp (25-32).
- *At the end of a sentence of imprisonment.* Post-sentence detention of dangerous offenders is discussed in Section 6, '**Preventive Detention**' (pp 32-38). Section 7, '**Supervision in the community**' outlines some options for controlling and monitoring released offenders (pp 38-39).

Section 6 briefly considers *mentally disordered offenders*, in particular some issues relating to 'psychopaths' (persons suffering from severe personality disorder manifesting as aggression, irresponsibility, indifference and destructiveness) (pp 33-35).

## 2. CONCEPT OF DANGEROUSNESS

Although 'dangerousness' can be said to involve the likelihood that a person will inflict serious harm on another, it is notoriously difficult to define exactly what the elements of 'dangerousness' are. The concept and its implications for the criminal law were discussed in detail in a United Kingdom report in 1981 (the Floud Report).<sup>3</sup> Danger, notes Floud, 'is a thoroughly ambiguous concept, and we may well ask whether it has any place in the administration of criminal justice, and, if it be conceded that it has, how

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<sup>3</sup> Floud J and Young W, *Dangerousness and Criminal Justice*, Heinemann 1981 (Report of the Working Party of the Howard League for Penal Reform). The report and some critical responses to it are summarised in Floud J, 'Dangerousness and Criminal Justice', (1982) 22 *British Journal of Criminology* 213.

are we to define and identify “dangerous” offenders for legal purposes’.<sup>4</sup> Floud went on to observe that: ‘The question of penalties for serious offences - even for the worst cases of such offences - must not be confused with the question of protecting the public from the few serious offenders who *do* present a continuing risk and who *are* likely to cause further serious harm’.<sup>5</sup> This was based on the observation that few serious offenders repeat their serious offences, so that there is no reason, in most cases, to keep them out of circulation on that account for very long periods of time.

In fact, it has been argued that the concept of dangerousness is ‘so insidious that it should never be introduced in penal legislation’.<sup>6</sup> Floud states that ‘dangerousness’ is a concept which is not at all objective, since what is dangerous is a matter of judgement or opinion - a question of what one is prepared to put up with.<sup>7</sup> The Floud Report, having cited the problems of definition and prediction, commented:

It is worth noting that no-one dismisses the practical problem. That is, no-one denies the existence of a minority of serious offenders who present a continuing risk. The argument is all about degrees of risk, perceptions of danger and justifiable public alarm, the difficulty of deciding whether or not someone is ‘dangerous’ and the legitimacy of confining people for what they *might* do as well as for what they have actually done.<sup>8</sup>

Attempts to determine if a person is ‘dangerous’ raise a number of difficult questions, including:

- What constitutes ‘serious harm’?
- How likely must it be that the offender will cause serious harm?<sup>9</sup>
- How can the likelihood of the offender causing serious harm be predicted?<sup>10</sup>

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<sup>4</sup> Floud J, ‘Dangerousness and Criminal Justice’, (1982) 22 *British Journal of Criminology* 213 p 214.

<sup>5</sup> Floud, n 4, p 216.

<sup>6</sup> L Radzinowicz and R Hood, ‘A dangerous direction in sentencing reforms’, [1981] *Criminal Law Review* 713 p 722.

<sup>7</sup> Floud, n 4, p 213.

<sup>8</sup> *Ibid*, p 216.

<sup>9</sup> Walker suggests a ‘typology of dangerousness’: The individual who harms others only if accidentally brought into a situation of provocation or sexual temptation; the individual who gets into such situations not by chance, but by following inclinations; the individual who is constantly on the lookout for opportunities for offending; and the individual who creates opportunities for re-offending: Walker N, ‘Dangerous Mistakes’ , (1991) 158 *British Journal of Psychiatry* 752.

<sup>10</sup> See section 3.1 for a discussion of predictions of dangerousness.

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On the question of what constitutes ‘*serious harm*’, there is no doubt that a person who is likely to kill another, or commit a serious physical injury or sexual assault is a danger to members of the public. Beyond these basic offences, however, it becomes less clear what potential harms make an offender ‘dangerous’. Not all activities resulting in serious physical harm attract similar levels of community concern. Floud asks, ‘Why is it that when someone mentions ‘dangerous offender’ we do not immediately think of drunken drivers, keepers of unsafe factories, tippers of toxic waste, vendors of unsafe cars or harmful pharmaceutical products?’<sup>11</sup>

Among the crimes included in various categories of ‘serious offences’ or ‘serious harms’ have been those resulting in:<sup>12</sup>

- death;
- serious bodily injury;
- serious sexual assault;
- severe or prolonged pain or mental stress;
- lasting psychological damage;
- loss or damage to property which causes severe personal hardship;
- damage to the environment which has a severely adverse effect on public health or safety,
- serious damage to the security of the state.

It would be difficult to find a consensus that all these harms justify special incapacitating measures beyond those provided by the general criminal law. For example, the Social Development Committee of the Victorian Parliament considered that a risk of causing psychological damage should not be sufficient to classify an offender as dangerous.<sup>13</sup>

Walker has commented that although dangerous offender legislation contains lists of crimes which qualify for precautionary sentencing, there have been very few attempts to state the principles upon which these selections are based.<sup>14</sup> The elasticity and subjectivity of terms such as ‘dangerous’, ‘violent’ and ‘serious’ allow them to be applied to a wide range of acts. For example, in Queensland the category of ‘serious violent offences’ was recently expanded to include (among other offences) unlawful assembly, bomb hoaxes, some burglaries, and carrying on the business of trafficking in a dangerous drug.<sup>15</sup>

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<sup>11</sup> Floud, n 4, p 214.

<sup>12</sup> Ibid, pp 221-222. See also Section 4 below.

<sup>13</sup> Social Development Committee, Parliament of Victoria, *Inquiry into Mental Disturbance and Community Safety: Interim Report: Strategies to deal with persons with severe personality disorder who pose a threat to public safety*, May 1990 pp 11-12.

<sup>14</sup> Walker N (ed), *Dangerous People*, Blackstone Press Ltd, 1996 p 10.

<sup>15</sup> *Penalties and Sentences Act 1992* (Qld), Schedule.

### 3. *SOME ISSUES RAISED BY PRECAUTIONARY DETENTION OF OFFENDERS*

One of the basic legal tenets inherited from the English common law is that citizens should only be deprived of their liberty as punishment for what they have done, not for what they may do in the future. However, the community protection movement has led to a range of legislative provisions that allow some offenders to be detained, in the public interest, for longer than their particular offence would otherwise justify.

These provisions usually take the form of protective sentencing or preventive detention. *Protective sentencing* involves imposing sentences whose principal objects include protecting the public by incapacitating offenders. Examples are indefinite sentences and life sentences without parole (see Section 4 below). *Preventive detention* is the incarceration of a person for the sole purpose of removing that person from the community, usually due to a fear of criminal conduct.<sup>16</sup> Preventive detention is not a sentence imposed as punishment for a crime; it is generally used when a high-risk offender has completed a sentence of imprisonment and is due to be released from prison (see Section 6). This section considers issues relating to both protective sentencing and preventive detention.

#### 3.1 *Predicting dangerousness*<sup>17</sup>

One of the major difficulties in dealing with ‘dangerous’ offenders is the problem of accurately predicting which offenders are likely to inflict serious physical harm on others. Most serious crimes against the person are committed by people who have not been detected in previous offending (or at least, not in anything worse than dishonesties or traffic offences).<sup>18</sup> Most offenders convicted of violent offences do not repeat their serious offences (although recidivism varies between offences; for example, homicide offenders have a low re-offending rate, while those convicted of assault have a higher rate of recidivism<sup>19</sup>).

The ‘dangerous’ person with a career of seriously injuring others is relatively rare, and virtually impossible to identify in advance. Research studies have pointed consistently to the conclusions that individual assessments of dangerousness are more likely to be

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<sup>16</sup> New South Wales Law Reform Commission, *Sentencing*, Discussion Paper No 33, April 1996 p 235.

<sup>17</sup> This section is largely drawn from Griffith G, *The Habitual Criminals Act 1957: A Commentary on Issues Relating to Persistent and Dangerous Offenders*, NSW Parliamentary Library Briefing Paper No 19/94 pp 18-19.

<sup>18</sup> Walker, n 14, p 8.

<sup>19</sup> Thompson B, *Recidivism in NSW: General Study*, NSW Department of Corrective Services Research Publication No. 31, May 1995, p 39; see also Floud, n 4, p 216.

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wrong than right, and that errors largely result from the exercise of excessive caution.<sup>20</sup> According to Ashworth, the Floud Report's survey of the available studies into dangerousness and recidivism revealed that no method of prediction had managed to do better than a 50 per cent success rate in predicting 'dangerousness'.<sup>21</sup> A fifty per cent success rate represents one false positive for every true positive predicted. Indeed, many of the prediction methods have only a one-third success rate.

The point is made in an Australian context that the mental health and behavioural science professions have as yet been unable to demonstrate an effective technology for distinguishing violent offenders who will recidivate from those who will not.<sup>22</sup> The issues of definition and prediction were reviewed in great detail in the 1992 inquiry of the Victorian Parliament's Social Development Committee on the Draft Community Protection (Violent Offenders) Bill. The Bill, which was clearly informed by the situation relating to Garry David (see p 36), applied to offenders who had committed specified serious offences and were considered to be dangerous because of a severe personality disorder. The Committee's Second Report set out the submissions it received, many of which were from leading commentators in the field.<sup>23</sup> The Committee's own conclusions were then set out in its Third Report of April 1992. It found, among other things, that criminological and psychiatric research and literature did not support the provisions and premises of the Draft Bill. The Committee concluded that the criterion of two prior violent offences is an indicator of the increased likelihood of committing further violent offences, but professionals have only a one in three chance of accurately predicting who will reoffend.

There remains considerable debate about the efficacy of predictions of dangerousness. While no-one claims that it is possible to identify with certainty offenders who will commit serious acts of violence, it has been argued that:

If one is dealing with an individual who has committed violent crimes in the past and he indicates he will commit violent crimes when he next gets a chance and is regarded by experienced psychiatrists as being very likely to carry out his threats, the probabilities are that one has on one's hands an individual who is

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<sup>20</sup> Baker E, 'Dangerousness, Rights and Criminal Justice', (1993) 56 *Modern Law Review* 528.

<sup>21</sup> Ashworth A, *Sentencing and Criminal Justice* Weidenfeld and Nicolson, 1992 p 160. See also Brody S and Tarling R, *Taking Offenders Out of Circulation*, Home Office Research Study No 35, 1981 pp 29-30.

<sup>22</sup> Mals P and Grantham G, "Queensland Boards a Sinking Ship: New Dangerous Offenders Legislation" (1993) 10 *Alternative Law Journal* 17 p 19.

<sup>23</sup> Social Development Committee, Parliament of Victoria, *Inquiry Into Mental Disturbance and Community Safety*, Second Report, 1992.

likely to be dangerous.<sup>24</sup>

It has been observed that ‘a review of the more responsible literature on the subject would make it clear that dangerousness cannot be predicted but rather that people can be assigned to probability groups on the basis of their present behaviour, its antecedents and if relevant, a psychiatric diagnosis’.<sup>25</sup>

### 3.2 *Detaining offenders for what they might do*

At common law, the courts cannot incarcerate a person simply to incapacitate him or her. Any sentence must be proportional to the crime, neither more or less severe than is warranted. This principle was affirmed by the High Court in *Veen (No 2)*,<sup>26</sup> holding that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender. A disproportionately long sentence imposed in order to incapacitate a dangerous offender would, it is said, amount to a sentence for a crime the offender did not commit, and which he or she may well not have committed.

The Floud Report argued that the protective detention of dangerous persons can be justified, despite the problems of over-prediction of dangerousness, and the ethical difficulty of detaining people for what they may do.<sup>27</sup> The Floud Report was informed by an ethical approach structured around two key principles: the principle of ‘just redistribution of risk’, and the principle that the citizens of a free society have the right to be presumed free of harmful intentions. The just redistribution of risk is between a known offender and a potential victim of a predicted offence. The Report refers to the making of a moral choice between competing claims: the claim of a known individual offender not to be unnecessarily deprived of his liberty; and the claim of an innocent (unconvicted), unknown person (or persons) not to be deprived of the right to go about their business without risk of grave harm at the hands of an aggressor. The Report asks, who should bear the risk? It is argued that the committing of a serious crime negates the presumption that the person responsible is free of harmful intentions. It may therefore be justifiable to redistribute the risk of future harms by favouring the potential victims and by burdening the known offender. Thus, a just redistribution of risk could be undertaken in favour of potential victims.

In response, Ashworth suggests that arguably the right to be presumed free from harmful

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<sup>24</sup> Evidence to the Victorian Social Justice Committee, Social Development Committee, Parliament of Victoria, *Inquiry into Mental Disturbance and Community Safety: Interim Report*, n 13, p 15.

<sup>25</sup> Leighton I, ‘Dangerousness - easy to misuse’, *Community Care*, 8 February 1990.

<sup>26</sup> (1988) 164 CLR 465 at 472 per Mason CJ, Brennan, Dawson and Toohey JJ.

<sup>27</sup> Floud, n 4. This section is largely drawn from Griffith G, *The Habitual Criminals Act 1957: A Commentary on Issues Relating to Persistent and Dangerous Offenders*, n 17, p 20.

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intentions should not be extinguished for ever if a person commits a grave crime.<sup>28</sup> Baker further points out that:<sup>29</sup>

Utilitarians have constructed elaborate arguments regarding the comparative costs and benefits of the certain harm resulting from the release of an individual incorrectly judged to be 'safe' and the uncertain harm arising from the prolonged detention of an individual erroneously perceived to be dangerous. However, it remains an uncomfortable truth that, while the former attract considerable public concern, the latter remain largely inconspicuous. This is not least because detention denies them an opportunity to establish the accuracy of the judgment made about them one way or the other.

**Civil detention** : Much of the opposition to preventive detention is based on the concept that it amounts to punishing offenders for what they may do, not what they have done. It has been suggested by many that a solution is to develop a form of *civil*, non-punitive detention of dangerous offenders, as opposed to detention in a prison. This form of detention, it is argued, is analogous to quarantining of persons with infectious diseases, or compulsory detention of the mentally ill.<sup>30</sup>

Civil detention of this kind would be based solely on considerations of danger to the public, not on moral culpability. Some support for a statutory system of this type was expressed by Deane J in a dissenting judgment in *Veen (No 2)*:<sup>31</sup>

The protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence. Such a statutory system could, one would hope, avoid the disadvantages of indeterminate prison sentences by being based on periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatric and other experts.

However, others have criticised the idea that detention in a civil institution is non-punitive:

The essence of incarceration from a punitive point of view is the deprivation of

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<sup>28</sup> Ashworth, n 21, p 162.

<sup>29</sup> Baker, n 20, pp 546-7.

<sup>30</sup> Wood D, 'The Morality of Protective Sentencing', [1988] *Criminal Law Review* 424 pp 430-431.

<sup>31</sup> (1988) 164 CLR 465 at 495.

liberty, and this is in no way lessened by claiming the incarceration is civil. When a person is sent to prison following conviction for an offence, tremendous variations exist as to the nature of the institution to which he or she will be committed, and the form that incarceration will take. Ideally, the form of imprisonment will be the least harsh that can be imposed having regard to the need to prevent the particular individual from escaping or from doing further harm while incarcerated. In the case of a person said to be detained civilly precisely similar considerations would apply. Such incarceration is, accordingly, properly classified as a form of preventive detention akin to imprisonment. To make use of less harsh sounding labels is merely to seek to escape from the gravity of the issues inevitably involved in arguing in support of preventive detention.<sup>32</sup>

### 3.3 *Effect on public safety*

As noted at 3.1 above, most serious crimes against the person are committed by people who have not been detected in previous offending, and most offenders convicted of violent offences do not repeat their serious offences. It is said that the contribution of repeat violent offenders to serious violent crime in the community is very small.<sup>33</sup> Many argue that imposing longer sentences or refusing or delaying parole for these offenders would result in great financial cost to the prison system, but would not significantly reduce the number of serious violent crimes committed:

To protect the community from a few who do re-offend violently by imprisoning them for longer periods, much larger numbers must be held for longer periods than would otherwise be imposed. Ultimately, the few who would have been violent are released, with any propensity for violence unchanged, so that the best that has been achieved is delay.<sup>34</sup>

The Victorian Sentencing Committee stated that:

Research evidence simply does not support the view that by pursuing a policy of incapacitating groups of offenders, there will be any discernible drop in crime rates. So the old notion of extended or enhanced sentences for recidivists or sex offenders or the like, with the sole aim of reducing crime by incapacitating those offenders have now fallen into disrepute in most jurisdictions. They have tended to be replaced by an approach of selected incapacitation which aims at a very small group of offenders who are chosen on the basis of their particular

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<sup>32</sup> Williams CR, 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case', (1990) 16 *Monash University Law Review* 161 p 179.

<sup>33</sup> Ward P and Porritt, D, *Violent Offences and Recidivism*, NSW Department of Corrective Services Research Bulletin No 9, June 1982.

<sup>34</sup> *Ibid.*

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characteristics.<sup>35</sup>

The effectiveness of an individualised, selective approach to detention has also been questioned, on the basis of the relative rarity and difficulty of identifying a ‘dangerous type’ of person.<sup>36</sup>

It has said that there is, in general, adequate scope under conventional sentencing powers to ensure that those with prior criminal records will serve longer terms in prison.<sup>37</sup> If those whose crimes inflict grave harm are simply given the ordinary sentences which are regarded as appropriate to those crimes, any crimes which they commit after their eventual release would make a negligible addition to the volume of really harmful crimes. In response, Walker makes the point that when the subject of discussion is the prevention of murders, rapes, and other grave crimes against the person, it requires courage to call any percentage of crimes ‘negligible’.<sup>38</sup> The questions arise: how large a reduction in grave crimes would justify a policy of extended detention? Should the question be one of how best to use limited resources?

### 3.4 *Public alarm*

In some sections of the community, fear of violence from strangers tends to be greater than the actual risk of violence.<sup>39</sup> Public fear may be exacerbated by media reports that give a distorted picture of the risk of injury from one of the small minority of repeat violent offenders. Some commentators have questioned whether public alarm in itself justifies exceptional protective measures regardless of whether the alarm is reasonable or excessive.<sup>40</sup>

### 3.5 *Possible abuse*

It has been argued that statutory powers to detain persons other than by the normal processes of the criminal law may potentially be abused for political purposes, to

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<sup>35</sup> Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee*, Vol 1, 1988, para 3.13.9.

<sup>36</sup> Brody S and Tarling R, *Taking Offenders Out of Circulation*, Home Office Research Study No 35, 1981 p 37. See also Broadhurst R and Maller R, *Sex Offending and Recidivism*, University of Western Australia Crime Research Centre, Research Report No 3, February 1991.

<sup>37</sup> Potas, I, *Just Deserts for the Mad*, Australian Institute of Criminology, 1982 p 196.

<sup>38</sup> Walker n 14 8-9.

<sup>39</sup> P Grabosky, *Fear of Crime and Fear Reduction Strategies*, Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice No 44, May 1995; Maxfield M, *Fear of Crime in England and Wales*, Home Office Research Study No 78, 1984.

<sup>40</sup> Bottoms A and Brownsword R, ‘The Dangerousness Debate After the Floud Report’, (1982) 22 *British Journal of Criminology* 229 pp 248-249

suppress awkward opponents.<sup>41</sup> This is particularly so if ‘dangerousness’ is defined to include threats to ‘national security’ or to ‘society’.

#### **4. *PROTECTIVE SENTENCING***

This section outlines legislative measures which provide for certain offenders to receive sentences whose chief object is to incapacitate the offender temporarily or permanently.

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<sup>41</sup> Radzinowicz L and Hood R, ‘Dangerousness and Criminal Justice; a few reflections’ [1981] *Criminal Law Review* pp 756-61.

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#### 4.1 *Special sentencing principles*

The courts have developed principles of sentencing to guide judges in determining appropriate sentences. In some jurisdictions, legislation provides for special community protection sentencing principles to apply to certain kinds of offenders or offences.

***Imprisonment not the last resort:*** It is generally accepted that a sentence of imprisonment should be the last resort, to be imposed only when no other sentence is appropriate. Legislative exceptions to this principle include the Queensland *Penalties and Sentences Act 1992*. Section 9(3) states that the principle that imprisonment is a last resort does not apply where an offender is sentenced for any offence that involves use (or attempted use) of violence against a person, or which results in physical harm. In Western Australia, the *Sentencing Act 1995* provides that a court must not impose a sentence of imprisonment on an offender unless it decides that the seriousness of the offence is such that only imprisonment can be justified; *or* that the protection of the community demands it: s 6(4). A similar provision exists in the United Kingdom: *Criminal Justice Act 1991* (UK) s 1(2).

***Community protection paramount:*** Courts take many factors into account in determining sentences. Legislation in some jurisdictions directs the courts to make community protection the paramount consideration in sentencing certain offenders. For example, the *Sentencing Act 1991* (Vic) provides that in sentencing ‘serious offenders’ for a ‘serious offence’, the sentencing court must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed (s 6D). The *Penalties and Sentences Act 1992* (Qld) provides that in sentencing a person who has committed an offence involving violence or resulting in physical harm, the court must have regard primarily to a number of specified factors, including the risk of physical harm to any members of the community if a custodial sentence were not imposed; the need to protect any members of the community from that risk, and any disregard by the offender for the interests of public safety: s 9(4).

***Disproportionate sentences for dangerous offenders:*** It is a basic sentencing principle that a sentence should be proportional to the gravity of the offence. Legislation in some jurisdictions permits or directs the courts to impose disproportionately long sentences on some offenders. For example, the *Sentencing Act 1991* (Vic) s 6D expressly allows judges to impose a sentence longer than that which is proportionate to the gravity of the offence when sentencing ‘serious offenders’ for a ‘serious offence’ in order to protect the public.

In the United Kingdom, the *Criminal Justice Act 1991* s 2(2)(b) provides that a sentence of imprisonment is to be commensurate with the seriousness of the offence; except that where the offence is a violent or sexual offence, the sentence is to be for such longer time (not exceeding the maximum) as in the opinion of the court is necessary to protect the public from ‘serious harm’.

These UK provisions have been criticised for failing to specify the degree of likelihood of reoffending needed before a protective sentence could be invoked,<sup>42</sup> and for laying the assessment of risks at the judges's door with very little assistance as to how to evaluate the relevant factors.<sup>43</sup> The UK Court of Appeal has made it clear that a sentencer should not impose a longer than normal sentence lightly, especially since even a commensurate sentence of imprisonment is likely to include an element of public protection.<sup>44</sup> Where the commensurate sentence for the offence was likely to contain an element which was designed to protect the public, it was wrong to impose a longer sentence for the same purpose.

#### 4.2 *Indefinite sentences*

Indefinite sentences are penalties imposed without a finite termination date. Courts may impose such penalties *ab initio* or as an indefinite extension of a normal fixed sentence. Indefinite sentences are available in all jurisdictions of Australia except for New South Wales and the ACT (see the review of jurisdictions below). Essentially indefinite sentences take two forms: that of an indefinite sentence terminable by executive act; and that of an indefinite sentence terminable by judicial review.<sup>45</sup>

The High Court considered indefinite sentences in the case of *Chester*,<sup>46</sup> where it set aside an indefinite sentence imposed on a man who had pleaded guilty to stealing a car and then \$19,000 from a bank whilst armed with a knife and threatening actual violence. The High Court referred to the 'fundamental principle of proportionality', stating that the use of such orders should be confined to 'very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm. The extension of a sentence of imprisonment which would violate the principle of proportionality can scarcely be justified on the ground that it is necessary to protect society from crime which is serious but non-violent' (at 618). The indeterminate sentence was said to be a 'stark and extraordinary form of punishment', made more problematic by the fact that it was terminable by executive, not by judicial decision (at 619).<sup>47</sup>

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<sup>42</sup> Von Hirsch A, and Ashworth A, 'Protective Sentencing Under Section 2(2)(b): The Criteria for Dangerousness', [1996] *Criminal Law Review* 175 p 178.

<sup>43</sup> Baker, n 20, p 545.

<sup>44</sup> *Mumtaz Ali* [1995] Crim LR 260; *Christie* (1995) 16 Cr App R (S) 269.

<sup>45</sup> New South Wales Law Reform Commission, *Sentencing*, n 16, ¶ 10.3

<sup>46</sup> (1988) 165 CLR 611.

<sup>47</sup> Griffith G, *The Habitual Criminals Act 1957*, n 17, p 16.

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The New South Wales Law Reform Commission in its report on sentencing concluded that the arguments against indefinite sentences are compelling, and recommended that indefinite sentences should not be introduced in New South Wales. The Commission summarised the arguments for and against indeterminate detention in its report, and concluded that the difficulties of predicting which offenders are likely to commit violent offences made it ‘extremely difficult, if not impossible’ to satisfy the stringent requirements which would be necessary in imposing such a sentence.<sup>48</sup> The Commission noted that it is difficult to prove the criteria as to dangerousness stipulated in existing legislation, and that the procedural safeguards in existing legislation fail to prevent the potential for injustice through predictive error.

The Commission went on to observe that it has been suggested that selective incapacitation of dangerous offenders is a useful way of more rationally allocating prison resources, by identifying high-rate offenders and targeting them. The Commission stated that although it is difficult to estimate the actual financial impact of indefinite sentences, some commentators have pointed to the serious potential cost implications of such sentences in terms of the prison population.

Other arguments against indefinite sentences include:

- Indeterminate sentencing legislation has distinct implications for the type of criminal to be imprisoned under it, with it being more likely that those imprisoned will be young, poor, disadvantaged and members of certain racial minorities rather than the more affluent, particularly white-collar criminals, who are often more able to show that they will not re-offend.
- Juries may be reluctant to convict when an offender may be subject to such a level of punishment.

**Western Australia:** The *Sentencing Act 1995* (WA) Part 14 provides that if a court sentences an offender to imprisonment for an indictable offence it may, in addition to the fixed term of imprisonment, order the offender to be imprisoned indefinitely. Indefinite imprisonment must not be ordered unless the court is satisfied on the balance of probabilities that when the offender would otherwise be released from custody at the expiry of the fixed term, he or she would be a ‘danger to society’. The factors which indicate that a person is a danger to society include: the exceptional seriousness of the offence; the risk that the offender will commit other indictable offences; and the character of the offender (such as any psychological, psychiatric or medical condition, and the number and seriousness of other offences committed). A prisoner sentenced to indefinite imprisonment may be released by means of a parole order at any time after the indefinite part of the sentence commences.

**South Australia:** The *Criminal Law (Sentencing) Act 1988* s 22 provides that the Supreme Court has a power to declare a defendant an habitual criminal and direct that

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<sup>48</sup> New South Wales Law Reform Commission, *Sentencing*, n 16, ¶10.4-5.

he or she be detained in custody until further order. The power arises on conviction for offences involving wounding, poisoning, sexual offences or abortion where the defendant has had two or more previous convictions of an offence in the same class; or, upon conviction for other specified classes of offences, where there is a previous record showing three or more convictions of an offence of the same class (e.g. robbery, arson and forgery).

Section 23 refers to offenders who are incapable of controlling their sexual instincts. Such offenders may be detained in custody until further order, a power which the Supreme Court may exercise in addition to, or instead of, imposing a prison sentence.

**Queensland:** The *Penalties and Sentences Act 1992* Part 10 provides that indefinite sentences are available for any person convicted of a violent offence. 'Violent offence' is defined to include an indictable offence that, involves the use, or attempted use, or counselling or procuring the use, of violence against a person and for which an offender may be sentenced to life imprisonment. It also includes more serious sexual offences, for which an offender may be sentenced to life imprisonment.

When imposing an indefinite sentence, a court is required to specify a 'nominal sentence', being a sentence of a fixed term which the court may have imposed had it not actually imposed an indefinite sentence. Further, certain pre-conditions must be satisfied before the sentencing power can be used. This includes the court being satisfied that the offender is a 'serious danger' to the community; in so determining a court must have regard to, among other things, 'the risk of serious physical harm to members of the community if an indefinite sentence were not imposed' and the need to 'protect members of the community' from such risk. The prosecution has the onus of proof and the standard of proof is that a court must be satisfied that the person is a serious danger (a) by acceptable, cogent evidence and (b) to a high degree of probability. A court must give detailed reasons for imposing an indefinite sentence. The court must review the indefinite sentence within six months of the offender having served 50% of the nominal sentence.

**Victoria:** The *Sentencing Act 1991* Division 2, Subdivision 1A provides that a court may impose an indefinite sentence on an offender in respect of a serious offence if it is satisfied to a high degree of probability that the offender is a serious danger to the community. The court is required to fix a nominal sentence equal in length to the non-parole period it would have set if it had imprisoned the offender for a fixed term.

The test of a 'high degree of probability', as the Attorney-General pointed out in her Second Reading Speech, 'lies somewhere between the criminal and civil standards'.<sup>49</sup> The burden of proof is on the prosecution. The term 'serious danger' is not defined. However, the courts are offered some guidance in determining why a person is a serious danger. They are directed to have regard to such factors as character, past history, age, health or mental condition and the nature and gravity of the serious offence committed

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<sup>49</sup> VPD(LA), 29/4/93, p 1355.

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by the offender. Further regard must be had when passing an indefinite sentence to such matters as the risk of serious danger to the community if a sentence of that kind were not passed and the need to protect the community from such risk.

**Tasmania:** Section 392 of the *Criminal Code* provides that where a person of or over seventeen years has committed at least two crimes of violence then he may be declared a dangerous criminal if the judge is of the opinion that such a declaration is warranted for the protection of the public. A judge is directed to have regard to such matters as the person's antecedents or character and to any medical or other opinion. The judge must sentence the dangerous criminal to term of imprisonment. The person may only be released if the Supreme Court discharges the 'dangerous criminal' declaration. The person may apply for a discharge after serving the non-parole period for the sentence.

**Northern Territory:** Under the *Sentencing Act 1995* (NT) ss 65-78, the Supreme Court may sentence an offender who commits a 'violent offence' to an indefinite term of imprisonment. The Court is not to impose an indefinite sentence on an offender unless it is satisfied that the offender is a 'serious danger to the community'. Whether the offender is a 'serious danger' is decided on the basis of his or her antecedents, character, age, health or mental condition; the severity of the violent offence; and any special circumstances. The Court may make a finding that an offender is a serious danger to the community only if it is satisfied by acceptable and cogent evidence and to a high degree of probability that the evidence is of sufficient weight to justify the finding.

**United Kingdom:** The courts have a discretion to impose a sentence of life imprisonment for a number of offences including attempted murder, manslaughter, robbery, rape, attempted rape, aggravated burglary and arson. Discretionary life imprisonment is in effect an indeterminate sentence, as the prisoner may be released at some stage determined by the executive government. The courts have held that life imprisonment should not be imposed unless the offender is subject to a mental condition or personality defect which makes it probable that he or she will commit grave offences in the future.

**Canada:** A person may be classified as a 'dangerous offender' under the Criminal Code. To be classified as such, a person must have been convicted of a serious personal injury offence, punishable by 10 years or more in gaol. These offences include those involving violence against others or conduct likely to endanger the life or safety of others, or likely to inflict severe psychological damage, including sexual assaults and attempted sexual assaults. The convicted person must then be found to constitute a threat to the life, safety or physical or mental wellbeing of others. He or she may then have an indeterminate sentence imposed on him in lieu of any other sentence imposed. The application must be made after conviction but prior to sentencing. The sentence is reviewed at the end of three years and every two years thereafter to determine whether parole should be granted.

### 4.3 *Mandatory or minimum sentences*

One element in the movement to reduce the risk from violent offenders has been to limit

judicial discretion in sentencing. The courts in Australia have traditionally enjoyed a wide discretion in sentencing, in most cases confined only by broad statutory provisions, the most significant of which cover maximum penalties and avoidable dispositions.<sup>50</sup> However, there have been claims from some quarters that judicial leniency and inconsistency in sentencing has resulted in some dangerous offenders receiving sentences that are too short.

Some jurisdictions in Australia and overseas have responded with legislation restricting judicial sentencing discretion, or imposing minimum sentences or mandatory sentences for some offences. The trend began in the United States, where many states have legislation aimed at repeat and recidivist offenders. Some target drug or violent offences, such as the Federal Crime Act of 1994, which provides for a mandatory sentence of life imprisonment for violent offenders if the person has been convicted before on separate occasions of two or more serious violent felonies or one or more serious violent felonies and one or more serious drug offences.

The United Kingdom has also recently introduced a mandatory life sentence for offenders convicted of two ‘serious offences’ on separate occasions. For the second offence, the offender must be given a life sentence unless the court is of the opinion that there are exceptional circumstances relating to the offences or the offender.<sup>51</sup>

There is much debate about the ethics and effectiveness of mandatory minimum sentences.<sup>52</sup> The arguments in support of such legislated sentences include:

- They may be a greater deterrent than court-determined sentences.
- They ensure sentencing is in accordance with community standards.
- They produce greater consistency in sentencing.
- They demonstrate the legislature’s view of the seriousness of the offence.

Against mandatory sentences, it is argued that:

- They impose an excessive fetter on judicial discretion and undermine the role of the courts.

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<sup>50</sup> Munro C and Wasik M (eds), *Sentencing, Judicial Discretion and Training*, Sweet and Maxwell, 1992 p 207.

<sup>51</sup> *Crime (Sentences) Act 1997* (UK) s 2. ‘Serious offence’ includes attempted murder, soliciting murder, manslaughter, wounding or causing grievous bodily harm with intent; rape or attempted rape, intercourse with a girl under 13, and certain firearm offences.

<sup>52</sup> See the Report of the Victorian Sentencing Committee, *Sentencing*, Vol 1, April 1988 pp 168-171; Australian Law Reform Commission, *Sentencing*, Report No 44, AGPS 1988 ¶158.

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- They infringe the principle of individual justice, preventing judges taking individual circumstances into account, and may therefore lead to unjustly harsh or arbitrary sentences.<sup>53</sup>
  - The evidence that they will be effective as a deterrent is lacking.
  - They may encourage perverse jury verdicts, as juries may be unwilling to convict where an offender faces an unduly harsh sentence.
  - They are likely to decrease the rate of guilty pleas.
  - They may lead to increased delay due to defence reliance on procedural tactics and technical defences.
  - They will shift discretion from judges to police and prosecuting authorities.

**New South Wales**: In New South Wales, murder carried a mandatory sentence of life imprisonment until 1982, when the sentence for murder was amended to allow judges to impose a less severe sentence where the offender's 'culpability for the crime is significantly diminished by mitigating circumstances' (*Crimes (Homicide) Amendment Act 1982*).

Mandatory sentences were reintroduced in New South Wales in 1996 by the *Crimes Amendment (Mandatory Life Sentences) Act 1996*.<sup>54</sup> The Act inserts s 431B into the *Crimes Act 1900*, which imposes a life sentence for murder and offences involving the trafficking of commercial quantities of drugs, if the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of a life sentence. Section 431B in fact substantially retains judicial discretion in sentencing for these offences.<sup>55</sup>

The New South Wales Law Reform Commission has recommended that s 431B of the *Crimes Act* should be repealed. The Commission objected in principle to mandatory minimum sentences, because it claimed they apply without regard to relevant

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<sup>53</sup> A well-publicised example occurred in 1995 in California, where an offender with prior convictions for violence was sentenced to 25 years imprisonment for stealing a slice of pizza from some children, under that state's 'three strikes' laws: "Three Strikes" Tough on Courts Too', *Washington Post*, 8 March 1995 p A-1.

<sup>54</sup> For more information see the *Report on the Crimes Amendment (Mandatory Life Sentences) Bill 1995*, Parliament of New South Wales Legislative Council Standing Committee on Law and Justice, Report No 1, November 1995; Griffith G, *Crimes Amendment (Mandatory Life Sentences) Bill 1995*, NSW Parliamentary Library Bills Digest No 3/95.

<sup>55</sup> G Griffith, *ibid* pp 11-12.

circumstances of a case, with consequent arbitrary and capricious results.<sup>56</sup>

#### **4.4 Cumulative sentences**

Where a court imposes more than one sentence of imprisonment on an offender, the court may order that the sentences be served concurrently (the sentences commencing together, the shorter sentence being subsumed into the longest sentence) or cumulatively (a sentence commencing at the termination of a preceding sentence). Obviously, if the offender serves the sentences cumulatively, he or she will be incarcerated for longer than if the sentences are concurrent.

Cumulation of sentences may be used to ensure that persons convicted of multiple serious offences receive lengthy sentences of imprisonment. For example, under the Victorian *Sentencing Act 1991* s 6E, where ‘serious offenders’ are convicted of more than one offence in a specified category, every term of imprisonment imposed must, unless otherwise directed by the court, be served cumulatively on other sentences of imprisonment imposed on that offender.

Arguments against the frequent use of cumulative sentences include:<sup>57</sup>

- Cumulative sentences may result in an excessive total sentence, such as 100 years imprisonment.
- Offences where a single incident gives rise to multiple charges may attract excessively long sentences. For example, several indictments are often available for an offence of a sexual nature.
- Juries may be less willing to convict an offender, being aware of the possibility of an excessively long sentence.

**New South Wales:** In New South Wales the courts have a general discretion to determine whether a sentence should be served concurrently or consecutively.<sup>58</sup> Cumulation of sentences may be appropriate where the offence was committed on bail, or while on parole for a similar offence, or where separate offences have been committed.<sup>59</sup> There is a presumption in favour of cumulative sentences in cases where a prisoner, who is already serving a sentence, is convicted on an assault or other offence against the person. Sentences for the prison offences of escape and tunnelling must be cumulated on all previous sentences.

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<sup>56</sup> New South Wales Law Reform Commission, *Sentencing*, n 16, ¶9.11.

<sup>57</sup> Sampford K, *Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997*, Legislation Bulletin No 4/97, Queensland Parliamentary Library p 33.

<sup>58</sup> *Crimes Act 1900* s 444, *Sentencing Act 1989* s 9.

<sup>59</sup> Schurr, B, *Criminal Procedure (New South Wales)*, LBC Information Services [24.580].

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The New South Wales Law Reform Commission recommended that there be a legislative presumption in favour of concurrent sentences.<sup>60</sup> The Commission argued that cumulative sentences should generally only be imposed because a maximum sentence is not available to make the effective total sentence for all the offences long enough to reflect the principle of totality or to denounce separate crimes.

#### 4.5 *Recidivist statutes*

Recidivist offender laws in some Australian jurisdictions allow the courts to impose lengthy sentences of imprisonment on offenders with repeated convictions. These laws may be used to incapacitate ‘dangerous’ offenders who have the required prior convictions.

In New South Wales, the *Habitual Criminals Act 1957* provides that an additional sentence may be imposed on an offender declared to be an ‘habitual criminal’. A declaration may be made if the judge is satisfied that the person has already served at least two separate terms of imprisonment for indictable offences, and that the person should be imprisoned for a substantial time, and that this would be expedient for the purpose either of reforming the convicted person or for the prevention of crime.<sup>61</sup> The *Crimes Act 1900* s 443 also permits the courts to impose additional sentences on an offender on a second or third conviction.

The New South Wales Law Reform Commission recommended that these provisions be repealed because:<sup>62</sup>

- they may take a sentence beyond that which is proportional to the criminality of the offence for which the offender is being sentenced;
- the provisions are archaic and do not correspond with current practice;
- the beliefs which underpin the Acts are no longer appropriate (for example, the *Habitual Criminals Act 1957* was passed in the belief that there was a class of habitual criminals who possess ‘criminal qualities inherent or latent in their constitution’);
- there has been little use in recent years of these provisions.

#### 4.6 *‘Warning’ offences*

A possible means to incapacitate some dangerous offenders is to impose sentences of

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<sup>60</sup> New South Wales Law Reform Commission, *Sentencing*, n 16, ¶8.31.

<sup>61</sup> See Griffith G, *The Habitual Criminals Act 1957*, n 17.

<sup>62</sup> New South Wales Law Reform Commission, *Sentencing*, n 16, ¶10.19.

imprisonment for some less serious offences that indicate the potential for future violence. Examples of proposals for such ‘warning’ offences are the making of mass threats, and contacting persons whom the offender is forbidden to contact.

***Mass or generalised threats:*** The Victorian Social Development Committee recommended that general threats to kill or injure unspecified groups or members of the public should be taken seriously and that such mass or generalised threats should constitute an indictable offence.<sup>63</sup> The recommendation was made in the light of the case of Garry David, who while in prison had made many threats, including poisoning the town water supply and making the Hoddle Street massacre ‘look like a picnic’. For example, under the Queensland *Criminal Code* s 359 it is an offence to make threats intended to cause public alarm or anxiety. The New South Wales *Crimes Act 1900* s 31 does not expressly state that threats to the general public are an offence.

***Contacting protected persons:*** A private member’s bill, the Community Protection (Dangerous Offenders) Bill 1996, has been introduced into the New South Wales Parliament.<sup>64</sup> The Bill provides that a person may be classified as a dangerous offender by the Supreme Court, if he or she has previously been convicted of a serious violent offence, defined in the Bill as murder, attempted murder, manslaughter, the infliction of serious injury, or a specified sexual assault. It would be an offence for such a person to contact or attempt to contact any person listed on a register of protected persons kept by the Attorney General. To be placed on the register these persons would have to satisfy the Attorney General that they had good reason to fear the dangerous offender. If convicted of such an offence the dangerous offender would be liable to a minimum prison sentence of two years. The Government is considering the principles raised in the Bill in the context of the broader issues of the Law Reform Commission Sentencing Report.<sup>65</sup>

#### ***4.7 Never to be released: life imprisonment without parole***

The ultimate form of incapacitation in New South Wales is the life sentence. A person sentenced to life imprisonment is to serve the term of his or her natural life, unless released by the exercise of the royal prerogative of mercy.<sup>66</sup> Currently in New South Wales, only murder and certain drug trafficking offences carry a maximum sentence of

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<sup>63</sup> Social Development Committee, Parliament of Victoria, *Inquiry into Mental Disturbance and Community Safety: Interim Report*, n 13, pp 56-59.

<sup>64</sup> NSWPD, 31/10/1996 p 5648 by M Richardson MP.

<sup>65</sup> Hon P Whelan MP, NSWPD, 10/4/1997 p 7412.

<sup>66</sup> *Crimes Act 1900* (NSW) s 19A.

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life imprisonment.<sup>67</sup>

As the maximum sentence for murder or drug trafficking, life imprisonment may be imposed as the punishment for the ‘worst type’ of case of these offences. It has been argued that the fact that a particular offence is of the worst type should not be enough to justify life imprisonment. Given the extreme nature of the ‘natural life’ sentence, ‘there are good reasons to argue that a precondition to imposition of a sentence of natural life should be that the sentencing judge is clearly satisfied by cogent evidence that the prisoner will always remain a danger to the community, in the sense of danger of the commission of a serious violent crime’.<sup>68</sup> Arguments against a sentence of natural life include:

- It is in effect a sentence of slow death. Such a sentence can prompt despair and suicidal tendencies in prisoners, and may be considered more severe than a death sentence.
- It makes the management of such offenders more difficult, as there is no incentive to good behaviour or rehabilitation, and no disincentive to committing serious crimes in prison.
- If a natural life sentence is only imposed if the court is satisfied that the prisoner will always be a danger to the community, how is the court to predict whether he or she will ever be safe to be released? If the offender is young, the court may be predicting his or her conduct in 40 or 50 years time. It is said that prognostication becomes increasingly difficult the longer the likely lifespan of the offender.<sup>69</sup>

The *Sentencing Act 1989* does not allow judges to set a minimum non-parole term when a sentence of life imprisonment is imposed. If the judge sentences a person to life imprisonment, there is no possibility of parole. The New South Wales Law Reform Commission has recommended that a new sentencing option be introduced to give courts a discretion, when imposing a life sentence, to set a minimum term at the end of which the offender will be eligible to be considered for release on parole.<sup>70</sup> If the prisoner is never considered suitable for parole, he or she would never be released.

It is argued that the possibility of parole at some point would give life sentenced prisoners an incentive to good behaviour. It is also argued that it would be a useful

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<sup>67</sup> *Crimes Act 1900* (NSW) s 431A(2); *Drug Misuse and Trafficking Act 1985* (NSW). A sentence of life imprisonment is mandatory in some circumstances: *Crimes Act 1900* (NSW) s 431B (see section 4.3 above).

<sup>68</sup> ‘For the term of his (or her) natural life’, (1995) 19 *Criminal Law Journal* 61 p 63.

<sup>69</sup> Miller I, ‘Criminal Cases in the High Court of Australia: Mitchell’ (1996) 20 *Criminal Law Journal* 347 p 349.

<sup>70</sup> New South Wales Law Reform Commission, *Sentencing*, n 16, p 204.

sentence for cases in the worst category of moral turpitude but where it cannot be said that the prisoner will never during his or her lifetime have the capacity to rehabilitate.

## 5. ***RESTRICTION OR ABOLITION OF PAROLE***

This section outlines some measures to increase community protection by restricting or abolishing parole for dangerous offenders who have received sentences under which they may be released at some point. For a discussion of the life sentence without possibility of parole see section 4.7.

### 5.1 ***How is parole decided?***

Parole is the discharge of prisoners from custody prior to the expiry of the maximum term of imprisonment imposed by the sentencing court, provided that they agree to abide by certain conditions, with the intention that they serve some portion of their sentence under supervision in the community, subject to recall for misconduct.<sup>71</sup> The New South Wales Law Reform Commission summarised its purpose as follows:

Acceptance of the place of parole in the penal system involves a balancing of conflicting and uncertain priorities. Parole reflects the philosophy of rehabilitation, and recognises the advantage to both the community and the individual offender of conditional release from custody occurring in a supervised and supported manner conducive to rehabilitation. It is attended by the ultimately unpredictable risk of recidivism by any particular prisoner, but that risk is balanced by acknowledging the risk of releasing the offender unconditionally and without any support when the full sentence of imprisonment has been served.<sup>72</sup>

In New South Wales, the courts in sentencing offenders set a minimum term, which must be served in prison, and an additional term, during which the offender is eligible for parole. Parole is granted and administered by the Parole Board. The Parole Board is part of the executive government, but is independent of Ministerial or departmental authority. It is a statutory body exercising functions that are quasi-judicial in character.<sup>73</sup> The *Sentencing Act 1989* (NSW) requires that an order for parole be made having regard to the principle that the public interest is of primary importance and only when the Parole Board has sufficient reason to believe that the prisoner would be able to adapt to normal community life.

Serious offenders are dealt with by the Serious Offenders Review Council (SORC),

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<sup>71</sup> Mackey S, 'Parole - Background, Machinery and Statistics' in NACRO, *Parole - the Case for Change* (London 1979), quoted in *Report of the Royal Commission into New South Wales Prisons* (Nagle Report), Sydney 1978 p 602.

<sup>72</sup> New South Wales Law Reform Commission, *Sentencing*, n 16 p 241.

<sup>73</sup> *Ibid* p 243.

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which must report to the Parole Board on the prisoner's suitability for release. SORC's report is based on knowledge gained from management of and contact with the prisoner while the sentence is being served. SORC also has responsibility for making recommendations to the Commissioner with respect to the security classification and placement of, and provision of developmental programs for serious offenders. As each of these factors is relevant to the offenders progress towards rehabilitation and preparation for returning to the community as a law abiding person, SORC can directly influence the ability of an offender to satisfy the criteria justifying the making of a parole order.<sup>74</sup>

When a serious offender applies for parole, the offender's victims (or a family representative of a victim killed by the offender) can make submissions to the Parole Board. The Parole Board must also receive submissions from the State concerning release on parole of a serious offender.

## 5.2 *Restricting parole availability*

In the interests of public safety the legislature may tighten parole criteria for certain offenders, or limit the discretion of the executive government to determine who is suitable for parole (for example, by introducing a presumption against granting parole to serious offenders).

The recent *Sentencing Legislation Further Amendment Act 1997* (NSW) is an example of limiting the discretion to grant parole. The Act aims to ensure that a particular prisoner, Kevin Crump, will not be granted parole when he becomes eligible for it. The Act and its background are dealt with in more detail in Section 5.4 below (Redetermined life sentences). The Act applies to prisoners who were given sentences of life imprisonment before 1990, and whose life sentences have been redetermined by the Supreme Court to a minimum (non-parole) term and an additional term during which they may be released on parole. The Act makes it extremely difficult for these offenders to succeed in obtaining parole once they have served their minimum term, if at the time they were originally sentenced the judge recommended that they never be released. The Minister outlined the effect of the legislation on parole applications as follows:<sup>75</sup>

- The Serious Offenders Review Council and the Parole Board must, when exercising their functions in respect of offenders sentenced to life imprisonment before 1990, have regard to, and give substantial weight to, any relevant recommendations, observations and comments made by the original sentencing court when imposing the sentence concerned; give consideration to adopting or giving effect to the substance of such recommendations, observation and comments; and give consideration to adopting or giving effect to the intention of the original sentencing court.

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<sup>74</sup> Ibid p 259.

<sup>75</sup> NSWPD, 8/5/1997 pp 8337-9.

- If the Serious Offenders Review Council or the Parole Board nevertheless decides to decline to adopt or give effect to the recommendations, observations and comments of the original sentencing court, it must state its reasons for doing so. These bodies must take into account the need to preserve the safety of the community.

The legislation was criticised both for interfering too much with the discretions of SORC and the Parole Board,<sup>76</sup> and for not interfering enough with their discretions. It was argued that the amendments introduced by the *Sentencing Legislation Further Amendment Act 1997* were unsatisfactory because they left open the possibility that Kevin Crump could be granted parole. It was said that the question of the release of Kevin Crump should have been taken out of the hands of the Parole Board by directly legislating that he must never be released.<sup>77</sup>

Further legislation was introduced to apply the amendments to offenders who had already applied for a redetermination or parole, but the application had not yet been fully determined as at the date the amendments took effect: *Sentencing Amendment (Transitional) Act 1997*. Originally the amendments did not apply to applications for sentence redeterminations or parole that had been made before the Sentencing Legislation Further Amendment Bill 1997 was introduced into Parliament. The transitional legislation was passed in order to apply the amendments to proceedings for sentence redetermination or parole that were pending before the day on which the Sentencing Legislation Further Amendment Bill was introduced.

The possibility that Kevin Crump could still be granted parole under the *Sentencing Legislation Further Amendment Act 1997* led to the introduction of a Private Member's Bill, the Life Sentence Confirmation Bill 1997<sup>78</sup> which prevents him being released by providing that he is to serve a life sentence for the term of his natural life. The Bill is discussed in more detail in Section 6.3 below.

### 5.3 *Non-parole periods*

One measure to limit the release of dangerous offenders on parole is to fix a term of imprisonment which the offender must serve in prison before becoming eligible for parole. In the past in New South Wales, the courts determined the appropriate sentence for an offender and could set a non-parole period, but the decision as to when the offender would be released was made by the executive government. The non-parole part of the sentence could be reduced by remissions. Legislatures have moved to give judges

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<sup>76</sup> See NSWPD 8/5/97 p 8308.

<sup>77</sup> See NSWPD 8/5/97 pp 8296-8300; 8339-8343.

<sup>78</sup> Hon J Hannaford MLC, NSWPD 15/5/97 p 8657. The Leader of the Opposition, Hon P Collins MP, has given notice that the Life Sentence Confirmation Bill will be introduced in the Legislative Assembly.

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and Parliament more control over the amount of a time an offender must spend in custody. This can be done in two ways: by permitting or requiring judges to set non-parole periods, and by setting statutory non-parole periods.

In New South Wales, the non-parole element of sentence is determined both by the sentencing judge and by a statutory formula. Under the *Sentencing Act 1989* s 5, a judge can set a minimum (non-parole) term and an additional term, or can set a single fixed term with no parole; normally sentences consist of a minimum and additional term. The additional term of a sentence must not exceed one-third of the minimum term, unless there are special circumstances. The effect is that most sentences consist of a 75% gaol term and 25% parole term. This mandated proportion between custodial and non-custodial sentences is considered punitive in other jurisdictions.<sup>79</sup> Remissions have been abolished.

An example of a statutory non-parole period specifically directed at dangerous offenders is the Queensland *Corrective Services Act 1992* s 166. Under this Act, parole may not be granted to a prisoner serving a term of imprisonment for a serious violent offence unless the prisoner has served at least 15 years of a life sentence, or 80% of any other sentence. If an offender is convicted of multiple murders, there is a minimum non-parole period of 20 years (s 166(1)).<sup>80</sup>

#### **5.4 Redetermined life sentences under s 13A of the Sentencing Act 1989 (NSW)**

This section outlines recent New South Wales legislation (*Sentencing Legislation Further Amendment Act 1997*) designed to prevent a particular group of offenders who were sentenced with a recommendation that they never be released from becoming eligible for parole. If they do become eligible, the legislation makes it very difficult for these offenders to succeed in obtaining parole (see section 5.2 above).

When the death penalty was abolished in New South Wales by the *Crimes (Amendment) Act 1955*, life imprisonment became the most severe sentence available. Although a sentence of life imprisonment originally signified a term of natural life, various programs introduced by the executive government, such as remissions, parole and release on licence, had the effect of significantly reducing the time actually spent in prison under a life sentence. The availability of these discretionary releases meant that a life sentence under the *Crimes Act 1900* became in effect an indefinite sentence. The judiciary had a discretion to recommend that a prisoner never be released, due to the gravity of the crime and the danger to the community, but the recommendation could be overridden by the system of remissions and release on licence.

By 1989, most prisoners sentenced to life imprisonment did not serve out their full

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<sup>79</sup> *Griffiths v R* (1988) 167 CLR 372 at 391.

<sup>80</sup> The offender may be released sooner if there are 'special circumstances' under the *Corrective Services Act 1988* (Qld) s 166(4).

terms. The average period of imprisonment was approximately 11 to 12 years.<sup>81</sup> In response to the difference between sentences handed down by judges and the time actually served in prison, the New South Wales Coalition government enacted the *Sentencing Act 1989*, known as the ‘truth in sentencing’ legislation. One of the aims of the Act was to ensure that offenders sentenced under the new system must actually serve the term of imprisonment set by the judiciary. The *Crimes Act 1900* was amended to provide that a sentence of life imprisonment meant the offender’s natural life.

The question then arose as to what term of imprisonment should be served by prisoners who had received life sentences under the pre-1989 system - that is, sentences imposed in the knowledge that the offender would be considered for early release. Clearly all such sentences should not automatically be translated into a term of natural life, since the judge at the time of sentencing could have expected to serve the offender to serve about 10-15 years. In 1989, the Government introduced s 13A<sup>82</sup> into the *Sentencing Act 1989* to deal with life sentences handed down before 1989 in the light of the new truth in sentencing principles.

Section 13A provided that any prisoner sentenced to life imprisonment under the old system who had served at least eight years of the sentence could apply to the Supreme Court for the sentence to be redetermined. The Supreme Court could either replace the life sentence with a stipulated minimum and additional term, or it could decline to specify any minimum. Where the Supreme Court declined to set a minimum term, the prisoner could continue to apply every two years thereafter for redetermination of life sentences. The court had no power to in effect confirm the life sentence by barring future applications.

In 1993 s 13A was amended<sup>83</sup> to give the Supreme Court two additional powers in redetermining life sentences, in order to prevent offenders making continued unmeritorious applications. These additional powers were specifically reserved for the most serious cases involving the crime of murder. The court was given the power to direct, where the public interested so demanded, that:

- the prisoner may never reapply to the court and must serve the existing life sentence for the term of the prisoner's natural life; or
- that a period longer than the statutory two years must elapse before a further application may be made by the life prisoner.

In 1996 it was estimated that there were 88 prisoners who were eligible or would

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<sup>81</sup> Hon J Fahey MP, *NSWPD*, 14/10/1993, p 3884.

<sup>82</sup> *Sentencing (Life Sentences) Amendment Act 1989* (NSW).

<sup>83</sup> *Sentencing (Life Sentences) Act 1993* (NSW).

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become eligible to apply for sentence redetermination under s 13A.<sup>84</sup> On 24 April 1997, Kevin Crump, a prisoner who had been convicted in 1974 of murder and conspiracy to murder and sentenced to life imprisonment, applied successfully to have his life sentence redetermined to a minimum term and an additional term under s 13A of the *Sentencing Act* 1989. He was given a minimum term of 30 years and an additional term of life. He will therefore be eligible for parole in 2003, although he will still have to be assessed for suitability for parole by the Parole Board if he applies for parole.

The circumstances of the case were very unusual. Although Crump was involved in two murders, he was only tried for the murder of one person, Ian Lamb. He was never tried for the appalling murder of Virginia Morse, because she was killed in Queensland, and he was tried in New South Wales. Instead, he was convicted of the murder of Mr Lamb, and conspiracy to murder Mrs Morse. The Supreme Court in redetermining the sentence did not regard the murder of Mr Lamb as a case of murder in the highest category of moral turpitude, and conspiracy to murder does not carry a life sentence. The court therefore determined that a minimum term of 30 years was appropriate.

There was considerable public disturbance at the prospect of allowing Crump to apply for parole in 2003.<sup>85</sup> The trial judge had said, when in sentencing Crump in 1974, that in any future application for release ‘the measure of your entitlement . . . should be the clemency or mercy you extended to this woman when she begged for her life.’ Parliament quickly enacted the *Sentencing Legislation Further Amendment Act* 1997 designed to severely limit the ability of Crump and several other prisoners with redetermined life sentences to succeed in obtaining parole when eligible at the expiry of their minimum term.<sup>86</sup> The Act also made it difficult for prisoners with pre-1990 life sentences ever to become eligible for parole if the original sentencing judge had recommended that they never be released. This was done by amending the conditions for redetermination of life sentences to a minimum term and an additional term. The Minister set out the effect of the legislation on applications for redetermination as follows:<sup>87</sup>

- In order for an offender who was the subject of a non-release recommendation to be eligible for redetermination of his sentence, the Supreme Court must find there are ‘special reasons’ why the sentence should be redetermined at all.
- The Supreme Court must in considering an application for redetermination have

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<sup>84</sup> Hon J Shaw MLC, *NSWPD*, 15/5/1996 p 973.

<sup>85</sup> For example, Gibson M, ‘Why this man should rot in gaol’, *Daily Telegraph*, 9 April 1997.

<sup>86</sup> See section 5.2 above.

<sup>87</sup> *NSWPD*, 8/5/1997 pp 8337-9. Further legislation was introduced to apply the amendments where an application for redetermination had been made but not fully heard as at the date the amendments took effect: *Sentencing Amendment (Transitional) Act* 1997; see pp 27-28.

regard to, and give substantial weight to, any relevant recommendations, observations and comments made by the original sentencing court when imposing the sentence concerned; give consideration to adopting or giving effect to the substance of such recommendations, observation and comments; and give consideration to adopting or giving effect to the intention of the original sentencing court.

- If the court nevertheless decides to decline to adopt or give effect to the recommendations, observations and comments of the original sentencing court, it must state its reasons for doing so. It must take into account the need to preserve the safety of the community.
- The Supreme Court when considering an application for redetermination must have regard to all the circumstances surrounding the offence for which the life sentence was imposed, and all offences of the offender, wherever those offences were committed. The court will, in other words, look at the totality of the circumstances of the case.
- The period of time which certain pre-1990 life sentence offenders must serve before being eligible to apply for a redetermination of their sentences in the first place is lengthened from eight years to 20 years for offenders who were the subject of a non-release recommendation.
- The period of time which a pre-1990 life sentence offender, if that offender has been unsuccessful in seeking a redetermination of his sentence, may have to wait before being able to re-apply is lengthened from two years to three years.

This legislation is said to affect 10 prisoners currently serving pre-1990 life sentences. The legislation was criticised both for unduly restricting judicial discretion to redetermine life sentences,<sup>88</sup> and for retaining too much judicial discretion. It was argued that the Act should have made it more difficult or impossible for offenders who were sentenced with a non-release recommendation to have their sentences redetermined to a minimum and additional term.<sup>89</sup>

Concern that Kevin Crump will be eligible to apply for parole in 2003 has led the Opposition to introduce legislation directing that he never be released (Life Sentence Confirmation Bill 1997).<sup>90</sup> This kind of individual-specific legislation is discussed in

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<sup>88</sup> Nicholson J, 'Judiciary loses its powers', *Sydney Morning Herald* 15/5/97; See also *NSWPD* 8/5/97 pp 8300-8313.

<sup>89</sup> See for example *NSWPD* 8/5/97 pp 8296-8300, 8339-8343; 8349.

<sup>90</sup> Hon J Hannaford MLC, *NSWPD* 15/5/97 p 8657. The Leader of the Opposition, Hon P Collins MP, has given notice that the Life Sentence Confirmation Bill will be introduced in the Legislative Assembly.

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Section 6.3 below.

## **6. PREVENTIVE DETENTION**

Preventive detention is the incarceration of a person for a fixed or indefinite period for the sole purpose of removing that person from the community for some specified reason, usually a fear of criminal conduct.<sup>91</sup> Preventive detention is a civil measure; it is not a sentence imposed as punishment for a crime. The question of preventive detention usually arises when a high-risk offender has completed a sentence of imprisonment and must therefore be released from prison, and the offender does not have a mental illness justifying involuntary admission to a hospital.

Preventive detention is usually a selective measure - that is, it is used for persons who are individually assessed as 'dangerous'; it is not generally imposed on groups of offenders. There are wide variations in preventive detention programs - some rely on the judiciary to order and supervise detention of offenders who have completed their sentences, while in others the executive government is responsible for detaining and releasing individuals. Detention also varies in its focus: some are programs designed to detain individuals while treating or rehabilitating them; others are purely designed to remove such persons from the community, detaining them in prisons.

This section gives a brief overview of some preventive detention proposals and schemes,<sup>92</sup> and discusses possible preventive detention legislation in New South Wales following the *Kable* case. Some general issues raised by the use of detention for the sole purpose of preventing crime are discussed in section 3 above.

### **6.1 Mental illness and 'psychopaths'**

Many persons who are considered to pose a high risk to the community are mentally ill, and are dealt with under the mental health system. However, mental illness does not automatically equate to dangerousness. The National Committee on violence observed that homicide rarely resulted from attacks by deranged, pathological individuals, and that the incidence of mental illness in homicide offenders was no greater than in the general population.<sup>93</sup>

All jurisdictions have legislation allowing persons who are mentally ill to be detained involuntarily in some circumstances (for example, the *Mental Health Act 1990* (NSW) s 57 allows the continued detention of mentally ill persons if no other care of a less restrictive kind is appropriate and available). In New South Wales offenders who are

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<sup>91</sup> New South Wales Law Reform Commission, *Sentencing*, n 16, p 235.

<sup>92</sup> For more detailed information on some overseas jurisdictions, see *Dangerous Offender Legislation Around the World: Directions for Canada*, n 2 .

<sup>93</sup> National Committee on Violence, *Violence: Directions for Australia*, Australian Institute of Criminology, 1990 p 21.

found unfit to stand trial, or who are found to be not guilty by reason of mental illness are detained in hospitals (*Mental Health (Criminal Procedure) Act 1990*).

Difficult questions arise in relation to ‘psychopaths’ (persons suffering from severe personality disorder manifesting as aggression, irresponsibility, indifference and destructiveness). Although their behaviour is often bizarre or brutal, offenders with personality disorders are not considered by mainstream psychiatric opinion to be mentally ill. The difference between ‘mental illness’ and ‘personality disorder’ is usefully summarised in an article by Professor Williams, quoting from a paper prepared by the Royal Australian and New Zealand College of Psychiatrists:<sup>94</sup>

Personality refers to enduring characteristics of a person shown in his or her ways of behaving in a wide variety of circumstances. It is usually described in terms of traits such as sensitivity, suspiciousness, conscientiousness, shyness, aggressiveness and so on. Such traits are present in all of us to a greater or lesser degree and are thus dimensional. People with a personality disorder are generally defined as (i) those in whom some of these traits are present to a statistically abnormal or extreme degree and (ii) who as a consequence of this suffer emotionally or who cause others to suffer.... These traits can be identified from late adolescence when personality is essentially formed and are an enduring feature of the person. Discrete symptoms of mental illness are absent. A mental illness such as schizophrenia, on the other hand, is associated with the emergence of characteristic symptoms (such as delusions, hallucinations, pathological mood states), develops in someone who was previously free of such symptoms, and represents a disruption or discontinuity of their usual personality and their normal modes of psychological functioning.

The question as to whether there is a treatment for severe personality disorder does not seem to have been finally resolved, but the weight of expert evidence is that there is no medical treatment: ‘The very notion of being ‘cured’ of one’s personality has little meaning’.<sup>95</sup>

Generally in Australia offenders with personality disorders who are legally sane are dealt with in the penal system, and cannot be detained on the grounds of mental illness once they have completed their sentence. Involuntary detention on the grounds of personality disorder does not appear to be authorised by statute in any state except Tasmania. The *Mental Health Act 1963* (Tas) ss 20, 33 allows the hospitalisation of persons with a ‘psychopathic disorder’, defined in s 4(4) as a persistent disorder or disability of mind ... that results in abnormally aggressive or seriously irresponsible conduct on the part of

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<sup>94</sup> Williams, n 32, p 166.

<sup>95</sup> Ibid. See also Social Development Committee, Parliament of Victoria, *Inquiry into Mental Disturbance and Community Safety: Interim Report*, n 13, pp 29, 34.

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the patient, and requires or is susceptible to medical treatment.<sup>96</sup>

It has been suggested that persons with personality disorders should be able to be detained as if they were mentally ill. Many overseas jurisdictions provide for the preventive detention of persons with personality disorders (see Section 6.2 below). The Victorian Law Reform Commission in its report on *The Concept of Mental Illness in the Mental Health Act 1986*<sup>97</sup> recommended that the *Mental Health Act* be amended so that a person with a personality disorder could be considered to be mentally ill and dealt with in the mental health system. This recommendation has been criticised as a fiction, camouflaging the issue of principle as to whether and in what circumstances persons who are sane can be deprived of their liberty in the interests of public safety.<sup>98</sup> It is argued that hospitals should not be used as repositories for criminals who do not have mental illnesses.

The Social Development Committee of the Victorian Parliament also rejected the Victorian Law Reform Commission recommendation, stating that the issue of dangerousness should not be blurred by considering dangerous offenders who have a diagnosis of anti-social personality disorder to be mentally ill.<sup>99</sup> The Committee observed that psychiatrists' responses suggested that it is clear the diagnoses of personality disorders can neither accurately predict or explain dangerous behaviour amongst offenders. It concluded that in dealing with offenders with personality disorders the critical issue is their dangerousness, not their disorder.

The Social Development Committee recommended that psychopathic offenders should be imprisoned and not hospitalised, but that a range of pre-release and post-release behaviour management programs should be established to prepare the offender for a return to the community, as well as programs to provide supervision and accommodation assistance in the community. The Committee noted that 'personality disorder' does not automatically equate with 'dangerousness'. Most people who commit serious violent or sexual crimes do not have personality disorders or other mental abnormality, and people with personality disorders often lead peaceful lives. There are only a handful of offenders with severe personality disorders who are considered a threat to public safety.<sup>100</sup>

## 6.2 Some preventive detention legislation

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<sup>96</sup> Under the *Mental Health Act 1996* (Tas), which is yet to commence, a psychopathic disorder is not in itself a basis for involuntary detention.

<sup>97</sup> Report No 31, April 1990.

<sup>98</sup> Williams, n 32, p 174.

<sup>99</sup> Social Development Committee, Parliament of Victoria, *Inquiry into Mental Disturbance and Community Safety: Interim Report*, n 13.

<sup>100</sup> Social Development Committee, Parliament of Victoria, *Inquiry into Mental Disturbance and Community Safety: Interim Report*, n 13, p ix.

**United States:** federal law, and many state laws, provide for preventive detention of dangerous offenders, particularly those with severe personality disorders. The focus has been on dangerous sexual offenders. For constitutional reasons, statutes usually provide for those identified as dangerous to be detained in civil institutions (hospitals, psychiatric asylums etc) rather than in prisons. For example, in Kansas under the *Sexually Violent Predator Act 1994*, the courts can order that 'sexually violent predators' be confined indefinitely in a mental facility for long-term care and treatment, after their prison sentence has been completed. 'Sexually violent predator' is defined as 'any person who has been convicted of or charged with a sexually violent offence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence'. There is provision for annual review of the offender, who must be released if assessed as safe to be at large.

**United Kingdom:** Under the *Mental Health Act 1983* (UK) personality disorder can be a grounds for involuntary detention. A person who suffers from a mental disorder may be detained in hospital for treatment. 'Mental disorder' includes a 'psychopathic disorder', defined as 'a persistent disorder or disability of mind ... which results in abnormally aggressive or seriously irresponsible conduct'.

**Australia:** As discussed in Section 6.1 above, Australian States do not generally allow the detention of sane offenders who have completed their sentences. There have been two recent attempts to introduce preventive detention statutes: the Victorian *Community Protection Act 1990*, and the New South Wales *Community Protection Act 1994*. Each of these Acts was limited to a particular prisoner, and each relied on the judicial system to implement and supervise the detention.

The *Community Protection Act 1990* (Vic) was enacted specifically to detain a Victorian prisoner, Garry David after his term of imprisonment had expired. David had been convicted of two counts of attempted murder in 1980. He had a long history of bizarre and threatening behaviour, and was judged by psychiatrists to suffer from an antisocial personality disorder. The prospect of his release in 1990 raised concerns about his likely behaviour in the community, leading the Government to enact the *Community Protection Act 1990*. The Act authorised the Supreme Court to order that David be placed in preventive detention in a psychiatric in-patient service, prison or other institution for up to six months, if the Court was satisfied on the balance of probabilities, that he was a serious risk to the safety of any member of the public; and was likely to commit any act of personal violence to another person. Detention orders were made by the Supreme Court upon application by the Attorney-General. David died in custody in 1993, apparently from self-inflicted wounds.

The *Community Protection Act 1994* (NSW) was enacted to continue the imprisonment of Gregory Kable, convicted of the manslaughter of his wife. While serving his 5½ year sentence, Kable had written threatening letters such as to cause serious concern that upon his release he would be a danger to those he had threatened. The New South Wales Parliament in response passed the *Community Protection Act 1994*, which applied only to Kable. It provided for Kable to be detained in prison for up to six months by order of the Supreme Court, on the application of the Director of Public Prosecutions, if the court

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was satisfied on reasonable grounds that he was more likely than not to commit a 'serious act of violence' and that it is appropriate for the protection of a particular person or persons or the community generally, that he be held in custody. A detention order was made in 1995. The effect of the order was that Kable was detained in a prison for six months, classified as a 'detainee' and therefore not dealt with under the *Sentencing Act 1989* (NSW), yet taken for practical purposes to be a prisoner.

The *Community Protection Act 1994* (NSW) was declared invalid by the High Court in 1996.<sup>101</sup> The Court found that the Act imposed functions on the Supreme Court that were incompatible with the exercise of federal judicial power, because it provided for the court to order the imprisonment of Kable without a finding of guilt.

### 6.3 *Future directions for New South Wales*

The future for preventive detention legislation in New South Wales legislation must be assessed in the light of the High Court decision in the Kable case. Clearly the Parliament cannot establish a system administered by the judiciary for detaining dangerous offenders who have completed their sentences.

One response is for the Parliament to rely on its legislative powers to detain particular individuals without recourse to the courts. It is argued that Parliament itself can order the detention of any person on any ground it sees fit - or on no ground at all.<sup>102</sup> An example of an attempt to use the New South Wales Parliament's legislative power to detain a person is a recent private member's bill, the Life Sentence Confirmation Bill 1997.<sup>103</sup> For background to the Bill, see Section 5.4 above. The Bill proposes to pass legislative sentences on Kevin Crump of life imprisonment without parole, and further states that the life sentences cannot be changed and no appeal against them can be made.

When the contents of the Life Sentence Confirmation Bill were foreshadowed in an amendment moved by the Opposition during debate on the *Sentencing Legislation Further Amendment Act 1997* (NSW), the Minister stated that the Government has legal advice that the legislation would be unconstitutional.<sup>104</sup> The Bill has been introduced and reached its second reading, but has not proceeded further.

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<sup>101</sup> *Kable v DPP* (1996) 70 ALJR 814. For more information see Griffith G, *The Kable Case: Implications for New South Wales*, New South Wales Parliamentary Library Briefing Paper No 27/96.

<sup>102</sup> Handsley E, 'Do Hard Laws Make Bad Cases? - The High Court's Decision in *Kable v DPP* (NSW) (1997) 24 *Federal Law Review* 171 p 173.

<sup>103</sup> Hon J Hannaford MLC, *NSWPD* 15/5/97 p 8657. The Leader of the Opposition, Hon P Collins MP, has given notice that the Life Sentence Confirmation Bill will be introduced in the Legislative Assembly.

<sup>104</sup> Hon P Whelan MP, *NSWPD* 8/5/97 pp 8349-8350. See also Hon J Shaw MLC, *NSWPD* 14/5/97 p 8545.

Even if legislation passing sentences on individual offenders is valid, the wisdom of continuing to deal with dangerous offenders by ‘one-off’ statutes from time to time may be doubtful. Such practices might be criticised as reactive to publicity about various offenders, rather than a considered response to the problem posed by the existence of a few highly dangerous persons. Relying on individual-specific legislation to incarcerate particular offenders would also be a time consuming, ad hoc and administratively cumbersome way of dealing with the problem.

Individual-specific legislation is also open to the criticism that statutes that single out individuals for special treatment are in some sense contrary to the ‘rule of law’. The rule of law is the idea that all citizens are equal before the law; individuals are not punished except for a breach of the ordinary law that applies to all other citizens. The Attorney-General stated that:

There are obvious dangers and difficulties with both the legal and principle nature of this Parliament seeking to usurp the functions of the courts to sentence prisoners in lieu of the courts. Under the rule of law and under the separation of powers doctrine, that is quintessentially a matter for the independent courts, not for the Parliament.<sup>105</sup>

Another option for the post-sentence detention of offenders would be a system of preventive detention administered by the executive government. A government officer or body, perhaps along the lines of the Parole Board, could have the responsibility of deciding which offenders would be detained at the end of their sentence, and would determine when the offender should be released.

## **7. SUPERVISION IN THE COMMUNITY**

### **7.1 Community notification**

Many overseas jurisdictions have introduced public notification legislation, providing that when a dangerous offender is released, he or she must register with local authorities who notify the community of the offender’s presence and convictions. These provisions have been restricted generally to sexual offenders, and usually child sex offenders.<sup>106</sup>

### **7.2 Long-term parole supervision**

Currently in New South Wales the Parole Board is restricted from ordering as a condition of release on parole a period of supervision greater than three years from the

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<sup>105</sup> Hon J Shaw MLC, *NSWPD* 14/5/97 p 8545.

<sup>106</sup> For more information see Swain M, *Registration of paedophiles*, New South Wales Parliamentary Library Briefing paper No 12/97; Royal Commission into the New South Wales Police Service, *Final Report* Volume 5: The Paedophile Inquiry pp 1201-1251.

date of release.<sup>107</sup> The NSW Law Reform Commission recommended that the Parole Board should be able to order a period of supervision longer than three years. The Commission acknowledged the ‘widely held’ belief that supervision on parole can only be effective for a relatively limited time. ‘The anecdotal evidence is that failure on parole will most likely occur within a relatively short time, and that there are few benefits to be had from supervision extending over a long period of time.’<sup>108</sup> Nevertheless the Law Reform Commission considered that the Parole Board should have the option of making supervision for more than three years a condition of a parole order for serious offenders where the sentencing court has proposed supervision of more than three years, and the Parole Board considers that longer supervision is justified.

An example of extended supervision of released offenders is the *Crime (Sentences) Act 1997* (UK). Section 20 provides that a released sexual offender is to be subject to a ‘release supervision order’ for a period equal to 50% of the term of imprisonment or 12 months, whichever is longer, or a longer period of up to 10 years if the sentencing court considers a longer period is necessary for the purpose of preventing the offender committing further offences and securing the offender’s rehabilitation.

## 9. CONCLUSION

There is no doubt that there are some offenders who pose a real threat to the safety of members of the public, although they are a tiny minority of offenders. The government, Parliament and the court have a duty to try to protect the public from the risk of injury by these dangerous individuals. However, the next step of establishing a system for detaining dangerous persons is made difficult by ethical, practical and legal problems. Any dangerous offender legislation needs to address a range of issues, including the following:

***Who is dangerous*** : What potential harms will make a person ‘dangerous’? What degree of likelihood must there be that the person will cause such harm in order to justify special protective measures?

***Selective or group incapacitation*** : Selective incapacitation involves measures that restrain individual offenders who are identified as ‘dangerous’ (for example, preventive detention of offenders who are likely to commit serious acts of violence). Questions raised by selective incapacitation measures include: who will determine whether an offender is ‘dangerous’ - judges, medical or psychiatric experts; how is ‘dangerousness’ to be assessed; and what degree of likelihood of reoffending is needed before a protective measure should be invoked.

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<sup>107</sup> *Sentencing (General) Regulation 1996* cl 10(4).

<sup>108</sup> New South Wales Law Reform Commission, *Sentencing*, n 16, p 293. A Western Australian study indicated that the length of time on parole before failure varies between various groups; it found a median fail time of 11 to 23 months: Broadhurst R, ‘Evaluating Imprisonment and Parole: Survival Rates or Failure Rates?’ in McKillop S (ed), *Keeping People Out of Prison*, Australian Institute of Criminology 1991, p 31.

Group incapacitation involves detaining offenders not on the basis of their individual 'dangerous' character, but on the basis of their past offences (for example, 'three strikes' legislation that imposes a long sentence for a third violent offence). Such measures raise questions of what kind of offences should attract a protective sentence; the number of convictions required; and whether there should be a judicial discretion to vary the sentence.

***Role of judicial and executive discretion*** : The legislature's role in sentencing has traditionally been to set maximum sentences and articulate sentencing policies. To what extent should the legislature direct the exercise of judicial sentencing discretions? Legislative involvement in sentencing dangerous offenders has ranged from specifying the priority to be given to public safety to proposing legislative sentences. A further question is the extent to which the legislature should direct the exercise of executive government discretions, such as decisions of the Parole Board.

***Constitutional limitations***: The decision in *Kable v DPP*<sup>109</sup> limits the kinds of dangerous offender legislation that may be enacted in New South Wales. It remains to be seen what restrictions the case sets on the activities and functions that may be conferred on the judiciary.

***Role of rehabilitation or treatment***: It is said that 'Within the criminal justice system, the tension between rehabilitation and punishment is heightened when the issue of the safety of the general public is more than usually in doubt.... In the end, the only way the safety of the community can be protected is to reduce the dangerousness of the person who threatens it. Detention without rehabilitation will not achieve this.'<sup>110</sup> What resources should be put into efforts to treat persons perceived as dangerous? Which offenders can be treated?

***Effect of dangerous offender legislation*** : To what extent will dangerous offender measures increase public safety? Most acts of violence and sexual assault are random and are committed by people who have not been detected in previous serious offending. Most of those people who do commit acts of violence do not repeat them. The small number of offenders who will repeatedly injure others, and the difficulty of accurately identifying them, means that a policy of precautionary detention probably makes little contribution to the protection of the public.

***Balance between public safety and individual rights*** : As noted above, attempts to predict future dangerousness are far from accurate, and tend to over-predict the likelihood of future harm. That is, in any group of persons classified as likely to commit serious acts of violence, there will probably be a significant number who in fact would not have committed any such acts. Provisions that detain offenders solely for the

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<sup>109</sup> See Section 6 above, and Griffith G, *The Kable Case*, n 101.

<sup>110</sup> Social Development Committee, Parliament of Victoria, *Inquiry into Mental Disturbance and Community Safety: Interim Report*, n 13, pp xi-xii.

purpose of community protection involve a choice between possible injury to the members of the public and certain deprivation of liberty for offenders whose future conduct can only be estimated.

Dealing with dangerous offenders requires hard decisions to be made. In doing so, it is important to conduct debate in public and clearly spell out the facts and policies on which such decisions are made.